The Court of Appeal for Bermuda

CRIMINAL APPEAL NO 10 of 2015

Between:

AARON O'CONNOR

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, P.**
Bell, J.A.
Bernard, J.A.

Appearances: Mr. C. Craig Attridge, for the Appellant
Ms. Nicole Smith, Ms. Victoria Greening, Department of Public Prosecutions, for the Respondent

Date of Hearing: **4 November 2015**

Date of Judgment: **20 November 2015**

JUDGMENT

PRESIDENT

1. On 17th July 2015 Aaron O'Connor, the appellant, was convicted on his own confession of unlawful carnal knowledge contrary to Section 181(1) of the Criminal Code Act 1907. The complainant (C) was 14 years and 10 months at the time of the offence, the appellant 20 years and 4 months. He was later sentenced to 12 months' imprisonment by Acting Justice Scott.

2. He appeals against conviction on the ground that it was an abuse of process to charge him with unlawful carnal knowledge. He should instead have been charged with sexual assault contrary to Section 323 of

the Criminal Code Act 1907, the significance being that Section 190 affords a defence to those under 21 years of age who believed and had reasonable cause to believe that the complainant was over 16. In respect of offences under Section 181(1) such a defence is only available to those under 18, which means that the defence was not available to the appellant.

3. Both unlawful carnal knowledge and sexual assault are offences that carry a maximum penalty of 20 years imprisonment but the ambit of the offences is very different. Unlawful carnal knowledge involves vaginal intercourse with a girl of 14 or over but under 16. Sexual assault can be committed upon either sex and covers a wide range of conduct including rape and other sexual acts (see Section 233). Subject to very limited exceptions, it is not a defence that a complainant under the age of 16 consented to the activity forming the subject matter of the charge (see Section 190). A girl under the age of 16 cannot by law consent to vaginal intercourse.

4. It seems to me an anomaly that those between 18 and 21 should have a potential defence to an offence of sexual assault whereas such a defence is only open to those up to age 18 in respect of unlawful carnal knowledge. A similar point was made by Kawaley C.J. in *Miller v Crockwell* [2012] Bda L.R.56 at paras 43-45 and 95. This is a matter that could usefully receive the attention of Parliament. There is a logical argument for reducing the age to 18.

5. The fundamental submission of Mr. Attridge, for the appellant, is that in every case of an 18 to 20 year old having carnal knowledge with a girl under 16 if there is any evidence that the offence was not consensual the prosecution must charge sexual assault rather than unlawful carnal knowledge so that the defendant is afforded a possible defence under Section 190.

6. The facts of the present case can be briefly summarised as follows. The appellant first approached C in early 2014 when she was on her way to school wearing her school uniform. They exchanged names and she told him her age. He asked for her phone number but she did not give it to him. From about April 2014 they communicated on Skype and WhatsApp. Many of the appellant's messages were sexually and emotionally manipulative with a view of luring her into a situation in which he could have sex with her. He asked her to send photos of herself to him, which she did on more than one occasion. He threatened to put these on Facebook if she did not meet his sexual requests. He went to her house on three occasions. The first was in May 2014, but her father came home from work and the appellant left. On the second occasion, in June 2014, he took her pants down and tried to have sex with her but she pushed him off. He threatened to post a photograph of her on Facebook. The third occasion was on 9 August 2014 when they did have sex. He repeatedly told her not to tell her mother that she had had sex, and that if she did she was not to say it was with him as he did not want to be locked up.

7. C did tell her parents and the police were contacted. She was a virgin prior to the offence. Some of the appellant's WhatsApp messages show his interest in whether her parents were likely to be at home when he was making plans to visit her house. On no occasion did C invite him over. On 18 August 2014 the appellant was arrested. When cautioned he replied: "I don't know what you are talking about." When interviewed the following day he replied: "No comment" to all the questions.

8. There was a second count on the indictment alleging luring contrary to Section 182 (1) of the Criminal Code, but this was left to lie on the file and not be proceeded with without the order of the Court.

9. There was considerable evidence that C did not consent to having intercourse with the appellant both in relation to background events and C's description of what happened on 9 August 2014. It is immaterial to the commission of offence of unlawful carnal knowledge whether or not the complainant consented because as a matter of law a girl under the age of 16 is incapable of consent. It is nonetheless highly relevant in assessing the gravity of the offence. In the present case the prosecutor was faced with the dilemma of whether to accept a plea of guilty from the appellant on the basis that the intercourse was consensual or face requiring C to give evidence in the witness box. Such a dilemma is not uncommon in cases of this nature and there is usually a strong argument for avoiding the stress and distress to the complainant of giving evidence in Court. Having appropriately discussed the matter with C and members of her family, the prosecutor decided to accept the plea on the basis tendered. This in my view was an entirely understandable decision, albeit one that was fortunate for the appellant.

10. However, before there was any discussion as to plea between the prosecutor and the defence, Mr. Attridge on behalf of the appellant had submitted to the judge that it was an abuse of process to have charged the appellant with unlawful carnal knowledge under Section 181 because it denied him the defence that would possibly have been open to him had he been charged with sexual assault under Section 323 of the Criminal Code.

11. The judge rejected Mr. Attridge's submission that it was not apt to charge unlawful carnal knowledge where there were allegations of non-consensual forcible sexual intercourse. She said the Crown could charge what they deemed best in the circumstances based on the information they had before them at the time of charging. She found no ulterior motive on the part of the Crown as the case fitted within the ambit of the

section. There was no infringement of Article 6(1) of the Bermuda Constitution Order and she declined to stay the proceedings.

12. Mr. Attridge's argument before us ran thus. The appropriate charge where the factual allegation is vaginal intercourse with a girl between 14 and 16 who is a willing participant (albeit not legally capable of consenting) is unlawful carnal knowledge contrary to Section 181(1) of the Criminal Code. The section contains no element of non-consensual intercourse in the sense that it is forcible. Such a charge is not apt where the allegation is of non-consensual or forcible sexual intercourse. He relied on the observation of Lord Bingham of Cornhill in *R v J* [2004] UKHL 42 at para. 6 where he pointed out that non-consensual intercourse with an under age girl would be prosecuted as rape rather than under the equivalent English provision of Section 6 of the Sexual Offences Act 1956. So, therefore, the appropriate provision in Bermuda is under Section 323 for sexual assault.

13. *R v J* was strongly relied upon by Mr. Attridge and it is important to have in mind the certified point of law that was there under consideration:

> "Whether it is an abuse of process for the Crown to prosecute a charge of indecent assault under Section 14(1) of the Sexual Offences Act 1956 in circumstances where the conduct upon which the charge is based is an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution may be commenced under Section 6(1) of the 1956 Act by virtue of Section 37(2) of, and Schedule 2 to, the 1956 Act."

14. The Court of Appeal resolved the question in favour of the Crown but the House of Lords reversed the decision by a majority of four to one. The complainant did not reveal what had happened to her until 3 years after

the event by which time the 12 month time limit for bringing proceedings for unlawful sexual intercourse had long passed.

15. Lord Bingham said at para. 15 that the real complaint was not that the prosecution had abused the process of the Court, as the expression is ordinarily understood, but that it had prosecuted under Section 14 when, on a proper construction of the statutory provisions and on the facts relied on to support the prosecution, it was precluded by statute from doing so. As he put it in para. 18: -

> "...what possible purpose could Parliament have intended to serve by prohibiting prosecution under Section 6 after a lapse of 12 months if exactly the same conduct could thereafter be prosecuted with exposure to the same penalty, under section 14?"

16. Lord Bingham added at para. 24:

> "Mr. Perry contended that conduct may not infrequently be covered by more than one criminal offence and that prosecutors must enjoy a wide measure of discretion in selecting what charges they should prefer. With this in general I agree, while observing that if conduct falls within a more general and also a more specific statutory provision one would ordinarily expect a charge to be laid under the latter, as exposing the defendant to the penalty which Parliament prescribed for the particular conduct in question. But these principles are not engaged by the present provisions, in which Parliament has ordained that conduct of a certain kind shall not be prosecuted otherwise than within a certain period."

17. Lord Clyde also emphasised that the prosecutor's decision upon the appropriate charge must be principally governed by the predominating

essence of the charge" (para. 48) and that the prosecutor should not be entitled to circumvent that protection by resorting to another offence which is less suited to the facts of the case (para. 49).

18. As Lord Rodger of Earlsferry put it at para. 63 "...the Crown cannot do indirectly what it is forbidden to do directly."

19. Mr. Attridge submits that *R v J* is on all fours with the present case. Taking away the potential age defence for those between 18 to 20 is no different from depriving the defendant of a time limit prohibiting prosecution. I am unable to accept this submission. The starting point is to ask what are the predominating facts of the present case for this is critical to determination of the appropriate charge. In my judgment the answer to this question is sexual intercourse with an underage girl. The issues of persuasion and consent were not open and shut and went more to the gravity of the offence than to its label. Furthermore, there was the second count of luring, ultimately not proceeded with by the Crown. In my judgment, the predominating facts of the present case fell much more narrowly into the category of unlawful carnal knowledge than sexual assault which covers both sexes, all ages and a wide variety of different kinds of conduct. Also, the time limit in *R v J* prohibited any prosecution for unlawful sexual intercourse, the offence most suited to the facts of the case, whereas in the present case there was no bar to prosecution for either offence, there was simply an anomalous difference in the defences available, so that the appellant was 2 years and 4 months too old to qualify for the defence to unlawful carnal knowledge. Nor was the prosecution ever invited to amend the indictment to include sexual assault. I cannot accept that the prosecution have manipulated the process of the Court so as to deprive the appellant of a protection provided by the law.

Conclusion

20. The offence of unlawful carnal knowledge can cover a variety of different states of mind on the part of the complainant from active encouragement on the one hand, through reluctant acquiescence to forcibly expressed refusal on the other. The offence exists for the protection of girls under 16 and it is trite law that the level of penalty is dependent on the particular circumstances of each case. This appellant could be said to have been fortunate that the prosecution agreed to accept his plea of guilty on a basis more favourable to him than some of the prosecution evidence suggested. The core of his argument is that he should have been prosecuted for sexual assault rather than unlawful carnal knowledge. Had that been the case there would not have been a plea of guilty. C would have given evidence and the appellant would have faced the real risk of conviction on a factual basis far more serious than that on which he pleaded guilty. Further, the prospect of his establishing a defence under Section 190 seems to me remote. In my judgment he has suffered no injustice, the prosecutor acted lawfully and I would dismiss the appeal as Acting Justice Scott came to the correct conclusion.

Baker, P.

I Agree

Bell, JA.

I Agree

Bernard, JA.