[2022] SC (Bda) 99 app. 22 December 2022

In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2021: 21

RAYMOND CHARLTON

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

JUDGMENT

Application for leave to adduce fresh evidence on appeal against conviction in the Magistrates' Court- Difference between Voluntary and Involuntary Intoxication – Offences of Basic Intent Sexual Assault- Section 323 of the Criminal Code- Intrusion on the privacy of a female – Section 199(2) of the Criminal Code

Date of Hearing:	15 December 2022
Date of Judgment:	22 December 2022
Appellant	Ms. Elizabeth Christopher (Christopher's)
Respondent	Ms. Shaunte Simons-Fox for the DPP

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 Counts 1 and 3 of Information 19CR00139 which consists of a charge of intrusion of the privacy of a female, contrary to section 199(2) of the Criminal Code and

charge of sexual assault, contrary to section 323 of the Criminal Code. The summary trial nearly spanned a one year period, having started on 18 March 2020 and concluded on 1 March 2021.

2. In furtherance of this appeal, the Appellant filed an application to adduce fresh evidence for an order to be made under section 16(2)(b) of the Criminal Appeal Act 1952 allowing the admission of expert opinion evidence from Dr. Henagulph on the psychiatric condition of the Accused at the time of allegations underlying the convictions entered against him in the Magistrates' Court. This application was opposed by the DPP.

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

Summary of the Material Evidence at Trial

The Case for the Crown:

4. The Complainant, a young adult female, personally knew the Appellant prior to the offences in question. Growing up, her mother's brother was very close to the Appellant. The Complainant's mother knew and considered the Appellant like a brother. So, the Complainant naturally took to the Appellant as a would-be uncle.

5. On 22 August 2018, the Appellant attended the Complainant's residence where she lived with her mother. The purpose for his trip to their home was to assist with some electrical issues in the house. The Complainant believed the Appellant was going to repair the ceiling fans. At some point after his arrival, the Appellant entered the Complainant's bedroom and greeted the Complainant with a hug and a side-kiss on her cheek. In this moment, the Appellant remarked to the Complainant about how small her "boobs" or "titties" were. This, she told the trial magistrate, made her feel uncomfortable

6. Having ignored this comment, the Complainant tried to keep her distance from the Appellant while he tried to engage her in "small chit-chat". Thereafter the Appellant turned his attention to the electrical matters, repeatedly leaving and re-entering the Complainant's room.

7. The Complainant then got dressed for work. Having done so, the Appellant informed her that he could see her "ass" or "butt" through her skirt and then grabbed and lightly squeezed her buttocks. The Complainant explained that it was after she had opened her bedroom window blinds that the Appellant said; "*Whoa…your clothing is completely see-*

through". The Complainant's evidence was that this made her feel both sad and very uncomfortable.

8. Also on the Complainant's evidence, in the after-math of the "boob" remark and the butt-grabbing, the Appellant told her that he was "high" as he had smoked a "joint" on a few occasions that morning. She added that the Appellant's eyes were red and bloodshot. It was also the Complainant's mother's evidence that the Appellant was "high" that morning when she saw him in the house.

The Case for the Defence:

9. The Appellant's case was that he was a man of previous good character, a fact for which he was credited in respect of his credibility as a witness and on the issue of propensity.

10. The Appellant took the stand and gave evidence in his own defence. As was recorded in the magistrate's ruling, Mr. Charlton stated that he was at a loss as to why these allegations were being made against him and that he since which had some form of a nervous breakdown.

11. On the morning of 22 August 2018, prior to his arrival to the Complainant's house, Mr. Charlton said that he took his various medications for depression, cholesterol and pain. Additionally, he smoked cannabis that morning as a supplemental measure to fight his pain.

12. Having taken these substances in combination with the cannabis smoking, the Appellant left his home at approximately 7:45am to meet the Complainant's mother's brother and another sibling at Island Cuisine where he arrived around 8:00am. However, once he got to Island Cuisine, those two people had already left, leaving him to sit with the Complainant's mother who was there seated on a stool at the inside counter. There ensued some dialogue between them which was aimed to bring an end to a longstanding rift.

13. During that breakfast conversation, the Complainant's mother asked for the Appellant to troubleshoot a ceiling fan in her bedroom. This is how the Appellant came to attend the Complainant and her mother's home that morning. (The Appellant provided a technical explanation as to why it is that he used the Complainant's bedroom ceiling fan to resolve the faulty issue with the fan in the Complainant's mother's room.)

14. The Appellant stated in his evidence at trial that he first went to the Complainant's mother's room. She then accompanied him to the Complainant's room after knocking on

the door. According to Mr. Charlton, he greeted the Complainant from the doorway without hugging or kissing her. He said he welcomed her back from the UK and congratulated her on having passed her school exams. Mr. Charlton said that at this point, the Complainant was seated on the far side of her bed, getting ready to leave for work.

15. The Appellant explained that he left the Complainant's room and informed her mother that the fuses were in order that he would reset the circuit breakers then check back in to the Complainant's room.

16. In outlining the Defence case in answer to the allegation concerning Mr. Charlton's remark about the Complainant's breasts, the magistrate stated in his judgment [47]:

"*Mr. Charlton said that on the second or third visit to* [the Complainant's] *doorway, the started he said, to talk about her working at the hair salon in Hamilton, and somehow got onto the subject of the rift that existed between her mother, himself and his wife.* [The Complainant] *was under the impression that her mother had distance*[d] *herself from him and his wife, he said, but he told her that it was in fact the other way around. He said that he told* [the Complainant] *that her mother had a habit of distorting things and misrepresenting what someone had said. It was at that point that he said to her; "For example. If I told you that you had the body of a tall slender model your mother would convolute that to I love your tiny titties." He said that in his example he was using what he thought to be her mother's vernacular. On the third or fourth visit to her room he said he made some "out there" comment about opening a salon on 5th Avenue, which was in hindsight he said, something totally bizarre.*"

17. In response to the comment about the Complainant's clothing, the Appellant accepted that he startled the Complainant when he told her he could see through her clothing as she opened a blind on the east-facing window, allowing the sunlight to come through. He did not accept the suggestion that he subsequently grabbed the Complainant's buttocks. Instead, he said that he patted the Complainant on her back to get her attention to tell her that he could not fix the fan and that he was leaving the premises. According the Appellant, it was at this stage that they hugged and he gave her a peck on the cheek before telling her, as he normally did, that he loved her.

The Unused Toxicology Report and the Intended Fresh Evidence

18. The Appellant told the trial magistrate that he was diagnosed with depression in January 2018 and bi-polar disease at the end of August of that same year. As to his cannabis use, the Appellant accepted at trial that he was smoking on two-hour intervals and that he had

smoked to the point of feeling high before attending the Complainant's residence on 22 August 2018. This was done in combination with his taking of the Tramadol. The Appellant further accepted that his memory was "foggy" covering the period starting with his surgery of 7 August 2018 through to the end of August 2018. Notwithstanding, it was his choice to smoke cannabis and to take the Tramadol prescribed to him that day, as noted in the magistrate's judgment [66].

19. Prior to the start of the trial, in October 2019 the Appellant undertook to obtain a toxicology report from Mr. Richard Brown of Keith Borer Consultants. Although the Defence decided against producing Mr. Brown's report at trial, that report was filed in the course of these proceedings. In its material portions, it provides:

"...

Mr. Charelton [sic] *believes that medications he had been taking had caused him to act out of character, to be in a dream-like state and cause his recollection of events to be poor.* <u>*He denies taking cannabis as alleged by* [Complainant]</u> [underlined for my emphasis] *but instructs that he took to the following:*

- *1x tramadol previous evening between 8pm and 11pm*
- *1x tramadol, 1 Lexapro, 1x atorvastatin*[,] *1x 100mg docusate sodium 7:30am-7:45am*

I am requested to consider the potential effects of medications taken by Mr. Charleton [sic] *on individuals in general terms*

In the preparation of this statement, I have relied upon the following:

- *Instructions from Christophers* [sic] *Solicitors dated 19/08/19, 26/08/19 and 10/09/19*
- *Proof of evidence of Ray Charleton* [sic] *undated, received 10/09/19*
- *Statement of* [Complainant] *dated 23/04/19*
- *Record of police interview with* [Complainant] *dated 27/11/18*

...

...

Lexapro (Escitalopram)

Escitalopram is a [sic] *used in the treatment of depression and is one of the newer selective serotonin reuptake inhibitor (SSRI) drugs, a class that also contains citalopram, fluozetine (Prozac) and paroxetine (Seroxat). This class of drug acts by prolonging the effects of serotonin, a neurotransmitter in the brain that plays a role in mood....*

…
Side effects include … Rare instances of out-of-character behaviour and suicidal tendencies have also been reported.

Tramadol

Tramadol is an opiod analgesic, a class of drugs which includes morphine and diamorphine (heroin). Tramadol produces fewer side effects and is less likely to cause dependence than other drugs in this class.
…
More serious side effects are rare but can include confusion, changes in blood pressure, rashes and hallucinations which tend to occur with high doses.

Discussion

…Mr. Charleton [sic] *believes that his medication affected him on the day in question. He had taken tramadol the previous evening which is unlikely to have had any effect on him the following day. On the day of the alleged offences he took atorvastin, docusate, escitalopram and tramadol.*

Of these medications, only escitalopram and tramadol could have had any appreciable effect on state of mind and recollection. Mr. Charleton [sic] *does not state the dose of tramadol taken but says it was one tablet the maximum dose of which available in the UK is 200 mg.*

Escitalopram may cause drowsiness and a rare side effect is reportedly out-of character behaviour. It is not possible to determine whether or not Mr. Charleton [sic] *suffered this at the time. I would not expect tramadol in the dose likely to have been taken to have caused any significant side effect either alone or in combination with escitalopram other than drowsiness which, in my opinion, could not account for Mr. Charleton*['s] *alleged actions* [underlined for my emphasis].
…
…
Appendix 2: Quality Assurance

Peer Reviewer: Jennifer Gray

A second consultant has studied the case file, read the report and is satisfied that the scientific principles used have been properly applied and the opinions expressed are

reasonable based on the information made available to us. [Underlined for my emphasis].

..."

20. Mr. Brown's report was exhibited to the Appellant's affidavit evidence filed in these proceedings which reads [2]-[4]:

"...

2. ...the Prosecution asserts that the evidence we ultimately obtained from Dr. Henagulph could have been obtained for trial with reasonable diligence.

3. Upon consultation with my attorneys and at a relatively early stage, we solicited the opinion of a toxicologist from Keith Borer Associates- who often provided expert scientific evidence in this jurisdiction. I was feeling that the issues that I was having with the events in question arose out of the prescribed drugs I was taking. I provided a history of the prescribed drugs that I was taking. I did not provide, nor was I solicited for over the counter medication, in this instance the Ventra which was an over-the counter antacid.

4. I hereby produce at "RC-2" a true copy of the report of forensic scientist Richard Brown. You may note the assumptions that he was making about the level of escitalopram. In effect the psychiatrist, Dr Henagulph, was saying that the over-the-counter CBD and Ventra led to elevated escitalopram which in turn led to significantly elevated levels of the anti-depressant in his blood stream leading to his manic state."

21. So, in short, the Appellant contends that this report is of limited assistance because the toxicologist was not informed, by either Ms. Christopher or her client, that Mr. Charlton had ingested Ventra (Esomeprazole).

22. On 1 March 2021 the learned magistrate found the Defendant guilty on Counts 1 and 3 of the Information. On 21 May 2021 the matter was adjourned for sentencing to 14 June 2021. Ms. Christopher explained to this Court that upon the Appellant's conviction, she requested for Magistrate Attridge to order a psychiatric report in aid of sentencing. Accordingly, such an order was made.

23. On 14 June 2021 a 25 May 2021 report from Bermuda Hospital's Board's Consultant Forensic Psychiatrist, Dr. Seb Henagulph, was produced before the magistrate in aid of the sentencing hearing. (The magistrate subsequently stayed those sentencing

proceedings pending an undertaking from Ms. Christopher to file a Notice of Appeal based on grounds related to the findings of Dr. Henagulph.). Ms. Christopher contends that this report should be adduced as fresh evidence on appeal.

24. In the opening paragraphs of Dr. Henagulph's report, he summarised his findings as follows [1]-[5]:

"*1. Mr Raymond Charlton is before the Court having been found guilty of sexual assault, contrary to Section 323 of the Criminal Code.*

2. Mr Charlton has a previous history of suffering from mild to moderate depressive episodes which appear to have responded to treatment. Further to these episodes he experienced, in my opinion, a prolonged and moderately sever episode of mania without psychotic symptoms between February and August 2018.

3. I am of the opinion that this episode of mania that directly lead to the offence and that the manic episode was likely the direct result of a combination of prescription medications and cannabis constituents.

4. Mr Charlton has been engaged in treatment since the offence and his future risk is adequately managed by continuing voluntary engagement with mental health services.

5. As Mr Charlton no longer has the option of a hospital disposal under the Mental Health Act 1968 and is not suitable for the Mental Health Treatment Court, I will leave it to the Court to consider an appropriate disposal."

25. During the hearing of this appeal, Ms. Christopher suggested that Dr. Henagulph's reference [3] to "*cannabis constituents*" applied only to CBD oil. Notably, Dr Henagulph reported [29] his review of a 29 August 2018 letter from Mr. Charlton's GP, Dr Shaw, referring the Appellant to Mid-Atlantic Wellness Institute [MWI]. In that referral letter it was noted that Mr. Charlton was taking CBD oil ¾ tsp daily for neck pain and that he had been smoking marijuana "*all day, every day*". Dr Henagulph further reported [30] and [35]:

MWI Records

...

30. Following assessment and subsequent admission [into MWI], *he was reviewed by consultant psychiatrist Dr Neilson-Williams. He told her his presenting complaint was "I have been using so much cannabis." On mental state examination she noted "pressure of speech, talkative and verbose, grandiose, expansive, loosening of association and some*

insight into the fact he had been using too much THC." The initial clinical impression was "THC dependency and ?manic [sic] *episode." He was prescribed anxiolytic diazepam to assist with possible THC withdrawal and his antidepressant was stopped. On further review the following day he was noted to have a "significant improvement in mental state." He reported feeling calmer and that his thoughts were not racing like before. He was able to sleep "for the first time in ages". The clinical impression at this time was manic episode and cannabis dependency.*

...

...

35. Following discharge there were no further concerns reported. He engaged in several sessions with the clinical psychologist, Dr Donaldson. It is notable that in an email, dated 15th March 2019, Dr Donaldson queried the diagnosis of bipolar, given his inability to elicit any "significant mh [mental health] history of Bipolar mood issues prior to this time." He felt that substances may have had a greater impact on Mr. Charlton's presentation, noting he had been "abusing tramadol and cannabis to quite a degree." [Underlined for my emphasis]. *He also questioned whether Mr Charlton continued to require sodium valproate and whether an antidepressant would be more appropriate."*

26. Dr Henagulph further reported [57], [60]-[61] and [63]:

"57. Towards the end of April he travelled to Europe with his wife and another couple. This was for a planned river cruise from Holland to Switzerland. He said while in Amsterdam he began to use cannabis frequently due to its easy availability. He began smoking it as well as ingesting it. When I asked him about any unusual behaviours during this time, he said that the other couple began to distance themselves from him due to his behaviour. This appears to have mainly been in the form of over-familiarity with strangers. He recalled being in a hot tub and speaking to a woman he did not know in a way in which he now feels embarrassed about. He also recalled approaching two women in the street and telling them that he was on a scavenger hunt and needed to get two hugs and then hugged them- he said his wife took a picture of this although she thought it was a bit strange at the time. ....

...

60. Then on 30 June 2018 he experienced an episode of sepsis (blood infection) which he said made him "delusional" in that he experienced visual hallucinations and was told that he was speaking to his friend...who was not actually there.

61. Following this health scare, he said he returned to only using cannabis at weekends… …He said his wife had told him she was considering leaving him due to his behaviour.

…

63. On 7th August 2018 he had an operation on his perianal area which left him with severe pain post-operatively. He was prescribed pain relief in the form of tramadol rather that [than] the usual opiate-based medication, presumably due to a recorded allergy to opiates. Due to the ongoing pain he again sought out cannabis and began smoking it several times a day up until 10pm at night (to help with sleep) but often waking at 4am to smoke more."

The Magistrate's Judgment

27. Magistrate Attridge considered the issue of voluntary intoxication [61]:

"*I pause to note that where, as here, there is evidence that at the time when he did the things which are alleged to constitute the offence, the Defendant was affected by drugs, intoxication does not relieve a person of responsibility for committing a crime. It may, however, when considering the state of his memory of the events surrounding the incident which has given rise to the charge. Further, whilst it may offer some explanation for his conduct, it does not, without more, entitle him to an acquittal.*"

28. In stating his findings on the reliability of the witnesses, the magistrate stated [71] and [75]:

"*The Court having had the opportunity to observe and consider the demeanour of both the Complainant and the Defendant, ultimately did not find the Defendant to be an honest or credible witness …*

As indicated above the Court having had the opportunity to observe and consider the demeanour of both the Complainant and the Defendant, ultimately did not find the Defendant to be an honest or credible witness. I do, however, accept the Complainant['s]…*evidence that after she had got dressed for work, she was standing by the window in her bedroom when the defendant told her that he could see her "ass" or "butt" through the skirt before he subsequently, "grabbed, and touched, [her] butt". As well as her later evidence that there was "a grab and like a light squeeze" by Defendant using one hand.*"

The Ground of Appeal

29. By a Notice of Appeal dated 22 June 2021, the Appellant appealed on the following single ground:

"*In light of fresh evidence that became apparent during the sentencing phase of the trial via the expert psychiatrist report of Dr. Sebatian Henagulph dated 25th May, 2021 the Appellant's conviction ought to be quashed due to unintentional, involuntary intoxication from ingestion of a combination of prescription and over-the counter medications (section 42 of the Criminal Code).*"

Decision and Reasons

30. Having examined Dr. Henagulph's report, I am persuaded that his conclusions were drawn on a clear and express appreciation that the Appellant was incessantly smoking cannabis during a period covering 22 August 2018 when the offences were committed. So, it is evident that Dr. Henagulph would have kept the Appellant's cannabis-smoking at the forefront of his analysis when he opined that Mr. Charlton's episodes of mania directly resulted from the combination of the prescription medications and cannabis constituents.

31. In my judgment, Dr. Henagulph's report does not give rise to a defence of involuntary intoxication. To the contrary, this is a clear case of voluntary intoxication, a principle which the learned magistrate properly considered. Dr. Henagulph's report outlines various examples in which the Appellant abused cannabis smoking during a period shortly prior to August 2018 when he suffered similar previous episodes which would also be described as manic. While the cannabis misuse is not reported to be the single cause of the offending behaviour, it was clearly a significant contributing factor. For those reasons, I deem it unnecessary to outline the reported effects of the prescription medications or the Ventra antacid.

32. In Lord Brown's majority judgment for the Privy Council in *Dial and another v State of Trinidad and Tobago* [2005] UKPC 4, [2005] 1 WLR 1660 the Board held [31]:

"*In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the Court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the Court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the Court regards the case as a difficult*

one, it may find it helpful to test its view "by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict" (Pendleton at p83, para 19).

The guiding principle nevertheless remains that stated by Viscount Dilhorne in Stafford (at p906) and affirmed by the House in Pendleton:

"While ... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe]."

33. On my assessment, Dr. Henagulph's report does not raise any reasonable doubt as to the guilt of the Appellant. At the end of the day, all that it really provides is an explanation as to the effects of the Appellant's voluntary intoxication. In this case, we are concerned with basic intent offences. So voluntary intoxication is not capable of annulling the Appellant's *mens rea*. In deciphering between voluntary and involuntary intoxication, I am assisted by the below passage from the Lawton LJ in *R v Quick* [1973] 3 ALL ER 347 as quoted in the judgment in *R v Bailey* [1983] 2 ALL ER 503 [506]:

"*...A self-induced incapacity will not excuse...nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs; or failing to have regular meals whilst taking insulin. From time to time difficult borderline cases are likely to arise. When they do, the test suggested by the New Zealand Court of Appeal in R v Cottle [1958] NZLR 999 is likely to give the correct result, viz can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of mind?*"

34. In my judgment, the evidence established that the Appellant was abusing cannabis in the form of habitual smoking and that this activity directly caused him to feel intoxicated, whether singularly or in combination with the other medications he took (whether prescription or over-the-counter). That indeed points to a self-induced incapacity.

35. Further, I am bound to take note of the conflicting positions advanced by Mr. Charlton between his trial and his appeal. At trial, Mr. Charlton mounted a defence that he had not performed the offending acts. He explained in some detail that the Complainant had misunderstood his vernacular and he expressly denied grabbing and squeezing her buttocks, claiming that he instead patted her on the back. However, on appeal, he now appears to accept that he did commit the offences for which he was committed but did so in an involuntary state of intoxication.

36. Magistrate Attridge accepted the Crown's evidence as proved beyond reasonable doubt and found that the Appellant's evidence was not of the quality to inject doubt into the Crown's proven case. In making this finding, the magistrate rejected the Appellant as a truthful witness. I see no reason to interfere with those findings.

37. For these reasons, this application cannot succeed.

Conclusion

38. The conviction is safe and the appeal shall be dismissed on all grounds. Accordingly, I remit this matter to the Magistrates' Court for sentencing.

Dated this 22nd day of December 2022

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE