In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2020: 07

FIONA MILLER
(POLICE SERGEANT)

Appellant

-v-

SHAYNE JAMES

Respondent

JUDGMENT

Crown's Appeal against Ruling of No Case to Answer in the Magistrates' Court – Taking a Vehicle without Consent or lawful authority – Section 342 of the Criminal Code - Robbery – Section 338 of the Criminal Code – Whether the Doctrine of Recent Possession Applies – Fingerprint Evidence

Date of Hearing: 4 December 2020
Date of Judgment: 6 January 2021

Appellant Ms. Kentisha Tweed for the Director of Public Prosecutions
Respondent Ms. Elizabeth Christopher, Acting Senior Legal Aid Counsel

JUDGMENT delivered by S. Subair Williams J

Introduction

1. This is an appeal against Magistrate Mr. Khamisi Tokunbo's ruling of no case to answer on Information 16CR00318 in respect of (i) Count 1: a charge of taking a vehicle without consent or lawful authority contrary to section 342 of the Criminal Code and (ii) Count 2: a charge of robbery, contrary to section 338 of the Criminal Code.

2. Having heard Counsel for both sides on their oral and written submissions, I reserved judgment which I now provide with these reasons.

The Evidence

3. The evidence in this case was not contentious on the material facts, save to say that the contested issue at trial was the identification evidence.

***The Facts relevant to Count 1*:**

4. On Thursday 26 May 2016 at some point during evening hours the Complainant, Ms. Veneta Alexiva, locked and parked her motor bike, a white Honda Spacy 110CC registered as BW951 at her residence. The following morning she discovered that her vehicle had been stolen from that location so she reported this to the police.

***The Facts relevant to Count 2*:**

5. At approximately 2:45pm on Wednesday 1 June 2016, the Complainant, Mr. Franklyn Foggo, was riding his motor bike east along North Shore Road when another motor bike rider approached him from behind before forcibly grabbing and removing Mr. Foggo's pendant from the gold chain hanging around his neck. The assailant rider then sped off, making good his escape. However, Mr. Foggo, having pursued the robber for a certain distance, observed that the motor cycle registration number was BW951 i.e. the same as that which was stolen from the first Complainant, Ms. Alexiva.

The Police Chase Later that Same Day

6. At approximately 3:45pm on the same day as the robbery, uniformed Police Constable 860 DeForest Evans was on mobile patrol. In his evidence to the Court, he told Magistrate Tokunbo that he spotted someone riding a white motor cycle with licence plate number marked BW951 in the area of Dundonald Street, Hamilton City. PC Evans initiated his emergency equipment and signalled for the rider to pull over. According to the magistrate's note of his evidence, PC Evans said; "*The rider turned their head slightly to the right and the cycle began to increase speed travelling east, turned right on to King Stree travelling south. Not within the speed limit. The cycle failed to stop at the junction of King and Victoria heading south…*"

7. By agreement between Counsel, PC Evans was permitted to read from his witness statement dated 2 June 2016. Having described a high-speed chase throughout the Hamilton City area and how the rider nearly caused multiple collisions to other road-traffic users, PC Evans told the Court from his statement:

"*…The cycle continued west along Happy Valley Road traveling in the east bound lane and then made a right turn onto Curving Avenue where the rider lost control of the cycle and collided with a staircase railing on the nearside of the road. The rider then jumped to their feet and ran off in a westerly direction through the yard of an adjacent residence.*

I observed that the rider was male, brown skinned in complexion, approximately 5'10" in height. He was wearing a white t-shirt with dark coloured pants and dark coloured footwear. The rider was of slim to medium build…"

8. Police Constable 469 Walter Jackson's evidence (which was read in by agreement) was that the suspect chased by police was a brown skin male wearing a black crash helmet. He went on to state that at approximately 100 yards west of the abandoned cycle, he found a black crash helmet.

9. PC Thompson attended the scene and was directed to the motorbike and the black crash helmet for the taking of photographs, finger print lifts and DNA swabs. He was also directed to other items which he understood to have been recovered from the scene by DC Swan. Amongst those items was a ring of keys. (It appears that there was no direct evidence from DC Swan before the Court about the seizure of the keys or other items said to be removed from the bike.) PC Thompson reported a total of six fingerprint lifts exhibited. These were taken from various parts of the motor bike and the nearby helmet.

10. Fingerprint expert, Ms. Monique Hill-Lee, gave evidence on the stand about the ridge characteristic comparisons discovered between various lifts submitted by PC Thompson and the Respondent's prints which were taken by Police Constable 2022 Delfi Burrows on 29 July 2016 by livescan machine. It is unnecessary for me to provide a detailed narrative on the results of her examination. Suffice to say, the fingerprint comparison evidence was strong enough to support a reasonable conclusion that the Respondent's fingerprints were discovered on the right mirror and on the left side panel of the motor bike in addition to the abandoned helmet. These were based on ridge characteristics ranging between 9 and 20.

11. On the witness statement of Police Constable 2474 Kirsteen Brown, the Court was told that the Respondent, Mr. Shayne James, was arrested for the robbery at 8:20pm on Friday 29 July 2016. He was cautioned to which he made no reply. On 30 Jul 2016 the accused participated in a caution interview by police. No admissions were made during this interview. On 31 July 2016 the accused was charged with the offences contained in the Information laid before the Court.

The Magistrate's No Case Ruling

12. The learned magistrate found that there was no evidence on which the Respondent could be convicted in respect of the taking of the vehicle under Count 1.

13. The Record of his ruling on Count 2 is follows [page 46]:

"*The Defendant is charge[d] in Count 2 with robbing Franklyn Foggo on 1st June of a pendant and using force to do so. The Crown's evidence on this Count is entirely circumstantial – that evidence is fingerprint on the stolen bike found soon after the robbery, fingerprint evidence on a helmet found nearby to where a rider being chased by police abandoned the cycle.*

The only other evidence is visual ID of the chasing officer, PC Deforest Evans.

The law provides that a court must be cautious when the sole evidence is ID or substantially ID evidence and must consider all of the surrounding circumstances.

PC Evans never described the colo[u]r helmet the rider was wearing or if indeed he had on a helmet. He says nothing about the/a helmet being dropped or discarded.

The ID is only of clothing, brown skinned person, male and height.

As to the fingerprint evidence – there is evidence of [the] Defendant's fingerprints on the helmet found – and found in close proximity to where the "safe follow" ended. There is also evidence of fingerprints of the Defendant found on the stolen bike. Ms. Christopher correctly raises issues on continuity as it relates to the bike frame, the scene and as to when the fingerprints were placed on the bike.

There is no evidence of the pendant having been recovered and no forensic evidence connecting the Defendant to the chain which held the pendant.

AGAIN, while the evidence here on Count 2 is circumstantial it is not huge or overwhelming as the Crown described it.

In my view there is some evidence on Count 2, that the Defendant may have committed the offence, but I find that evidence is so weak or tenuous that a trier of fact properly directed on the law and facts could not convict the Defendant.

In the circumstances I find the Defendant has no case to answer on this or either of the 2 counts and therefore the Defence application is allowed.

The Defendant is acquitted."

The Crown's Notice of Appeal

14. By Notice of Appeal filed on 23 January 2020 the Crown appealed against the no case ruling on the following ground of appeal:

    "*That the Learned Magistrate Khamisi Tokunbo erred in law when he found there was insufficient evidence on which a trier of fact, properly instructed, could convict in relation to Count 1 and 2.*"

Analysis and Decision

15. The test stated by Lord Lane CJ in *R v Galbraith [1981] 2 ALL ER 1060*, famously known as the *Galbraith* principles, is established law for the determination of whether a submission of no case to answer. No dispute arises on this area of the law. Lord Lane CJ [1042B-D]:

    "*How then should the judge approach a submission of no case? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…*
    There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

16. In Miller (Police Sergeant) v Charles Richardson [2018] Bda LR 90 [para 18] I described the second limb of the test as follows: "*The second limb of the Galbraith test entails a judicial assessment of the quality and reliability of the evidence, rather than its sufficiency. A Magistrate is thus called upon to consider whether or not the strength of the evidence is such that it could support a conviction.*"

17. In this case, the Crown's case was indeed mounted purely on circumstantial evidence. In some cases, circumstantial evidence will be strong enough to support a conviction. However, in this case the Crown had little more than the fingerprint comparison evidence to point to in its efforts to discharge its burden of proof beyond reasonable doubt.

18. There was no evidence before the magistrate to support a conviction on Count 1. Ms. Alexiva could only tell the Court that her bike was stolen. So, in its aim to prove Count 2, the Crown hopelessly hedged its bets on securing a resulting inference that the person who robbed Mr. Foggo on the stolen bike must also be the person who stole the bike from Ms. Alexiva days prior. This, of course, is not necessarily so. The Crown could have plausibly proven Count 2 without having discharged its burden on Count 1.

19. In relation to Count 2, the identification evidence given by PC Evans and PC Jackson was so inherently weak that the officers' evidence was insufficient to support of dock identification of the Respondent. Plainly speaking, the officers could not properly say that the man they pursued around Hamilton City was the man sitting in the dock at trial. Thus, the doctrine of recent possession has no application in this case because the Crown was unable to establish that the Respondent was the man who was chased by police on the bike or even that he was in possession of the bike or the helmet at all. This draws a distinction between contact and possession.

20. Taking the Crown's case at its highest, a reasonable inference can be made that the Respondent at some point came into contact with the bike and the helmet. However, there was no expert opinion evidence before the magistrate from which he could have drawn a conclusion on the timeframe during which the Respondent had any such contact. The fingerprint evidence was, therefore, insufficient to establish that the Respondent had contact with the bike and the helmet on any day in June 2016. This was conceded by Ms. Tweed during the hearing before me.

21. For all of these reasons, I am bound to agree with the reasoning provided by Magistrate Tokunbo in his ruling that the Respondent had no case to answer.

Conclusion

22. The appeal is dismissed.

Dated this 6th day of January 2021

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE