The Court of Appeal for Bermuda

CRIMINAL APPEAL No 6 of 2014

Between:

SHUJA MUHAMMAD

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Peter Farge, Farge and Associates, for the Appellant
Ms. Nicole Smith, Department of Public Prosecutions, for the Respondent

Date of Hearing & Decision: **18 March 2015**

Date of Reasons: **22 April 2015**

REASONS

1. The Appellant in this case appeals against his conviction following trial in the Supreme Court before Greaves J from 7 May to 12 May 2014, where he had been charged with four offences of sexual exploitation of a young person by a person in a position of trust, contrary to section 182B(1)(a) of the Criminal Code. He was sentenced to periods of imprisonment of six years, eight years and five years, to run concurrently, for the first three offences, and for a period of two years for the fourth offence, to run consecutively, giving a total period of imprisonment of ten years.

2. Mr Farge appeared as counsel on the appeal, but did not appear as counsel in the court below. Notice of Appeal was filed on 2 June 2014, containing four grounds of appeal, but subsequently amended grounds were filed, for which leave was necessary. The final version of the application for leave to file an amended notice of appeal was dated 18 March 2015, the day of hearing of the appeal. It deleted the original four grounds in their entirety, and substituted some seven grounds of appeal. Briefly, these were:

(i) That there were irregularities during the trial (apart from the judge's summing up) which were unfair and prejudicial to the Appellant.
(ii) That the judge failed to present the Appellant's case fairly in his summing up.
(iii) That there was an irregularity in the proceedings after the jury had retired.
(iv) That the judge had made improper comments in the absence of the jury.
(v) Non-disclosure to the defence of cell phone records and inaccuracy in the transcript of the DVD interview.
(vi) Reference to another, subsequent, case in which the complainant in this case was also complainant, and
(vii) A catch-all ground.

3. After reviewing these with counsel, and retiring to consider the position, we refused leave in respect of the first, fourth, fifth, sixth and seventh grounds, on the basis that such grounds had no reasonable prospect of success, and proceeded to hear argument on the second and third grounds.

4. In relation to the two grounds of appeal for which leave was granted, the first ground has six aspects. We now address these, as follows:-

The summation

(a) Failure to refer to evidence

5 When reminding the jury of the case for the Crown, the judge said:

> "There is no reason established by the evidence on either side tending to show why this young girl who loved this Defendant so much would choose these moments to tell such egregious lies on him, as the defence alleges."

6. When read in context, it is clear that the judge was expressing the submission of the Crown, not his own view. The complaint is that at no point in the summation did the judge refer to an admission by the complainant that she had seen "white stuff coming out of a vagina" while she was watching television at home. Mr. Farge submitted that the judge might have referred to this because it might have provided the Appellant with a defence. This vastly overstates any significance which the inclusion of such a reference might have had. In no sense would it have provided the Appellant with a defence. At its highest, it would have provided the defence with a possible explanation, or more accurately, speculation as to how the complainant at her young age might have had the necessary knowledge with which to fabricate an allegation of sexual exploitation. The judge was under no obligation to refer to this when the point does not seem to have featured in the submissions of trial counsel. The significance of what the complainant had admitted was not central to her allegations, which did not include any such feature. Indeed her candour about what she had seen on television may have served to underwrite her credibility. We are not impressed by this point.

(b) Magnifying a discrepancy in the Appellant's account

7. The judge referred to the Appellant having given two different accounts for having gone to his house with the complainant and her brother on "the beach day". In interview, he had suggested that it had been to change his shoes. In evidence he had referred to collecting his wife from the ferry. Having referred to this when summarising the Appellant's evidence, the judge said:

> "Whether the difference is significant and why in the context of this case is a matter for you"

8. In other words, he left the assessment of any potential significance entirely to the jury. There is nothing objectionable about that.

(c) The judge gave a "direction of guilt"

9. This complaint relates to a passage in the summation when the judge said:

> "He accepts it. She accepts it. The mummy accepts it. Everybody accepts it. You haven't heard any argument in this case to the contrary."

10. On any fair appraisal of the summation it is clear that the judge was referring to an acceptance by all parties that, whatever the truth was about the alleged offences, the accounts of the various comings and goings all fell within the span of dates referred to in the indictment, and that the exact date was immaterial. He directed the jury to concentrate on the allegations of the offences and not to waste time on irrelevant matters such as the exact date. It is fanciful to suggest that any juror would have understood the judge to have meant that the Appellant accepted that he had done what the complainant alleged.

(d) A second "direction of guilt"

11. Mr. Farge referred to this passage:

> "You should not be distracted by all the other alleged contradictions, differences, or variations the defence focussed upon. They are not important to this case. They are mere attempts by the defence to distract you from the real issue…"

12. It is clear beyond doubt that the judge was not "directing" the jury. The passage comes from that section of the summation where he was summarising the case for the Crown. On the next page he turned his, and the jury's, attention to the defence case. One passage reads:

> "You should not disregard those inconsistencies, as the prosecution wish you to do. They are important because if [the complainant] is untruthful or mistaken about them, how can you be sure she is not untruthful or mistaken about what she said this Defendant did to her."

13. Again, there is no "direction", but a cogent illustration of the even-handedness of that part of the summation.

(e) Directing the jury to "virtually disregard" the evidence of the complainant's brother

14. Mr. Farge's focus on the evidence of the complainant's brother was predicated on the proposition that it undermined aspects of the evidence of the complainant's mother. That proposition may be correct, but it does not justify the criticism of the judge. Plainly his approach was to concentrate the minds of the jury on an assessment of the evidence of the two principal adversaries - the complainant and the Appellant - and not to be distracted into trying to resolve factual disputes between other witnesses who were not immediately present at the times of the alleged offences. That was a permissible, indeed sensible, approach. In any event the judge did not ignore the evidence of the brother, and neither did he direct the jury to disregard it. Indeed, he reminded them that the defence had placed reliance on it. There is nothing in the criticism.

(f) Improper comments and lack of balance

15. Much of this complaint is in the form of "the judge should have referred to" or "the judge should have highlighted" this inconsistency or that discrepancy. It is not sustainable. Moreover, the judge told the jury that they were free to ignore any view which he expressed, and that all of these matters were ultimately for them. Mr. Farge also criticised the judge for engaging in prejudicial speculation. He cited a passage in which the judge had referred to a part of the Appellant's interview in which, when referring to the relationship between himself and the complainant, the Appellant had said "she wanted to hug me and stuff …whereas I had felt [it] inappropriate" and "I know it's because she misses her daddy". The judge said:

> "You might think the prosecution is entitled to say, What's going on in the head of that fellow, thinking like that? Is it saying something about him? All matters for you".

16. It is difficult for us to evaluate the judge's comment without knowledge of what the appellant said in cross-examination about this point. It does not seem to provide great assistance to the Crown case. However the judge explained that it was for the jury to assess it. It does not strike us as being an improper comment or a manifestation of a lack of balance.

17. We have read the entire 100 pages of the summation on two occasions (the case having been listed twice). It seems to us to be a robust, fair and helpful summation which does not have any of the faults which this ground of appeal seeks to establish.

18. We now turn to the second ground for which leave was granted.

Irregularity during the jury's retirement

19. In the course of the trial, the jury had watched a DVD of the Appellant's police interview. When the judge referred to it in the course of his summation he added:

> "You can see it again, or any part of it you wish, and you have the transcript".

20. There had been concern that, at one point, there is a passage containing something prejudicial to the Appellant, but there is no issue about that now. The present problem arose in this way. The jury retired to consider their verdict at 12:45pm. At 2:21pm the judge came into court and told the attorneys that the jury wished to see the DVD again. There was a ten minute discussion between the judge and the attorneys in which consideration was given to whether there should be an attempt to edit or pause the DVD so as to conceal the potentially prejudicial part. The discussion was inconclusive, the judge's final comment being:

"Let's wait a few minutes to see if we can get them through without it".

21. At 2:32pm he adjourned. Soon afterwards at 2:50pm the jury notified the Jury Officer that they were ready with their verdict. Essentially, the "irregularity" complained of is that the judge deprived the jury of the assistance they had sought.

22. Now that we have seen all the documents, we are convinced that this is a misconceived ground of appeal. It was right for the judge to discuss the jury's request with the attorneys. The discussion was suitably short. It was natural that the risk of prejudice to the Appellant featured in it. The judge's decision to leave the request unanswered for a short while was prescient and not at all unfair. Quite the contrary; it is highly improbable that the jury would have been annoyed by the delay. They had been told by the judge that he would need to discuss any request with the attorneys before answering it, so the delay would not have been considered odd. The delay in any event was minimal. The guilty verdict came after a retirement which had been noticeably brief.

23. We are entirely satisfied that there was no irregularity and that the Appellant suffered no disadvantage.

24. In conclusion we are convinced that the convictions are safe and that the grounds of appeal fell a long way short of casting any doubt upon them. For this reason, we saw no need to call upon the Crown, and dismissed the appeal.

Signed

Baker, P

Signed

Kay, JA

Signed

Bell, JA