In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2013: CRIMINAL APPEAL NO: 41

DESMOND STUART TROTT

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT
(In Court)[1]

Date of Hearing: April 1, 2014
Date of Judgment: April 10, 2014

Mr. Michael J. Scott, Browne Scott, for the Appellant
Ms. Susan Mulligan, Office of the Director of Public Prosecutions, for the Appellant

Introductory

1. The Appellant was charged in the Magistrates' Court upon an Information sworn on 26th April, 2012 which alleged that he committed the following offence:

> "*On the 1st day of March 2012, in Pembroke Parish, intruded on the privacy of* [C]*, a girl, in such a way as to be likely to alarm, and did in fact alarm the said* [C]."

2. Following a trial before the Magistrates' Court (Wor. Khamisi Tokunbo), he was convicted on October 17, 2012. On or about April 4, 2013, after pre-sentencing reports

[1] The Judgment was circulated without a formal hearing for handing down Judgment.

had been prepared, a 2 year Probation Order was imposed[2]. The Appellant's antecedents involve no history of offences of a sexual nature or involving violence. The reports revealed that his cognitive functioning is at a borderline level and that he has substance abuse problems, he is unemployed and has related family and social adjustment problems. He also maintained his innocence of the offence.

3. On April 12, 2013, the Appellant filed a Notice of Appeal against conviction, complaining solely about the fairness of the conviction in light of the Prosecution's failure to disclose prior to trial that the child complainant ("C"), who was 12 years old at the time of the offence, suffered from an anxiety condition. This complaint was supported by the Appellant's Affidavit of April 14, 2013.

4. On March 24, 2014 seven days before the present appeal was listed for hearing, the Appellant's counsel advised the Court and the Respondent of the following supplemental ground of appeal:

> "*The Learned Magistrate erred in law in that he failed to direct his mind to the crucial elements of 'intruding' and 'privacy' in section 199(2) which was a material non-direction and in consequence failed to consider whether there was any intruding on the privacy of a girl in law, on the present fact*[s]*, proven at trial.*"

5. Both complaints raised by the Appellant turn the proper construction of the provisions of section 199 of the Criminal Code. Before considering these complaints, however, it is necessary to identify the key factual findings made at the conclusion of the trial and the relevant statutory provisions.

Facts found by the Magistrate

6. Although the Record did not contain the notes of evidence, neither of the two main grounds of appeal made it impossible to fairly adjudicate the appeal. The Learned Magistrate's findings themselves, in relation to an incident which happened at the Hamilton Bus Terminal were not challenged:

> "*He was a total stranger to her; she was only 12 years old, she thought he was in his twenties and had been drinking alcohol since he was carrying a Heineken bottle in a brown paper bag. The Defendant questioned the Complainant and followed her when she moved away and sought some refuge among older members of the public; where he then tried to sit next to her. When the opportunity presented itself, upon seeing a bus dispatcher, the Complainant again took flight and this time reported the Defendant's behavior* [sic] *to the Dispatcher. All of this in my view makes me satisfied so that I feel sure that any young girl in her position, confronted with the same situation would be alarmed, and in this case was in fact so alarmed by the Defendant's behavior* [sic]"

[2] The Probation Order was amended on May 14, 2013.

7. Having regard to the two complaints made by Mr. Scott in support of the present appeal, it is noteworthy that the Learned Magistrate:

    (a) expressly found that the Appellant's conduct was both objectively and subjectively alarming to C; and

    (b) Clearly set out the factual underpinnings of his conclusion that the charge had been proved to his satisfaction.

Section 199 of the Criminal Code

8. Section 199 of the Criminal Code provides as follows:

> "***Acts intruding upon the privacy of women or girls***
> *199. (1) For the purposes of this section a person shall be deemed to intrude upon the privacy of a woman or girl if wilfully upon and without lawful excuse—*
>
> *(a) he accosts or follows her; or*
>
> *(b) he utters any word, makes any sound or gesture, or exhibits any object, or commits any indecent act, intending the word or sound to be heard by her or the gesture or object or the indecent act to be seen by her.*
>
> *(2)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.*
>
> *(3)The foregoing provisions of this section shall have effect without prejudice to any other provision of this Act or any provision of any other Act.*
>
> *(4)A prosecution shall not be instituted under this section without the consent of the Director of Public Prosecutions.*"

9. Three initial observations can be made about the above provisions. Firstly, subsection (1) articulates a statutory definition for the offence of intruding on the privacy of a woman or girl. Secondly, there are two distinct ways in which the offence may be committed. In the present case, only paragraph (a) of subsection (1) is engaged. And, thirdly, subsection (2) imposes two essential "impact" elements of the conduct complained of: it must be objectively likely to cause alarm and it must (subjectively) actually cause alarm to the complainant before the court.

Was any heightened level of anxiety on the part of the complainant relevant to the finding of guilt?

10. I will assume for the purposes of the present appeal that it was potentially open to the Appellant's counsel to use information, not disclosed until after trial, which might have supported a finding that C's anxiety levels were abnormally high[3]. Ms. Mulligan submitted that any such evidence would have been immaterial because:

    (a) the Court below found not simply that that the Appellant's conduct alarmed C, but also that his behaviour would have been alarming to "*any young girl in her position*"; and

    (b) a criminal defendant must take his victim as he finds them. If C was unusually nervous, this simply made it easier for the Crown to prove what I have characterised as the subjective element of the offence.

11. Senior Crown Counsel relied on the following passage found in the judgment of J.L. *Foster in Queen-v-Knight and Hay* (2001) ABQB 247, which Mr. Scott was unable to discredit:

    "*[20] …A person who commits an unlawful act, takes his victim as he finds him and is responsible for even its extraordinary consequences.*"

12. I found both of the submissions advanced by Ms. Mulligan in response to the first main ground of appeal to be sound. The non-disclosure complaint is rejected and fails.

