The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 2 of 2014

Between:

JONATHAN JON CUMBERBATCH

Appellants

-v-

THE QUEEN

Respondent

Before: **Zacca, P**
Auld, JA
Baker, JA

Appearances: Mr. Larry Mussenden for the Appellant
Mr. Rory Field, Director of Public Prosecutions and Ms. Cindy Clarke for the Respondent

Date of Hearing & Order: **29 May 2014**
Date of Reasons: **9 June 2014**

REASONS FOR DECISION

Baker, J.A.

1. On 29 May 2014, we allowed Jonathan Cumberbatch's appeal against conviction on Count 1 for serious sexual assault and substituted a conviction for the lesser offence of sexual assault. We refused an extension of time for leave to appeal against sentence.

Facts

2. On 3 May 2010, Cumberbatch was convicted on his own confession of four offences, one of serious sexual assault contrary to section 325(1)(d) of the Criminal Code and the other three of sexual exploitation contrary to section 182B(1) of the Criminal Code. On 16 July 2010 he was sentenced to 12 years imprisonment being made up of 12 years for the serious sexual assault and 10

years concurrent for the other three offences. Simmons J made an order under section 70P of the Criminal Code that he should serve at least half of the sentence before consideration for parole. The Crown appealed against sentence and this was dismissed by a different Division of the Court on 9 June 2011 who affirmed the sentence.

3. The one issue that caused the Court to allow the appeal against conviction to go forward long out of time was whether the facts put forward by the Crown on count 1 amounted to serious sexual assault within the meaning of section 325(1)(d). If, as we concluded, they did not, the conviction on that count had to be set aside.

4. The appellant, who was represented by Mr. Peniston in the lower court, claimed he was given no choice but to plead guilty. Mr. Peniston has supplied a response and is plain that the appellant had, apart from the legal issue on Count 1, no defence to any of the charges and an early plea of guilty was very much in his interests. However, it appears that the legal issue escaped the attention of Mr. Peniston and the point was not taken.

5. It is not necessary to go into the particularly unpleasant facts of the case save in the barest detail. The victims to whom we shall refer as A, B, and C, were respectively 11, 10, and 9 years old at the time of the offences in 2008. They are siblings who resided temporarily with their mother. The appellant acted as surrogate uncle.

6. Whilst with the appellant, A, B, and C touched each other's private parts with the encouragement of the appellant. He demonstrated how to perform oral sex placing his finger in B's mouth and making a sucking sound. When naked on the appellant's bed he told them to have sexual intercourse with each other. A was lying on the bed on her back with B on top of her. The appellant pushed B on the buttocks forcing his penis to penetrate A. He also instructed C to masturbate. He then told C it was his turn but C did not have a sufficient erection. B was also instructed to lick A's genitalia. There were two other children present in the room at the time.

7. About 18 months later the appellant was arrested. He made substantial admissions as to what had occurred saying he had set up barriers for himself

when dealing with children and that at times those barriers had been broken. He admitted he knew the children and explained his behaviour as the consequence of bad choices.

Serious Sexual Assault

8. The legislature has chosen to designate sexual assault committed in a particular way as 'serious sexual assault'. Serious sexual assault attracts a higher maximum penalty than ordinary sexual assault. The relevant section of the Code is section 325(1) which provides:

> 1) A person commits a serious sexual assault if in committing a sexual assault he:-
>
> a) carries, uses or threatens to use, a weapon or an imitation weapon; or
> b) causes bodily harm to the complainant; or
> c) threatens to cause bodily harm to a person other than the complainant; or
> d) is a party to the offence with another person.

9. The particulars of the offence alleged that the appellant procured the sexual assault of A. The Crown relied on section 27(4) of the Criminal Code which is a general provision and provides:

> "Any person who procures another person to do any act or make any omission of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment as if he had done the act or made the omission; and he may be charged with doing the act or making the omission."

10. In the present case the Crown's allegation is that the offence was a serious sexual assault because the appellant was a party to the offence with another person i.e. under section 325(1)(d). In our view the meaning of subsection 325(1)(d) is clear. In order to qualify as a serious sexual assault the offence must be committed by more than one person. This seems to us to be entirely in keeping with subsection 325(1)(a)(b) and (c) all of which specify circumstances which elevate the gravity of the conduct.

11. The Crown submits that section 325(1)(d) can be read in a different way so that 'another person' can include a victim or an innocent other person. Both boys in

the present case were, they argue, the 'other person'. The reality of the case, however, is that the appellant procured or incited sexual intercourse and used the boys as his instruments for this purpose. The boys were not charged with an offence, and it was not suggested there was a sexual assault by either of them.

12. It was not disputed that, being under the age of 14 years, B and C was unable in law to have carnal knowledge (section 44(3) of the Criminal Code). But it is argued sexual assault is not limited to carnal knowledge and section 44(2) of the Criminal Code does not remove criminal responsibility for the acts or omissions of children between the age of 8 and 13. The Crown's case, however, was not that the boys were participating with the appellant in an offence, rather they were the instruments that were used for his own gratification. We were referred to *White v Ridley* (1978) 140 CLR 342, an Australian case involving importation of cannabis into Australia by an innocent agent. It was observed that it was well settled at common law that a person who commits a crime by use of an agent is himself liable as a principal offender and that that is so not only where the agent lacks criminal responsibility, as for example, when he is insane or too young to know what he is doing, but also where the agent, although of sound mind and full understanding, is ignorant of the of the facts and believes what he is doing is lawful. The position in Bermuda is of course statutory as it is covered by section 27(4) of the Code.

13. It is therefore the judgment of the Court that the appellant has no answer to the offence of sexually assaulting A on the facts described. However, in order to elevate the offence to serious sexual assault B and C would have to be active participants in the offence with the appellant rather than the instruments by which he alone committed the offence. Section 44(2) of the Criminal Code provides that a person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission. There was no such proof and accordingly the presumption stands.

14. In our judgment the statutory offence of serious sexual assault under section 325(1)(d) of the Criminal Code could not be made out and therefore the conviction

on count 1 had to be quashed and a conviction for sexual assault contrary to section 323 of the Criminal Code substituted.

Sentence

15. As the conviction for serious sexual assault was quashed the sentence of 12 years imprisonment necessarily fell with it. Having substituted a conviction for sexual assault it fell to this Court to consider the appropriate sentence afresh. The maximum sentence for serious sexual assault contrary to section 323(1) of the Criminal Code is 25 years whereas that for sexual assault under section 232 is 20 years. In layman's terms it is impossible to describe the circumstances of the sexual assault in the present case as other than serious; the facts on which the appellant fell to be sentenced in this Court are exactly the same as those that were before the judge. We note the judge's sentencing remarks, with which we agree and the fact that the appellant has a previous conviction involving child sexual abuse. Accordingly we concluded that an appropriate sentence on Count 1, as substituted, was 12 years imprisonment.

16. Mr. Mussenden, for the appellant, sought to advance other aspects of an appeal against sentence, in particular that the overall sentence should be lower and that the judge should not have imposed a section 70P order. A different Division of this Court considered and dismissed an appeal against sentence, albeit by the Crown, on 9 June 2011. If there was any merit in them, these points should have been taken at that time. It is only in the most exceptional circumstances that this Court will grant an extension of time to consider an appeal long out of time when the issue of the appropriate sentence has already been considered by the Appellate Court and we declined to do so.

Baker, JA

Zacca, P

Auld, JA