In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: 48

ROSE BELBODA

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

JUDGMENT

Appeal against conviction in the Magistrates' Court – Physical Abuse of a Senior - Section 3 of the Senior Abuse Register Act 2008- Defence of Provocation – Sections 254 and 255 of the Criminal Code

Date of Hearing:	9 July 2021
Date of Judgment:	22 July 2021
Appellant	Ms. Susan Moore-Williams (Senior Legal Aid Counsel)
Respondent	Mr. Javone Rogers for the Director of Public Prosecutions

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. This is an appeal against Magistrate Mr. Craig Attridge's finding of guilt against the Appellant on Information 19CR00116 to a charge of physical abuse of a senior, namely Mr. Gladwin Edness Sr., on 20 November 2018, contrary to section 3(1) of the Senior Abuse Register Act 2008 ("SARA" / "the 2008 Act").

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

The Evidence

3. The evidence in this case did not give rise to any serious divergence on the facts.

4. The Appellant, Ms. Rose Belboda, was employed as a nursing aid at the King Edward Memorial Hospital ("KEMH" / "the hospital"). The Complainant, who was then 72 years of age, was an in-patient on Cooper Ward at KEMH and was suffering from Alzheimer's disease in addition to other forms of dementia.

5. On the day in question, 20 November 2018, Ms. Belboda was at Mr. Edness Sr.'s hospital bedside examining his blood pressure rate ("BPR") when he hit her eye. No other person was present to witness the Appellant being hit. While no detailed evidence was received by the learned magistrate in relation to the moments leading up to this point, the fact of the Complainant hitting the Appellant's eye was unchallenged evidence at the trial.

6. The Crown called oral evidence from Ms. Tafaya[1] Ramsay, a registered nurse who had attended to the Complainant immediately prior to his encounter with Ms. Belboda at approximately 6:00am. As Nurse Ramsay left the Complainant's room, the Appellant entered the room to test his BPR. Nurse Ramsay told the Court that in walking towards one of the neighbouring rooms she heard the Appellant make a "*very strange*" sound which caused her to re-enter the Complainant's room, having discerned that something was awry.

7. Nurse Ramsay said that as she returned to the Complainant's room she saw the Appellant standing close to his bed. She then queried Ms. Belboda who told her that the Complainant had hit her eye. Nurse Ramsay told the magistrate that she observed that the Appellant's left eye was red and accordingly advised her to go the emergency room. Thereafter, Nurse Ramsay left the Complainant's room to tend to other patients.

[1] The spelling of Nurse Ramsay's forename varies on the Record of Appeal

8. Nurse Ramsay also told the trial magistrate that after she went to another patient's room, she went to the back of the ward and told a colleague nurse about what had happened with Ms. Belboda. Nurse Ramsay said that as she was putting on her gloves she decided to check whether Ms. Belboda had in fact left for the Emergency Room as she had advised her to do. Nurse Ramsay's evidence was that less than 3 minutes had passed between her leaving the Complainant's room (after Ms. Belboda had been struck) and returning to his room (to check to see whether Ms. Belboda had left for the Emergency Room).

9. Upon returning to the Complainant's room, Nurse Ramsay witnessed Ms. Belboda standing close to the door leaning on her chest with her head in her hands. Nurse Ramsay asked Ms. Belboda what was wrong while looking towards Mr. Edness Sr. Ms. Belboda then told Nurse Ramsay that she had thrown an air freshener bottle at the Complainant and that it had hit him. Nurse Ramsay asked Ms. Belboda why she had done so and Ms. Belboda told Nurse Ramsay that Mr. Edness Sr. had told her that '*he should have juked out her eye*'.

10. Nurse Ramsay's evidence was that she approached the Complainant's bedside and observed that he was bleeding profusely from his left eye. She said he had a laceration above his eye and swelling below his eye. Ms. Beldboda left the room leaving Nurse Ramsay to clean and bandage the Complainant's eye for assessment by a doctor. Nurse Ramsay also changed Mr. Edness Sr.'s hospital gown which was blood-stained. Evidencing the appearance of swelling, the Crown produced photographs from Sgt Peter Thompson to evidence the Complainant's eye injury.

11. It was also unchallenged evidence that the Appellant suffered from diabetes. However, no expert opinion evidence was called by either side as to what, if any, added risks or effects a diabetes patient might likely endure as a result of the type of eye injury sustained by the Appellant. However, the magistrate did hear from another Crown witness, Mr. Grenville Russell, that diabetes can effect eyesight and can result in a loss of eyesight. Mr. Russell is a qualified nurse and a Clinical Director responsible for strategic management at KEMH.

12. When the Appellant took the witness stand she said that she was standing in the Complainant's room by the door in pain and in shock when he shouted at her; "*I wish I had dig your eye out*." She said that this made her angry and so she picked up the spray bottle and threw it at Mr. Edness. She told the magistrate that the spray bottle hit Mr. Edness Sr. in his left eye. The Appellant told the Court that she was aware that Ms. Edness was an Alzheimer's patient with other complications but that she believed that he was lucid when he struck her eye.

13. However, when cross-examined by the prosecutor, Ms. Belboda accepted that she had been professionally trained to deal with patients during a two-year certification program for nurses' aides held by the Bermuda College. She also accepted that patients diagnosed with Alzheimer had a tendency to become aggressive and forgetful. When describing her knowledge of Mr. Edness Sr. she informed Magistrate Attridge that she believed him to be 72 years of age and dependent on assistance for his mobility. She said that the nurses would help him on a daily basis to get out of his bed and to walk around. Otherwise he would remain in his bed.

14. The Appellant denied having remained in the Complainant's room with the intention to retaliate against him for having injured her eye and maintained that she threw the spray bottle in reaction to what he shouted at her. She said that she believed that he intended to gouge out her eyes and that she was fearful for her life.

15. Mr. Russell also told the Court about KEMH's procedural requirements for the reporting and investigating of any such incident and that he found the Appellant making entries into the Quantros reporting system upon his arrival to the hospital. Mr. Russell also informed the magistrate that the Bermuda Police Service was provided with the information gathered and assessed by a multi-disciplinary group of the hospital.

The Grounds of Appeal

16. By an Amended Notice of Appeal filed on 5 April 2021 the Appellant appealed on two grounds of appeal:

"*1. The Learned Magistrate erred in not giving sufficient consideration to the effect on the Appellant of the physical assault and threat perpetrated on the Appellant by the senior.*

2. The Learned Magistrate erred in law and/or fact in considering that the prerequisites for provocation had not been met."

The Relevant Law

Provocation:

17. Section 254 of the Criminal Code provides:

"***Provocation***

254 (1) "provocation", in relation to an offence of which an assault is an element, means, except as hereinafter provided, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

Defence of provocation

255 (1) A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self control, and acts upon it on the sudden and before there is time for his passion to cool:

Provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) For the purposes of this section the following questions are declared to be questions of fact, that is say,—

(a) whether any particular act or insult is such as is likely to deprive an ordinary person of the power of self control and to induce him to assault the person by whom the act or insult is done or offered; and

(b) whether, in any particular case,—

(i) the person provoked was actually deprived by the provocation of the power of self control; and

(ii) the force used was or was not disproportionate to the provocation; and

(iii) the force used was or was not intended, or was such as to be likely, to cause death or grievous bodily harm;

(iv) and the person provoked acted upon the provocation on the sudden and before there was time for his passion to cool."

Senior Abuse Register Act 2008

18. The Appellant was charged and convicted under section 3 of the 2008 Act which provides:

"*Abuse of senior an offence*

3 (1) A person who abuses a senior is guilty of an offence and is liable on summary conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years, or to both such fine and imprisonment.

(2) A court convicting a person under subsection (1) shall order that the person's name be entered in the register.

(3) A court convicting a person of an offence under the Criminal Code or the Summary Offences Act 1926 shall order that the person's name be entered in the register where—

(a) the victim of the offence is a senior; and

(b) the court is satisfied that the senior has been abused by the person.

(4) In this section "person" means a natural person.

(5) For the avoidance of doubt it is stated that this section applies only to offences committed after the coming into operation of this Act."

19. A "senior" refers to a person is who has attained the age of 65 years or more and the term "abuse" is defined by section 2 under the Interpretation part of SARA as follows:

"*Interpretation*

2 (1) In this Act, unless the context otherwise requires -

"abuse" means physical, sexual or psychological abuse, or financial exploitation…

(2) Without prejudice to the generality of the meaning of "abuse" in subsection (1)-

(a) a single act may amount to abuse;

(b) a number of acts that form part of a pattern of conduct may amount to abuse even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial."

20. Magistrate Attridge in his judgment considered the breadth of scope of section 3 and its previous application in the lower Courts to cases which involved offenders who had no relationship of trust with the abused senior. The learned magistrate said [9-10]:

"*9. …-and the 2008 Act specifically does not include a requirement for a "relationship where there is an expectation of trust"- the definition above accords broadly with the definition of "Elder Abuse" adopted by the World Health Organisation, namely:*

"A single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person."

10. Notwithstanding what could be seen as inadequacies in the definition of senior abuse, in prior judgments where charges contrary to Section 3(1) have been brought: one involving an alleged assault by a tenant upon their elderly landlord; and the other, an assault involving two seniors arguing over a television cable box, I have, without having to decide the point, expressed some disquiet as to whether parliament in enacting the offence in Section 3(1) of the 2008 Act intended it to cover disputes between landlords and tenants or housemates simply because the individual assaulted is over the age of 65. This, however, is the first case which has come before me in which it is clear, if one were required, in which the Defendant, was, at the time of the alleged senior abuse, in what could properly be described as a, "relationship where there is an expectation of trust" as regards the alleged victim."

21. The issues to be decided on this appeal do not require this Court to carve out the boundaries of section 3. However, a pit-stop to the heart and spirit of SARA is of value. As a starting point, the preamble of the 2008 Act reads:

"WHEREAS it is expedient to protect seniors from abuse; to establish a register of persons who have abused seniors; to provide for the mandatory reporting of the abuse of seniors; and to make supplementary provision for those purposes…"

22. Magistrate Attridge correctly pointed out that the 2008 Act does not expressly restrict its application to offenders who have a relationship of expected trust with the relevant senior. However, the centerpiece of SARA is perched on its efforts to prevent and stop seniors from being under the care of abusers. This is substantially achieved through the use of a register to record the names of the persons who have abused seniors.

23. The register of persons who have abused seniors ("the register") means the senior abuse register kept and maintained under section 4(2)(a). Section 5 requires a Court to inform a person whose name is to be entered in the register to be informed of the fact that his/her name will be entered in the register. Additionally that person shall be informed that he/she will be prohibited from being employed as a care worker and shall also be prohibited from carrying on or being otherwise concerned with the management of or the financial interest in a home or other institution that cares for seniors.

24. Section 5(2) requires the Clerk of the Magistrates' Court or the Registrar of the Supreme Court to send a copy of the Court order to the Registrar of Senior Abuse ("the Registrar SA") for entry of the offending person's name in the register.

25. Section 9 of SARA disqualifies any person whose name appears in the register from caring for seniors and section 6(3) outlines three different factors which the Registrar SA is obliged to consider, the third of which is whether there is "*any other factor relevant to the person's suitability, or lack of suitability, to be responsible for the care of seniors*."

26. The above provisions demonstrate that the Legislature's efforts, in passing SARA, targeted the elimination of abuse on seniors by offenders entrusted with their care. The register, which serves to bite with some of the sharpest teeth of the 2008 Act, is principally purposed to exclude offenders from continuing or being able to occupy trusted roles involving the management or care of seniors or from being concerned with

the financial interest of a home or institution that cares for seniors. So, looking at the 2008 Act as a whole, it seems to me that section 3 was intended to land on persons who abuse seniors while being responsible in some way or the other for their care.

Analysis and Decision

27. Both of the Appellant's grounds of appeal criticise the magistrate for not having found in favour of Ms. Belboda's statutory defence of provocation. The defence of provocation under section 255(1) of the Criminal Code provides that no person shall be held criminally responsible for an assault if provoked for the assault, so long as that defendant is deprived by the provocation of the power of self-control and acts with suddenness before there is time for the passion to cool. Further, as is stated in the *proviso*, the force used must not be disproportionate to the provocation nor can it have been intended or likely to have caused death or grievous bodily harm.

28. The prosecutor, Mr. Javone Rogers, argued that a provocation defence was a non-starter as section 255(1) could not apply to offences contrary to section 3 of the 2008 Act which is concerned with abuse as an element of the offence as opposed to assault. This argument was immediately unappealing as it ignored the reality of the prosecutor's choice not to charge the Appellant with assault under the Criminal Code. As this case involves a deliberate act of hurling an object at the Complainant and thereby causing physical injury to the Complainant, there can be no question that an assault is attached to the purported provocation.

29. The magistrate clearly found, in applying the ordinary-person test under section 255(2)(a) that the injury inflicted by the Complainant to the Appellant's eye was not such that was *"likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered*." When considering this part of the test on provocation, one must also look to all of the circumstances of the present case. It is, therefore, important to place the "ordinary person" in the shoes of Ms. Belboda who was a trained nursing assistant in the process of examining the BPR of an elderly dementia and Alzheimer's in-patient resident in the hospital's Cooper Ward. Magistrate Attridge was also required to remind himself of the

proviso that the force used must not be disproportionate to the provocation. (It was not suggested by the Crown that the assault by the Appellant was intended or was likely to have caused grievous bodily harm or death.)

30. The facts giving rise to the defence of provocation at trial was that the Complainant, having hit Ms. Belboda in her eye one or two minutes prior, shouted words to the effect that he "*should have juked out her eye*". Ms. Belboda's evidence was that she was both sad and angry and she said that she was also in shock while experiencing intense pain to her eye. Further, she had formed and maintained the view that Mr. Edness Sr. was lucid and had been deliberate in carrying out the act of hitting her eye and in making the subsequent utterance. Ms. Belboda went so far as to say in her evidence that she was in fear of her life.

31. The Crown, as properly noted by Magistrate Attridge, was required to disprove the defence of provocation beyond a reasonable doubt. The learned magistrate in his judgment clearly addressed his mind to whether the defence of provocation had been disproven. In his judgment, he concluded [49-50]:

"*49. Whilst said in the context of diminished responsibility and/or the partial defence to murder in the UK of loss of control, provided for in Sections 54 and 55 of the Coroner's and Justice Act 2009, the Court considers it applicable to our statutory defence also that:*

"Evidence of loss of control must be distinguished from evidence of anger; anger might be accompanied by loss of control, and in some circumstances it might be evidence from which loss of control could be inferred; but in others it might indicate the reverse, namely a considered controlled retaliation: Daniel v State of Trinidad and Tobago [2014] UKPC 3; [2014] A.C. 1290 (a decision on the law of provocation)." – see, Archbold 2019 paragraph 19-56a. Their Lordships referred also in this regard to the judgment of Delvin J, in R v Duffy [1949] 1 ALL ER 932

50. Having considered all of the evidence I have heard in this case and applying the law as set out above I am satisfied beyond a reasonable doubt, so that I feel sure, that when the Defendant threw the bottle at Mr. Edness she had not lost the power of self-

control but did so, as she accepted in cross-examination, notwithstanding her training and her knowledge that this is how patients react sometimes, because she was angry and retaliated by throwing the spray bottle at Mr. Edness…"

32. The evidence of abuse, for the purposes of an assessment of provocation may be treated as an assault. In my judgment, the abuse inflicted on Mr. Edness Sr. was unlawful as it was disproportionate to the provocation, having regard to all of the circumstances of this case. Ms. Belboda attempted to obtain her own version of justice measured by *an eye for an eye*. So, ultimately, Mr. Edness Sr. was a victim not only of his degenerative mental condition but also of Ms. Belboda, the very person who was assigned to assist in the provision of his care. As I see it, this is a classic example of the abusive treatment of seniors which Parliament intended to penalise and eliminate in passing the 2008 Act. For these reasons I find Magistrate Attridge's decision to reject the defence of provocation to be unimpeachable.

Conclusion

33. The conviction is safe and the appeal shall be dismissed on all grounds.

34. Accordingly, I remit this matter to the Magistrates' Court for sentencing.

Dated this 22nd day of July 2021

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE