IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

2012: No. 12

BETWEEN

A. C. Appellant

and

J. S. Respondent

Date of Hearing: 10th April, 2013
Date of Judgment: 13th May, 2013

Ms. Cindy Clarke, Deputy Department of Public Prosecutions for the Appellant
Mr. Saul Dismont, Christopher's, for the Respondent

INTRODUCTORY

1. This is an appeal, heard and allowed on 10th April 2013, with reasons in writing to follow, against a decision of a magistrate in Juvenile Court who on a point in limine dismissed a charge against the respondent, a young man between the ages of 13 and 14.

2. Crown Counsel is not seeking a retrial since the appeal is essentially on a point of law in accordance with section 4(a) of the Criminal Appeal Act 1952 and it is believed that since there appears to be no local judicial authority on the issue, a judgment should be given in writing.

THE FACTS

3. The youthful respondent was before the magistrate on a charge of sending by means of a public telecommunications device service, a cell phone, messages which were grossly offensive, contrary to section 53(1) of the Telecommunications Act 1986. The messages were apparently of a very sexual nature to a female.

4. That section under the heading: *Improper use of public telecommunication service,* states:

> *Any person who (a) sends, by means of a public telecommunications service, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character... commits an offence.*

5. On a point in limine, counsel for the respondent drew the magistrate's attention to section 4(2) of the Young Offenders Act and submitted that there was a burden upon the prosecution to prove that the defendant, who was thirteen years old, was aware that his actions were illegal. He submitted that most persons of that age would not have known it was illegal to use a cell phone in that manner and though the defendant admits the words complained of were his and that his actions would have made the complainant uncomfortable, he was not guilty on that basis - he lacked criminal responsibility which the prosecution was required to prove. That being, that he knew or ought to have known that that type of behaviour was an offence.

6. He further submitted that he had raised this issue to save the court's time and money before trial.

7. Counsel for the Crown responded in disagreement with the defence's submission and submitted that the complainant was the principal of the school who by virtue of the principal/student relationship would have known this behaviour was inappropriate.

8. She further submitted that the defendant had been interviewed by the police at length in his mother's presence and made certain admissions and that without any evidence to the contrary the court should accept that he knew his acts were illegal.

9. The learned magistrate, dismissing the charge without hearing any evidence and without any authority cited by any, accepted the defence submissions and found that the prosecution had not proved its case. She also ruled or suggested that in such circumstances, the police and social services should work together, including, a look into the child's family background to provide support rather than to seek to prosecute a child under the age of 14 years.

THE GROUNDS OF APPEAL

10. The appeal was filed by Crown Counsel of the DPP's office and was argued by the Deputy DPP. It states that the learned magistrate erred in law in that; (a) she dismissed the information upon finding that the Crown had not proved the case, without hearing any evidence; (b) she misinterpreted section 4(2) of the Young Offenders Act as an absolute bar to the prosecution of the respondent.

THE SUBMISSIONS

11. Counsel for the appellant submitted that section 4(1) of the Young Offenders Act 1950 constitutes an absolute bar to the prosecution of a child under eight years of age for a criminal offence. This dispute does not involve that section either in law or fact. She is correct.

12. The child in this case was 13 years old and thus the relevant section is section 4(2) of the Act under which a child of that age is deemed not criminally responsible unless it is proved that at the time of doing the act or omission he had the capacity to know that he ought not to do the act or make the omission. She submitted that the learned magistrate had been mislead when she held that the statute required the prosecution "to prove the defendant did know at the time the offence was illegal" and that though the defendant admitted he may have known that he should not have done what he did, the crown was required to prove he knew the act was unlawful and that the proof required by the statute could be ascertained without the hearing of evidence.

13. She submitted that section 4(2) is similar to the old Common Law in the UK, the presumption of doli incapax, which provided that the presumption could be rebutted by clear and positive evidence that the child knew his act was wrong. That the prosecution may rebut the presumption by leading direct evidence on the point showing the defendant's perception of the seriousness of what he had done. That such evidence need not be direct and it is for the court upon weighing the evidence, to decide as a matter of fact, including what the defendant said or did before or after the incident, what was the defendant's state of mind at the time of the offence and his appreciation of the seriousness of what he had done.

14. In support, she relied upon the cases of *C(A Minor) v. The DPP [1995]2 Cr App R 166, L v DPP; T v DPP; G.H v DPP, The Times, May 31, 1996.*

15. Counsel for the respondent submitted, the learned magistrate was correct to accept the demurrer and stay the proceedings, as there was no prima facie case against the defendant. He submitted, to continue with the trial would have been contrary to the overreaching duty to child defendants and the welfare principle.

16. In support, he referred to several articles of The United Nations Convention on the Rights of the Child 1989, ratified by the UK in 1991 and received by Bermuda in 1994. Particularly Articles 1, 2(1), 3(1), and (2), 28(2), 40(2)(b)(iii) and (3)(b). These articles he submitted, apply to the rights of all persons under 18, without discrimination; elevates the best interest of the child as the primary consideration in all actions; imposes a duty on all governments to make appropriate legislation to ensure the wellbeing of the child and to protect them from disciplinary humiliation; have their matters determined without delay and wherever possible avoid court proceedings.

17. He submitted, that given the old age of the Young Offenders Act, the more recent Convention should be relied upon for the interpretation of section 4(2).

18. Thus, given the overarching duties to child defendant's under the Convention, it is in their best interest and the interests of justice for the learned magistrate to hear a demurrer without delay, as such delay would likely prejudice the child's welfare and any involvement in the courts is likely to further prejudice that welfare. The learned magistrate was therefore correct to stop the trial to hear the demurrer and to settle the issue raised without delay.

19. In support, he referred to section 511(1) of the Criminal Code Act, which provides:

> *When an accused person demurs only and does not plead any plea, the Supreme Court shall proceed to hear and determine the matter forthwith and, if the demurrer is overruled, the accused person shall be called upon to plead the indictment.*

20. Referring to section 4(2) of the Young Offenders Act and acknowledging there is no local case law on the issue, he referred to section 14(2) of the Tevalu Islands Penal Code which he submits mirrors the Bermuda provisions. He then cited from that jurisdiction, *R v Setaga [2009] 2* LRC287, in which a 13 year old was prosecuted for the rape of a 7 year old girl and successfully obtained from the High Court a permanent stay of the proceedings on the basis of an unreasonable delay of 5 years; the Chief Justice ruling that the Code required the court to determine the applicant had the capacity to know he should not do what he was doing, which meant knowledge that the act was wrong in a criminal sense and not for any lesser reason.

21. In further support, he cited as an example, the insanity defence principles at Halsbury's Laws 5th Edn, Vol. 25 and 26, paragraphs 1-426, 427-792 and the cases cited thereunder which state;

> *Where on a criminal charge, it appears that at the time of the act or omission giving rise to the offence alleged, the defendant was labouring under a defect of reason owing to a disease of the mind so as not to know the nature and quality of his act, or, if he knew this, so as not to know that what he was doing was wrong, he is not regarded in law as responsible for his act.*

22. On the basis of the above authorities, counsel for the respondent submitted there was no prima facie evidence the defendant knew the communications, which counsel described as prank calls, were illegal, though he accepted they were wrong but that such an admission of naughtiness does not satisfy the mens rea.

23. Then, citing *C(A Minor) v DPP* and referring to the common law principle of doli incapax he acknowledged the presumption that a child between 10 and 14 is presumed not to know the difference between right and wrong and he submitted that

presumption may be rebutted by strong and pregnant evidence of a mischievous disposition. Wrong meaning gravely wrong, seriously wrong, evil or morally wrong.

THE LAW

24. Section 15 of the Criminal Code Act 1907, headed, Application of general provisions of this Act, states:

> *The general provisions of this Act relating to offences and criminal procedure shall apply, unless it is otherwise expressly provided, in relation to offences constituted or punishable by or under any other Act as well as in relation to the offences specially constituted by and punishable under this Act.*

25. Section 35 of the Criminal Code Act. 1907, under the heading, Ignorance of the law no excuse, states:

> (1*) Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.*

26. The Criminal Code is a statute of general application per section 15. Therefore in the absence of any provision in the Young Offenders Act 1950 and or the Telecommunications Act contrary to section 35 of the Criminal Code Act, that section applies.

27. There is no requirement of knowledge of the law as an element in a charge under section 53(1) of the Telecommunications Act, nor is there any such requirement under section 4(2) of the Young Offenders Act.

28. It is clear therefore that all of the participants in the proceedings below asked themselves the wrong question and consequently got the wrong answer.

29. For that reason alone the learned magistrate's decision to uphold the defence submission and her decision to discharge the respondent for the reasons she gave, were in law, fundamentally flawed.

30. The Young Offenders Act, section 4(1) headed, Age of criminal responsibility, states:

> *It shall be conclusively presumed that no child under the age of eight years can be guilty of an offence.*

31. As was said earlier, there is no dispute about the meaning of that section. It means exactly what it says. In Bermuda no child under the age of 8 years can be put on trial for any criminal offence.

Section 4(2) under the same heading states:

> *A child under the age of fourteen years shall be deemed not to be criminally responsible for any act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.*

32. Except for a few insignificant words, section 4(1) and 4(2) are identical to section 44(1) and 44(2) of the Criminal Code Act, headed, Immature age - and those two latter sections, except for one word of gender, are identical to section 29 of the Queensland Australia, Criminal Code Act 1899 - the source of the Bermuda Code.

33. Carter's Criminal Law of Queensland, 15th ed., a bible of the Queensland Code, at pages 267 to 268 under the heading, Doli incapax, sets out much of the learning applicable to the Queensland Code section 44(2) and hence our section 4(2) issue and refers to various English, Queensland and other sources in support, including inter alia the texts of Glanville William's, The Criminal Responsibility of Children, Russell on Crime, 12th ed. 1964, Vol. 1, p. 99, Hale's, Pleas of the Crown, 1800, Vol. 1, pp 24-5, Blackstone's Commentaries, 19th ed, Vol. 1V pp 22-3 and case law ranging from *R v M(1977) 16 SASR 589 at 590, per Bray CJ, R v Brooks[1945]NZLR]584, Mc C v Runeckles[1984]Crim LR 499, R v Kershaw(1902) 18TLR, 357, C (a Minor) v DPP[1996] 1 Crim App R 375, R v B (an infant)[1979]Qd R 417, R v B and A [1979, 3 WLR 1185 and R v F, Exparte A-G[199] 2 Qd R 157.* These authorities set out a comprehensive and useful history of the doli incapax principle.

34. Though there is some variation of the lower age of 8 in Bermuda, 10 in Quensland and the UK, the upper age of 14 and the applicable principles are the same in all three jurisdictions.

35. A perusal and study of the authorities reveals the following general principles applicable under both section 4(2) of the Young Offenders Act and Section 44(2) of the Criminal Code in this jurisdiction.

    (a) There is a rebuttable presumption that a child under 14 years of age is not criminally responsible for his acts or omissions;

    (b) The burden of proof is upon the crown to rebut that presumption;

    (c) The Crown may rebut that presumption by calling proper admissible evidence during the prosecution's case to clearly and positively show the defendant had the capacity to discern between good and evil; that is, that at the material time, the defendant appreciated or had the capacity to know that what he was doing was morally or seriously wrong, which means that the child could appreciate his act or omission was more than merely naughty or mischievous. In short, that he had the capacity to know that his act or omission was seriously right or wrong.

(d) The mere commission of the offence is not itself sufficient to rebut the presumption and the heinous nature of the crime may not always be sufficient but the more obviously heinous the crime, the less the evidence needed to rebut the presumption.

(e) The age of the child alone is not sufficient to rebut the presumption but the older and nearer the child is to 14, the less the evidence maybe to rebut the presumption;

(f) Proof of mental normality may generally rebut the presumption;

(g) Any relevant evidence maybe called by the Crown to rebut the presumption. Such may include, previous convictions; answers given by the child to police questions in previous matters when admissible; answers given by the child in the instant matter; evidence of the child's good upbringing by his respectable family and his good behaviour; good character evidence; his education level and performance; the manner of his speech; his demeanour; evidence of his conduct connected to the circumstances of the offence, including for example false alibi, the sophistication of his commission of the crime or his concealment of it.

(h) The above examples are not exhaustive. The finder of fact may, depending on the circumstances of each particular case, consider any of the above factors and draw such inferences as are reasonable, logical and probative.

It has been held that even when a prosecutor failed by mistake or inadvertence during his case to lead such rebuttal evidence the judge in his discretion may allow the prosecution to reopen his case to prove the rebuttal, particularly when the rebuttal evidence was not culpable or controversial.

CONCLUSION

36. The submissions of the responding counsel before the learned magistrate cannot be sustained. He asked himself and the magistrate the wrong question in the wrong format and thus the conclusion was wrong in law. His submissions before this court, mixed as they were cannot as a whole be maintained either.

37. Section 511(1) of the Criminal Code Act does not apply to the instant case. It is applicable only to cases on indictment before the Supreme Court.

38. There is nothing in section 4(2) of the Young Offenders Act that is contrary to the Articles of the United Nations Convention of the rights of the child.

The issue of delay did not arise and does not arise in the context put by responding counsel.

39. The learned magistrate erred in law when she ruled that the prosecution had not proved that the act of the defendant was unlawful.

    The prosecution is under no duty to prove such under section 4(2) of the Young Offenders Act.

40. She erred in law when she considered the question on submissions only and decided to discharge the defendant without first hearing evidence lead by the prosecution.

41. The correct procedure for the magistrate under section 4(2) of the Young Offenders Act is to proceed to hear evidence and thereafter to ask herself two questions. Firstly, has the prosecution upon the evidence she heard made her feel sure that the defendant had the capacity at the relevant time to discern that what he was doing was seriously wrong. If her answer is no, there will be no case to answer and she should dismiss the charge. If her answer is yes, she should then at the appropriate time proceed to ask herself the appropriate questions relevant to the proof of the offence itself.

    She failed to follow these principles and consequently the appeal was allowed.

42. On a further cautionary note. The concern of the learned magistrate that a matter such as that for which the appellant was charged may best be dealt with outside of the court system maybe understandable and maybe a commendable course to follow in some cases but her reasoning seems to suggest that a child under 14 should not be prosecuted. This appears to be the same route counsel for the respondent has taken. Such reasoning cannot be sustained under the current law. The very purpose of the Young Offenders Act and the Juvenile Court is to provide for the fair prosecution of offenders under 14. In some cases prosecution is necessary.

Dated this 13th day of May, 2013 _____

GREAVES C, J