Neutral Citation Number: [2022] CA (Bda) 17 Crim

Case No: Civ/2022/06

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE JURISDICTION
BEFORE THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2021 No. 15

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 18/11/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
and
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

JAMEL SIMONS

Appellant

- and -

HIS MAJESTY THE KING

Respondent

Aura Lee Cassidy, Kairos Philanthropy, Barristers & Attorneys, for the Appellant

Cindy Clarke, Director of Public Prosecutions, for the Respondent

Hearing date: 4 November 2022

- -

APPROVED JUDGMENT

BELL JA:

Introduction

1. We heard the above appeal on 4 November 2022, and at the conclusion of submissions on behalf of Jamel Simons ("the Appellant"), we dismissed the appeal and remanded the Appellant to appear in Plea Court on Monday 7 November. We said that we would give our reasons as quickly as possible, and this we now do.

Background

2. The Appellant was convicted in Magistrates' Court on 5 March 2021 by the Wor. Tokunbo ("the Magistrate") on a charge of sexual assault contrary to section 323 of the Criminal Code Act 1907 ("the Code"). The particulars of the offence contained in the information were that the Appellant had sexually assaulted the victim, to whom I will refer as the Complainant "on a date unknown between the 1st day of April 2002 and the 30th day of April 2002, in Warwick Parish". So it can be seen that there was a gap of almost twenty years between the commission of the offence and the Appellant's conviction. It was no doubt this length of time which led to some confusion as to the date on which the offence had been committed.

3. The Appellant did not deny that he had had sexual intercourse with the Complainant. His defence at trial was that the sexual intercourse was consensual. That defence was rejected by the Magistrate, and his appeal against conviction to the Supreme Court was dismissed by Subair Williams J ("the Judge") on 20 January 2022. The Appellant had not been sentenced at that point, and the Judge remitted the matter to the Magistrates' Court for sentencing and remanded the Appellant in custody.

4. In May 2022, the Appellant made an application for an extension of time within which to appeal to this Court. In support of that application he swore an affidavit on 5 April 2022, in which he explained that during his remand in custody he had come into contact with an inmate with whom he had previously been incarcerated, and from discussion between the two, the Appellant appreciated that he had been incarcerated between 28 January and 27 May 2002. This led him to conclude that he could not have committed the offence on or between the dates mentioned in the information. Despite his evidence before the Magistrate that he had had consensual sexual intercourse with the Complainant, he stated in his affidavit that he "could not have done what was alleged". He also swore that he had lived with a family in Alabama from September 2000 until June 2001. This led him to conclude further that "when we did have sex, it would have been 2003, and (the Complainant) would have been older than 16".

5. Finally, for completeness I should record that I granted leave to appeal out of time on 9 August 2022, and since the Crown did not oppose the Appellant's application for bail, I granted bail subject to conditions. I should also refer to the fact that on 31 October 2022, I heard an application for leave to amend the grounds of appeal and for an adjournment of the case from its scheduled date of 4 November 2022 until later in the session. I refused leave to amend the grounds of appeal on the basis that the new grounds had no realistic prospect of success. They were, in my view, largely irrelevant when considering the manner in which the case had been run before the Magistrate and argued before the Judge. I also refused the application for an adjournment since there were no other dates available to hear this matter during this session.

The relevance of the Complainant's age

6. Before turning to the grounds of appeal, it would no doubt be helpful to address the relevance of the Complainant's age in relation to her ability to consent to sexual intercourse, not least because both the Magistrate and the Judge did so. The starting point is section 190(1)(c) of the Code, which provides that where an accused is charged with an offence under section 323 of the Code (as in this case) in respect of a complainant under the age of 16, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge. In the event that a decision maker decides that a complainant has not consented to sexual intercourse, then he should, if all the other constituent elements of the offence are established, find the particular defendant guilty of the charge of sexual assault. In those circumstances, at least so far as conviction is concerned, the complainant's age is not relevant. It is only if the decision maker were to find that a complainant under the age of 16 did consent to sexual intercourse, that the complainant's age can become relevant, and then only if the defendant asserts a defence under the provisions of section 190(4)(b) of the Code, which is in the following terms:

> *"(4) It is not a defence—*
>
> > *to a charge under section 182B, or, where on a charge under section 323 or 324 or 325 or 326 it is alleged that the complainant consented to the activity that forms the subject-matter of the charge, to a charge under the said section 323 or 324 or 325 or 326, as the case may be, that the accused believed that the complainant was sixteen years of age or older at the time the offence is alleged to have been committed,*
>
> *unless the accused proves that he had reasonable cause to have, and did in fact have, that belief at the time:*
>
> *Provided that a defence shall not be available by virtue of this subsection—*
>
> *(aa) in any circumstances, to an accused who was twenty-one years of age or older at that time; or*
>
> *(bb) if an accused has once availed himself of such a defence to a charge under any of sections 182A, 182B, 323, 324, 325 and 326, ever again to that accused."*

7. So it can be seen that the defence of a belief that a particular complainant was in fact 16 years of age arises only in the case of consensual sex. The decision maker must then decide whether to accept the defendant's assertion that he had reasonable cause for his belief that the complainant was aged 16, and that he did in fact so believe. In this regard, the burden of proof is on the defendant.

8. In this case the Appellant did raise the issue of the Complainant's age – see the Response to the Crown Addendum at page 110 of the Record. But that does not mean that the issue fell to be considered by the Magistrate. Once he had decided that the Complainant had not consented to sexual intercourse, he should have found that the provisions of section 190 of the Code did not arise for consideration, and there was no reason thereafter for the Magistrate or the Judge to consider their applicability. Instead, the Magistrate found that the terms of section 190(4)(b) of the Code were not available to the Appellant, a finding which the Judge reversed. In doing so, the Judge placed the burden of proof on the Crown, when the section places it on the

defendant who puts forward the defence. But that aspect of matters is academic, given the Magistrate's finding in regard to consent, with which the Judge agreed. Hence the Complainant's age is of no relevance to this appeal. Bearing that in mind, I now turn to consider the grounds of appeal.

The grounds of appeal

9. There were three grounds of appeal pleaded, although in truth the Appellant's reasons for seeking leave to appeal out of time turned only on his late realisation that he had been incarcerated on the dates given in the information. The first ground of appeal was that the Magistrate's decision was not supported by the evidence, and that the Judge had failed to address the error of the Magistrate. No particulars were provided initially, and at first blush there appeared to be ample evidence, which the Magistrate set out in his judgment, and which the Judge also rehearsed in her judgment, sufficient to establish the Appellant's conviction. By the time the Appellant's submissions were filed, this ground appeared to have taken on increased importance.

10. The second ground contains a narrow point, which is that the new evidence adduced by the Appellant shows that he could not have committed the offence, as he was "at the time being detained at Her Majesty's pleasure" at the Westgate facility. But as I have said before, the Appellant's case did not depend in any way upon the timing of the alleged offence. Indeed, the sexual act was admitted. The only issue at trial was whether the sexual act was consensual. It will therefore be necessary to consider the applicable law to be applied in cases such as this, where the information contains an inaccurate date.

11. The third ground was that the judge had erred in law insofar as she did not properly direct herself on a matter of law. Again, there were no particulars provided, and it was not until submissions were filed that this ground, like the first ground, was expanded so as to be more readily understandable.

The argument before this court – the first ground of appeal

12. The sexual encounter between the Complainant and the Appellant had two phases. The first phase involved kissing and fondling and was clearly consensual and accepted by the Complainant to be such. But matters reached a stage where, on the Complainant's version of events, she wished to call a halt to the direction the sexual activity was taking, and it is here that there was a conflict in the evidence on the two sides. The Appellant denied that the Complainant had ever told him to stop or that she did not want sex. The Complainant's version of events was that she had first urged the Appellant to stop, then when he did not, she had tried to push him off her, at which point he had held her hands above her head against a metal bar on the bunk bed the two were on, that she believed that she had screamed and lastly that she had continued telling the Appellant to stop, but that he not done so.