Did the Learned Magistrate misdirect himself as to the elements of the offence, and are those elements impacted by the fact that the incident took place in a public space?

13. Mr. Scott sought to persuade the Court that on a true construction of section 199 of the Criminal Code, it ought not to be possible for any citizen to be guilty of so serious offence having regard to what the Appellant was found to have done in a very public space. The Appellant's Counsel also seemed to characterise the Hamilton Bus Terminal, in the afternoon when schools are out in term time, as the sort robust and unruly environment where angels and delicate souls ought not to be surprised by encountering un-angelic and even indelicate behaviour.

14. Ms. Mulligan countered that the relevant limb of the offence, and in particular the element of following, would ordinarily take place in public. More broadly, she submitted that young girls very much required protection from the law against this type of public behaviour. I agree. The Hamilton Bus Terminal is precisely the sort of public space which even the most delicate of young damsels should be free to occupy without being subjected to unwanted attentions. Ms. Mulligan also pointed out that the Prosecution

[3] The Respondent contended that the condition which C did suffer from was not an "anxiety disorder" in any event.

could be trusted to exercise its discretion in deciding to lay charges, to avoid entirely innocent or trivial behaviour being unfairly prosecuted. In accepting the latter submission, I note that:

(a) section 199(4) requires the consent of the Director of Public Prosecutions to be obtained before any charges are laid under the section; and

(b) that Parliament has in modern times upgraded this offence from a summary offence punishable with 12 months' imprisonment to an offence which is triable either summarily (and punishable with a term of up to five years' imprisonment) or on indictment (and punishable with a term of up to ten years' imprisonment)[4].

15. Mr. Scott placed the judgment of Meerabux J in *Philip Taylor (Police Sergeant)-v-Michael Eversley*[1998] Bda LR 27. This is the only reported local case to consider the elements of this offence. Although the incident in the cited case occurred in private, there is no suggestion that this was more than the incidental factual matrix of this case. The case is instructive because it involved section 199(1)(a). Meerabux J, noted for his acuity in statutory interpretation, reproduced subsection (1)(a) commented (at page 2):

> "*This is a deeming section and defines 'to intrude upon the privacy of a…girl'. The word 'accost' is not defined in the Act. According to the Shorter Oxford English Dictionary 'accost' means 'to approach for any purpose, to face' and (of a prostitute) to solicit.*"

16. This confirms a straightforward reading of the subsection and indicates that the term "*intruding on the privacy of*" a girl or woman, for the purposes of section 199(1)(a), does not signify either:

(1) intrusion into the privacy of a female in the common meaning that those words bear; or

(2) doing any more than approaching (or, perhaps more appropriately, "confronting") or following the victim.

17. Subsection (1) merely defines the phrase "*intruding on the privacy of*", qualified by the important pre-conditions that the accused is acting both "*wilfully and without lawful excuse*". The definition is not as far-reaching as it initially appears to be. In addition, when one comes to consider the substantive definition of the actual offence in section 199(2), the version of the offence engaged by the facts of the present case requires proof of two additional and important elements. Proof that the accused not only deliberately approached or followed the complainant without lawful excuse, but also that his behaviour both:

(a) was <u>likely to</u> frighten her; and

[4] Criminal Code Amendment Act 2006.

(b) actually did frighten her.

18. When the elements of the offence are carefully analysed in this way, then unless one is an advocate of bullying or loutish behaviour, or unless one places next to no value on the concept of physical autonomy and private space, it is difficult to see section 199 as a meaningful threat to personal freedom. It is easy to imagine borderline cases where one might question the fact that a decision to prosecute was made. The present appeal is not such a case. The Appellant, an intoxicated man of around 30 years of age, accosted a 12 year old schoolgirl whom he did not know, 'chatted her up' and followed her when she attempted to escape his unwanted attentions. She immediately reported her concerns to a person in authority. The Learned Magistrate, unsurprisingly, found that:

    (a) the Appellant acted wilfully and without lawful excuse;
    (b) the Appellant intruded on C's privacy for the purposes of section 199(1)(a) of the Code;
    (c) the Appellant's behaviour was likely to frighten any girl in a similar position to C and did actually frighten her.

19. The Appellant's seemingly genuine inability to acknowledge the impropriety of his actions may be attributable in part to an impaired recollection of precisely what transpired, and in part to his documented borderline cognitive function levels. His developmental level may well be less than his chronological age. His personal challenges were no doubt taken into account as strong mitigating factors at the sentencing phase. This offence was, perhaps, at the very bottom of the gravity scale for section 199, based on the facts found by the Learned Magistrate. But in my judgment those facts did support the conviction and the reasoning of the Court below cannot be faulted in any way.

20. The second main ground of appeal, despite the sterling efforts of Mr. Scott to advance his client's cause, also fails.

Conclusion

21. The appeal is dismissed and the Order of December 23, 2013 suspending the Appellant's sentence pending appeal is discharged.

22. Senior Crown Counsel submitted without apparent dissent that this Court should also direct for the avoidance of doubt that the Appellant is required to report to Bermuda Police Headquarters immediately to be fitted with an electronic Monitoring Device and that he thereafter report to Probation Services and resume compliance with the terms of his Probation Order. I so order. Although it is to be hoped that no further hearing will be necessary, I will hear counsel if required to deal with any matters flowing from the present Judgment which I have overlooked.

Dated this 10th day of April, 2014_____
IAN R.C. KAWALEY CJ