In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2013 No: 18

BETWEEN:-

DEVAUN JAMAL COX

Appellant

-and-

THE QUEEN

Respondent

JUDGMENT

(In Court)

Date of hearing: 7th January 2014
Date of judgment: 10th January 2014

Mr Kamal Worrell, Lions Chambers, for the Appellant

Ms Takiyah Burgess and Mr Loxly L A Ricketts, DPP's Chambers, for the Respondent

Introduction

1. On 16th May 2013 before the Magistrates' Court (Wor. Archibald Warner, Senior Magistrate) the Appellant, Devaun Cox ("Mr Cox"), was sentenced to 3 years' imprisonment, to be followed by 2 years' probation, for the offence of intruding on the privacy of a girl contrary to section 199(2) of the Criminal Code Act 1907 ("the Code"). He appeals against conviction and sentence.

2. During the course of argument the grounds of appeal were distilled to just two:

   (1) That the information was defective, such that the particulars alleged did not amount to an offence known to law.

   (2) That Mr Cox was sentenced on the erroneous basis that he had changed his plea from "not guilty" to "guilty", whereas he had not changed his plea. He was therefore never convicted or alternatively was convicted on an erroneous basis.

3. I shall deal with each ground in turn. I should first record my gratitude to Mr Worrell, who appeared for the Appellant, and Ms Burgess and Mr Ricketts, who appeared for the Respondent, for their helpful submissions.

The defective information

4. The information read as follows:

Davaun (sic) COX dob 06-Aug-84
Of: No Fixed Abode

OFFENCE

1. On a day and date unknown between the 1st day of March 2012 and the 31st day of March 2012, in the islands of Bermuda, did intrude upon the privacy of a girl and did in fact alarm, insult or offend the girl, namely [the complainant].

Contrary to section 199(2) of the Criminal Code

5. Section 199(2) of the Criminal Code provides as follows:

> Any person who intrudes upon the privacy of a woman or girl *in such a way as to be likely to alarm, insult or offend a woman or girl* and does in fact alarm, insult or offend the woman or girl whose privacy he intrudes upon is guilty of an offence, and is liable on conviction by a court of summary jurisdiction to imprisonment for five years and on conviction on indictment to imprisonment for a term not exceeding ten years. [Emphasis added.]

6. The information therefore omits an essential ingredient of the offence. The prosecution must prove not only that the defendant causes subjective alarm, insult or offence to the woman or girl whose privacy he intrudes upon, but that such intrusion was objectively likely to cause alarm, insult or offence. In other words, if the prosecution were to prove only the facts particularized in the information, but no more, Mr Cox would not be guilty of any offence.

7. I was initially attracted by the argument that in those circumstances the facts stated in the information would not amount to an offence known to law. The consequences of such a finding in relation to an indictment would be as stated in the 2014 edition of Archbold at paragraph 7-74:

> Where the facts stated in the indictment do not amount to an offence known to law, the conviction will be quashed: *DPP v. Bhagwan [1972] A.C. 60, HL*; *DPP v. Withers [1975] A.C. 842, HL*. This is so even though no point is taken at the trial and the defendant pleaded guilty: *R. v. Whitehouse [1977] Q.B. 868, 65 Cr.App.R. 33, CA.*

8. By parity of reasoning this principle would apply with equal force to the facts stated in an information.

9. In Bhagwan and Withers the indictments contained a statement of an offence not known to law, namely conspiracy to evade the control on immigration imposed by the Commonwealth Immigrants Act 1962 [Bhagwan] and conspiracy to effect a public mischief [Withers].

10. In Whitehouse the indictment contained two counts of incitement to commit incest. This was an offence known to law. However the conduct alleged in the particulars was not capable of amounting to that offence. The defendant was charged with inciting his daughter to commit the crime of incest, but as the law deemed his daughter to be incapable of committing that crime, the defendant could not be guilty of inciting her to commit it.

11. However the courts have distinguished between an indictment that discloses no known offence, as in the examples cited above, and one that, like the information in the present case, describes a known offence with incomplete particulars.

12. For example, in R v McVitie [1960] 2 QB 483, EWCA, the defendant was convicted of possessing explosives, contrary to section 4(1) of the Explosive Substances Act 1883. The particulars alleged that the defendants "*had in their possession a certain explosive substance … under such circumstances as to give rise to a reasonable suspicion that it was not in their possession for a lawful object*". As the Court of Appeal accepted, the particulars should have alleged "*knowingly had in their possession*". However the Court declined to allow an appeal against conviction. It noted the defendant had admitted that he knew he had explosives in his possession, and that it was conceded that he was not prejudiced by the omission. The Court held that the omission did not make the indictment bad, in the sense of invalid, but merely defective.

13. McVitie was cited with approval by the Court of Appeal in R v Hodgson [2009] 1 WLR 1070, EWCA. The defendants both pleaded guilty to one count of "*inflicting grievous bodily harm, contrary to section 18 Offences against the Person Act 1861*" whereas the count should have alleged "*inflicting grievous bodily harm with intent*".

14. Lord Philips CJ, commenting on the defendants' arguments, stated:

> These arguments were based on the premise that if the indictment does not spell out the mental element of a crime, it is to be read as if the crime has no mental element. That is a false premise. It may

> well be that, at least in the case of some offences, it is desirable practice to state the mental element of the offence in the indictment. But if the mental element is not stated expressly, it may be implicit from the statement of offence and the particulars that are given. In such a case the critical issue will be whether the indictment contains sufficient information as to the nature of the charge.
>
> This proposition is well exemplified in the case of theft. The offence of theft requires the specific intent permanently to deprive the owner of the property stolen, but there is no requirement to spell this out in the indictment: …

15. The requirement in England and Wales that the indictment should contain sufficient information about the charge derives from section 3(1) of the Indictments Act 1915. It is not limited to the mental element of an offence. The equivalent provision in Bermuda is section 477(1) of the Code:

> An indictment shall be intituled with the name of the Supreme Court, and must, subject to the provisions hereinafter contained, set forth the offence with which the accused person is charged in such manner, and with such particulars as to the alleged time and place of committing the offence, and as to the person, if any, alleged to be aggrieved, and as to the property, if any, in question, as may be necessary to inform the accused person of the nature of the charge.

16. Section 491 of the Code provides:

> The provisions of sections 477 to 490 relating to indictments apply to informations preferred against offenders upon their trial before courts of summary jurisdiction.

17. In my judgment, what is necessary to inform the accused person of the nature of the charge is dependent on the particular facts of the case. Here, the prosecution case was that Mr Cox approached the complainant while she was travelling alone on a bus, made inappropriately suggestive remarks and ogled her in a lewd way, then asked her where she lived and whether he could come home with her. The incident ended when the complainant got off the bus. It was implicit in the information that the prosecution were

alleging that this conduct was objectively likely to cause alarm, insult or offence. I am therefore satisfied that the information complied with the requirements of section 477(1) of the Code. This ground of appeal is dismissed.

Change of plea

18. The trial began on 13th February 2013 when the complainant and her mother gave evidence. The court adjourned after the complainant had given her evidence in chief to allow Mr Cox, who was unrepresented, to apply for Legal Aid. It appears that the Defendant submitted the relevant papers to the Legal Aid Office. However they had not yet been processed when the matter returned to court on 13th March 2013.

19. Following a short discussion about the legal aid position, Mr Cox volunteered that he wanted to change his plea. The following exchange then took place.

> Mr Cox: *Can I just plead guilty with an explanation?*
>
> . . . . .
>
> Court: *Do you understand what's going on sir?*
>
> Mr Cox: *Yes. But …*
>
> Court: *All right. Just a minute. One question at a time. Yes or no. Right. Yeah. And you want to plead guilty to this?*
>
> Mr Cox: *With an explanation. Can I explain myself?*
>
> Court: *Sir, you're always given the explanation, opportunity to explain yourself. But explaining yourself is something called different to um … um … pleading guilty. So you want to plead guilty?*
>
> Mr Cox: *Yes. With an explanation, sir.*
>
> Court: *Okay. You will be given an opportunity.*

Mr Cox: *All right.*

Court: *In light of that, what I am going to do is adjourn this matter for a week, if not, for a few days, and by that time we will have a Legal Aid counsel who should be able to handle a guilty plea on short notice without, you know, without one [of] the people from there being able to handle it.*

Ms Burgess (prosecuting counsel: *Umm ... okay. So you are accepting the guilty plea? I'm just wondering what to do with my witnesses. I don't want to keep bringing them.*

Court: *Witnesses can go out the front for now if they want. No. What I am saying is, I am not going to accept the plea today, I am setting it down for mention in a day or week time and the counsel will be here so that we can get, make sure that we can unequivocal plea.* [Emphasis added.]

Ms Burgess: *Yes.*

Court: *Of course, in the worst case scenario we may have to do other things.*

Ms Burgess: *Yes.*

Court: *But I think that is, in terms of scheduling that is the best way to handle it.*

Ms Burgess: *Yes, your Worship.*

Court: *Umm ... Let's give them a week. Today is 13th. 20th. It is adjourned until the 20th March at 9.30 in this Court Number 1. Mention re change of plea and let Legal Aid to be notified to supply counsel. Ms Burgess, you'll contact Legal Aid to make sure of that?*

Ms Burgess: *Yes.*

. . . . .

Court: *All right. Okay, Mr Cox, I've heard your, what you said about changing your plea. I still think that you should have some*

> *Legal Aid representation and I hope that, on the 20th, counsel is here and we can proceed.*
>
> Mr Cox: *Yea.*
>
> Court: *Very well. You're remanded in custody until then.*
>
> Mr Cox: *All right.*

20. In summary, Mr Cox indicated that he wished to change his "not guilty" plea to "guilty". Had the Court accepted the change of plea at the hearing this ground of appeal would not have arisen. Although I bear in mind that Mr Cox has a history of mental illness, I am satisfied in light of the learned magistrate's careful exploration of a possible change of plea with him that he did indeed wish to change his plea and that he understood what this meant. Thus I am satisfied that the plea "guilty with an explanation" is not on the face of it equivocal. The plea would only have become equivocal if any explanation proffered was inconsistent with Mr Cox's guilt.

21. However the learned magistrate stated in express terms that he would not accept the plea that day. His language suggests that, unlike this Court, he was not satisfied that the plea was unequivocal, and he adjourned the matter so that the plea could be retaken once Mr Cox was legally represented. Indeed his reference to a "*worst case scenario*" implies that he had in mind the possibility that Mr Cox might not change his plea after all. Thus, when the Court rose on 13th March, the plea of "not guilty" was still current.

22. As is custom and practice, the learned magistrate endorsed the information with a brief note of the hearing. This read:

> Def appears for continuation. Def says that he now wishes to plead guilty. Adj to 20/3/13 @ 9.30 for mention Legal Aid to be notified to provide counsel.

23. The note was a terse but accurate summary of what was said at the hearing. I therefore reject the prosecution submission that it records that Mr Cox had changed his plea: it does not. Even if it had done, it could not prevail over what was in fact said in court. However, I accept that if the note is read in

isolation, without benefit of a fuller note or transcript, it might give the erroneous impression that a change of plea had been taken. This may help to explain what happened next.

24. At the adjourned hearing on 20th March 2013, Mr Cox had obtained Legal Aid and was represented by Mr Worrell. The learned magistrate adjourned the matter for reports on the mistaken basis that Mr Cox had pleaded guilty at the last hearing:

> … the Defendant indicated that he was going to plead guilty. He did in fact plead guilty … he said he would plead guilty. And I entered a guilty plea … I am proceeding on the basis of his guilty plea, I've recorded a guilty plea, and as far as I'm concerned it is an unequivocal plea …

25. I appreciate that in a busy court with many cases each day it is easy to forget what was said on a previous occasion. That is why it is important that the Court makes an accurate note of any decision that is taken in sufficient detail to inform anyone who might in future need to consult the note of exactly what was decided.

26. The same applies to counsel. Although a different prosecuting counsel appeared on 20th March 2013, she should have had access to a file note that would have enabled her to assist the Court as to what had happened on the last occasion and to correct the learned magistrate when he misdirected himself on that point.

27. Mr Cox was sentenced on 2nd May 2013. The prosecution was once again represented by Miss Burgess. The Court and counsel all proceeded on the basis that on 13th March 2013 Mr Cox had changed his plea to guilty, the Court noting that after hearing the complainant's evidence, Mr Cox: "*decided that he wanted to change his plea, and on the face of that evidence, pled guilty*". Indeed Mr Worrell applied unsuccessfully to have the supposed guilty plea vacated.

28. The warrant committing Mr Cox to prison stated that he was convicted on his own plea on 16th May 2013. On any view that statement was incorrect. If he was convicted on his own plea, the date of his conviction would have been the date on which that plea was allegedly taken, namely 13th March 2013. But no change of plea was taken on that date.

29. Neither was Mr Cox convicted after a trial. Section 21 of the Summary Jurisdiction Act 1930 ("the 1930 Act") is headed "*Record of judgment*." It provides:

> When the case on both sides is closed the magistrate composing the court shall record his judgment in writing; and every such judgment shall contain the point or points for determination, the decision therein and the reasons for the decision, and shall be dated and signed by the magistrate at the time of pronouncing it.

30. Because the Court proceeded on the erroneous basis that Mr Cox had changed his plea the prosecution never closed their case and Mr Cox never opened his case. There was no decision as to whether he was guilty or not guilty of the offence with which he was charged.

31. In order for a defendant to be convicted of an offence, one of two things must happen. Either he must plead guilty, or he must be found guilty by the court after a trial. Thus section 3(4) of the Criminal Appeal Act 1952 ("the 1952 Act") provides:

> In this section "convicted", in relation to the commission of an offence by any person, includes—
>
> (a) a conviction upon that person's plea of guilty of the, offence; or
>
> (b) a conviction upon that person being dealt with ex parte whether or not he has admitted to the court the truth of the information;
>
> and "conviction" shall be construed accordingly.

32. Section 4(1) of the Interpretation Act 1953 provides:

> "conviction", in relation to any person, includes a conviction upon a plea of guilty by such person as well as upon a finding of guilt by a court or jury; …

Neither of those things happened in the case of Mr Cox.

33. I accept that a conviction has been recorded against him. Section 22 of the 1930 Act provides:

> When a conviction takes place the court shall cause the conviction to be recorded in a record book to be kept for that purpose: …

I have not seen the relevant entry in the record book although, applying the presumption of regularity, I am prepared to assume that there is one. However the recording of the conviction is not itself the conviction but is merely an administrative act.

34. Thus in R v Manchester Justices, ex parte Lever [1937] 2 KB 96 the Divisional Court held that a conviction pronounced by the justices in open court was complete and effective notwithstanding that it had not been entered in the court register. Lord Hewart CJ analysed section 22 of the Summary Jurisdiction Act 1879, which is analogous to section 22 of the 1930 Act. He stated:

> … the making of the conviction is antecedent to the entry of it in the register. It is not the entry in the register which makes, or contributes to the making of, the conviction. That has already been made. All that remained to be done [after the defendant's conviction was pronounced in open court] was to perform a formal act. The conviction itself was complete.

35. The Court went on to hold that the defendant's conviction in this manner, even though he had not been sentenced, was sufficient to found a plea of *autrefois convict*. That is no longer the law if indeed it ever was. See the decision of the Privy Council in *Richards* v *The Queen* [1993] AC 217. But in my judgment Lord Hewart's analysis of the entry of a conviction in the court register remains good law. It has never been disapproved.

36. I am therefore driven to conclude that Mr Cox was sentenced for an offence of which he was not convicted. If I am wrong on that point, then Mr Cox was wrongly convicted on the basis of a guilty plea that he had not entered.

The way forward

37. This situation is most unsatisfactory. Mr Cox could have had no valid complaint if on 13th March 2013 the learned magistrate had accepted the proffered change of plea. On the face of it, the prosecution case was a strong one. The alleged offence is the more serious as Mr Cox has another conviction for an act which took place in March 2012 of intruding upon the privacy of a girl.

38. However I cannot dismiss the appeal pursuant to section 18(1) of the 1952 Act on the ground that no substantial miscarriage of justice has in fact occurred. Mr Cox's final position in the Magistrates' Court was that he wished to plead "not guilty". Although I have seen no indication of what his defence would have been, I cannot exclude the possibility that he might have been acquitted.

39. The conviction, therefore, cannot stand. But in light of the above circumstances I have considered whether, pursuant to section 18(5) of the 1952 Act, I should instead of allowing the appeal order a new trial before a differently constituted court of summary jurisdiction.

40. I am satisfied that on balance this course would not be in the interests of justice. The conduct alleged, while serious, is not of the utmost seriousness. There was no physical contact and no overt threats. Mr Cox has already spent more than 12 months in custody for this offence, and is therefore eligible for parole. His sentence exceeded the 18 months to 2 years recommended by the prosecution. Were Mr Cox to be convicted on a retrial, therefore, the Court might well pass a sentence which would involve no further time being served.

41. Moreover, in the event of a retrial, the complainant, who was aged 13 at the time of the alleged offence, would most likely have to go through the ordeal of giving evidence again.

42. I shall therefore allow the appeal. I do so pursuant to section 18(1)(b) of the 1952 Act as it appears to me that the "conviction" recorded against Mr Cox should be set aside on the ground of a wrong decision in law, namely the decision of the learned magistrate to sentence him on the basis that he had changed his plea from "guilty" to "not guilty" when he had not. I therefore quash the "conviction" and direct a judgment of dismissal of the information to be entered.

43. In the circumstances, it is unnecessary for me to consider the appeal against sentence.

44. I appreciate that there is a logical inconsistency in my purporting to quash a conviction when I have found that Mr Cox was not actually convicted. But sometimes logic must yield to practicality. As Oliver Wendell Holmes J stated in The Common Law (1881):

> The life of the law has not been logic; it has been experience... it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

45. Moreover, I could achieve the same result by treating the appeal as an application for judicial review and granting equivalent public law relief.

46. There is one further point. In this Court, when a defendant wishes to change his plea, the indictment is put to him again. This ensures that there is no ambiguity about whether or not his plea has in fact been changed. Were a similar practice to be adopted in the Magistrates' Court, the confusion that beset this case would not arise in future.

Dated this 10th day of January, 2014 _____

Hellman J