13. The Appellant's submissions emphasised that the Complainant had said in her evidence that she believed that she had screamed after she had urged the Appellant to stop. Ms Cassidy sought to suggest that by reason of the Complainant's use of the word "believed", the Magistrate should not have accepted that she did in fact scream. But whether the Complainant did or did not scream, there were some three occasions in her evidence when the Complainant had either said that she wished the Appellant to stop, or had tried to push him off her. While Ms Cassidy suggested that the Complainant's statement that she "believed" she screamed

should not have been accepted by the Magistrate as evidence that she did indeed scream, the evidence has to be looked at as a whole, and the reality is that there was more than sufficient evidence for the Magistrate to draw the conclusion that while the Complainant had consented to foreplay, her consent to sexual intercourse had been withdrawn well before the sexual intercourse in fact took place.

14. Ms Cassidy also relied upon the Appellant's claim that he could not have pinned the Complainant hands against the bar on the bunk as described by the Complainant because he suffered from nerve damage to one of his hands. The fact is that the Magistrate clearly addressed the parties' competing version of events on this issue, and preferred that of the Complainant. Ms Cassidy then turned to the issue of credibility, and relied upon the case of *Bean v R* (CA) No 14 of 2001 as authority for the proposition that in the case of contradicting versions of what occurred, it is not a credibility contest between the Complainant and the Appellant. But *Bean* was a jury trial where it was the direction to the jury using those words that this Court found to be objectionable, obscuring as it did the nature of the burden of proof on the Crown. What the Magistrate did in this case was to indicate his view of the credibility of the two. And I do not think that the manner in which the Magistrate considered the credibility of the parties involved his reversing or ignoring the burden of proof. The reality is that he preferred the evidence of the Complainant over that of the Appellant, as he was entitled to do. Ms Cassidy submitted that the Appellant was being entirely honest and forthright and presented himself as a credible and reliable witness. That submission cannot be maintained in view of the Magistrate's finding on his credibility. It is for these reasons that the Court dismissed this ground of appeal.

The second ground of appeal

15. The submissions appear to indicate that Ms Cassidy now accepts the law as contained in the case of *R v Dossi* [1919] Cr App R 158, referred to in the Crown's submissions. It is nevertheless important to look at the issue in light of the facts of this case. In *Dossi,* the appellant was convicted of indecent assault. The indictment charged him with indecently assaulting a child on 19 March 1918. The child gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending in March 1918. A witness for the defence swore that he was with the appellant on 19 March during the material time and that no indecency with a child took place. The jury found the appellant not guilty with regard to the date of 19 March, but guilty if the indictment covered other dates.

16. In the Court of Criminal Appeal the judgment of the court was given by Atkin J, who started his judgment with these words:

> *"The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days, they found him Not Guilty and that that verdict must be stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.*
> *…*

> *Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence."*

17. *Dossi* was cited with approval in the Australian case of *R v Jacobs* 2 Qd 541. That case concerned drug offences involving the trafficking, supply and possession of cannabis. There were six counts where the underlying offences were said to have occurred on various different dates between December 1989 and June 1990. The appellant's evidence was that he was in the United States for a part of the period in question, such that his defence was that he had an irrefutable alibi with respect to two of the counts. So the timing of the offences was obviously material. Derrington J put matters in the following terms:

> *"The first of these relates to the issue of essentiality of the times mentioned in the indictment as elements of the respective offences charged…Subject to the qualification discussed below, time is not and never was an element of an offence charged except where it has some essential relation to the charge…The particulars in the indictment as to time have the purpose only of giving to an accused person "every fair opportunity to prepare his defence to what is charged and particularised against him". The indictment contains such particulars as to the time and place of the offence "as may be necessary to inform the accused person of the nature of the charge."*

18. In its submissions. the Crown also drew the Court's attention to the case of *Wright v Nicholson* [1970] 54 Cr App R 38, where *Dossi* was distinguished. The Lord Chief Justice in his judgment in that case emphasised that every case depends on its own facts, but pointed out that in *Dossi*, the argument that the appellant there had been prejudiced in that he had been deprived of the opportunity of adducing alibis for the date in question was "*really very thin, if not false, because the appellant gave evidence and admitted on a number of occasions fondling the girls*". Hence it is clear that the materiality of the date given in the information or indictment is critical to the success of any application based on an inaccurate date.

The application of the law to the facts in this case

19. Therefore, the question to be addressed on this appeal is whether the date specified in the information was in any way a material matter. And as the Magistrate said in his judgment, the sole issue for determination before him was the question of consent. No question of prejudice in relation to the date of the offence could have arisen, because the Appellant in his evidence admitted that sexual intercourse had occurred. On the issue of consent, the Magistrate found the Complainant to have been an honest witness and declared himself satisfied that the Appellant was guilty as charged. And on appeal, the Judge reviewed the evidence taken before the Magistrate in detail, and concluded, rightly in my view, that the conviction was safe and that the appeal should be dismissed.

20. The reality in this case is that the Appellant has latched on to the inaccurate date contained in the information, without focussing on the fact that his admission that he had had sexual intercourse with the Complainant and his defence that she had consented to sex rendered the error in date in the information immaterial. The true position is no doubt reflected in the Appellant's affidavit of 19 May 2022, where, explaining his failure to remember that he had been incarcerated at the time mentioned in the information, he said "I had done something foolish, which I regret, and for which I paid my debt to society". That last may or may not be

true. But what is clear is that the period of time given in the information is not material on the facts of this case.

21. I would finally refer to the Appellant's second affidavit, sworn on 5 April 2022, when he concluded that the correct date of his sexual relations with the Complainant would have been 2003, by which time the Complainant would have been 16. As noted above, the Magistrate did in his judgment address the age factor, pointing out the provisions of section 190 of the Code, and concluding that the defence afforded by the section was not available to the Appellant. But the Magistrate did go on to consider the defence of consent, concluding that the Complainant had not consented to the sexual act, which constituted the sexual assault, and this was the basis for the Appellant's conviction. The Judge agreed with the Magistrate's finding as to the lack of consent and concluded that because of her finding as to the use of force, the appeal must fail. I am of the view that the mistake in the date contained in the information is immaterial and not an essential part of the offence, and it is for that reason that the Court dismissed this ground of appeal.

The third ground of appeal

22. The submissions for the Appellant started by dealing with credibility, which very much ties in with the first ground of appeal. The argument under this ground moved back to the issue of the Appellant's claim that he would have been unable to pin the Complainant's hands against the bar on the bed, as described in paragraph 12 above, because he had suffered nerve damage to his hand. It was submitted that the Judge had failed to fully appreciate and acknowledge the Appellant's defence, but in her recitation of the relevant facts, this was included (see paragraph 46 of her judgment). And the Judge concluded, rightly in my view, that the Crown's case was strong and that she saw no reason why the Magistrate should have formed any other conclusion from the facts of the case. The Magistrate rejected the Appellant's assertion that he had an honest belief that the Complainant had consented to sexual intercourse, and there were ample grounds for him to do so. If, as I have held, the Magistrate did not err in the manner in which he dealt with credibility, I cannot see how the Judge can be criticised for accepting that he had dealt with the issue appropriately. And when the matter was put to Ms Cassidy in that way she accepted the position. In relation to this ground, it was for the above reasons that the Court dismissed this ground of appeal.

KAY JA:

23. I agree.

CLARKE P:

24. I, also, agree.