In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CRIMINAL APPEAL NO: 16

CAESAR GRAHAM

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT
(In Court)[1]

Date of Hearing: September 16, 2014
Date of Judgment: September 26, 2014

Mr. Javone Rogers, Mussenden Subair, for the Appellant
Ms. Susan Mulligan, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant appeals against his conviction following a trial in the Magistrates' Court (Worshipful Khamisi Tokunbo) on June 25 2013 of three counts of sexually assaulting the Complainant ("C"), who at all material times a child under 14 years old, when the Appellant was in a position of trust (Criminal Code section 182B(1)(a)). He was sentenced to three years' imprisonment on each count on September 23 2013, and has been in custody since.

2. Having heard argument, I identified two coherent and related grounds of appeal:

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

(a) the Learned Magistrate erred by taking into account highly prejudicial evidence about an incident which did not form the subject of a formal charge as proof of the truth of C's evidence;

(b) the Appellant was deprived of a fair trial because his former counsel, Mr. Marc Daniels and Ms. Simone Smith-Bean, failed to adequately conduct his defence, *inter alia*, by failing to put the Appellant's instructions in cross-examination, and, by failing to exclude or seek to exclude the highly prejudicial evidence about the 'Police Beach incident'.

The proceedings before the Magistrates' Court

3. C was 19 years of age by the date of trial. Her brother, a cousin and her aunt gave evidence. The allegations which formed the basis of the charges was that the Appellant rubbed C's legs and genital area, as well as digitally penetrating her, during a time when he was involved in an intimate relationship with C's mother.

4. The trial started on March 26, 2013, with Ms. Mulligan prosecuting and Mr. Daniels defending. After the Crown closed its case, the trial was adjourned for the Defence case to May 20, 2013, nearly two months later. At the resumed hearing, Ms. Smith-Bean appeared for the Defendant. Neither counsel made closing submissions. Judgment was delivered on June 25, 2014.

5. The primary issue raised by the Defence was the credibility of C who was alleged to have fabricated her evidence. Motives advanced included jealousy of her brother receiving more attention from the Defendant than she did, the fact the Defendant teased her and the fact she expected to get into trouble at school for having cursed the Defendant when he was employed there as a security guard. She was also challenged about inconsistencies between her various witness statements, in particular the fact that she only mentioned sexual touching in any detail in her third statement, given after charges were dropped against someone initially jointly charged with the Defendant. It was put to her that these details had been recently fabricated.

6. C's evidence in chief addressed two incidents which did not directly relate to the charges but which, Ms. Mulligan submitted, explained when C first made complaints about the Defendant's conduct. The first incident was at Police Beach when she said the Defendant pulled off her bathing suit bottoms while in the sea, causing her such distress that she told her aunt about the offences. The second incident was when she cursed the Defendant at the school she started attending when she was 14, because she did not want the Defendant to have anything to do with her. This prompted her reporting the Defendant's conduct to her counsellor, and, thereafter, C being invited to give a Police statement.

7. Under cross-examination she admitted that she gave further details in her later statement, mentioning genital contact for the first time, because she wanted the Defendant to be convicted. She claimed to have tried to block out certain memories and denied the fabrication allegation in the following terms: "*Not once did I lie in my statements. It might have contained mistakes. I did not intentionally lie about anything*".

8. C was cross-examined extensively about her version of the obviously prejudicial Police Beach incident. When she mentioned the incident in her examination-in-chief, her counsel did not object the admissibility of this evidence. C's brother (B) testified that he at Police Beach when C came out of the water distressed without her bottoms on, asked for a towel and said the Defendant had taken her bottoms. B also testified that (a) his sister had reported that the Defendant was touching her, and (b) that on one occasion when he and C switched positions in the bed they were sharing, the Defendant crawled into the room on the floor and touched him, retreating when he realised it was not C he was touching. C's cousin also gave evidence which supported in a general way her account of the Police Beach incident, primarily that she was distressed. His evidence was not challenged.

9. C's Aunt (A) gave evidence and explained that the Police Beach incident occurred around 7 years ago and this was when she first became aware of trouble between C and the Defendant. Defence counsel objected to A giving evidence about what C told her on the grounds of it being hearsay, but the Learned Magistrate ruled that such evidence was admissible to rebut the allegation of recent fabrication. A's evidence was that this when C was at Middle School. The allegation C reported was that the Defendant would crawl into her room on the floor at night and touch her. She reported the matter to C's mother. The Defendant subsequently left C's home. A subsequently was contacted by C's Senior School counsellor (C believed that it was A who made the initial report to the school), and she relayed the history about the Defendant and the desirability of there being no contact between him and C. Under cross-examination, A stated she never asked C about the details of the touching.

10. The Defendant gave evidence in his own defence and denied ever touching C inappropriately. He claimed the Police Beach incident as described by C never occurred. It was she who took off her bottoms and started shouting out that he had taken them off. This was in 2004 when C was 8 or 9 years old. He further testified that when C gets into trouble she tells lies to get out of it. Under cross-examination, he denied instructing his lawyer on any question. He later said he did not know why his lawyer suggested to C that the Defendant teased her. The Defendant called two female character witnesses who testified that the Defendant had enjoyed entirely appropriate relationships with their daughters.

The Judgment of the Magistrates' Court

11. The Learned Magistrate made the following crucial findings:

> "*…The Complainant was extensively and forcefully cross-examined by Counsel for the Defendant…[her] younger brother, cousin and aunt gave testimony which supported her evidence in material respects. Indeed, some evidence, (the Complainant's aunt's) over the objection of the Defendant, was permitted in evidence in order to rebut the Defendant's assertion, via is counsel, of recent fabrication…in my judgment the brother was a reliable and credible witness along with the cousin and aunt, all of whom buttressed the Complainant's evidence in some material respect.*
>
> *As for the Complainant, she impressed me as a young woman who has been harbouring her recollection of her younger years with pain and resentment toward the Defendant. I found that she gave an honest and vivid account to the best of her recollection with genuine confidence of the truth and belief of what happened between her and the Defendant. Her main weakness or uncertainty being her exact age at relevant times between 6 and 11. She was particularly frank and honest during cross-examination….*
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> *I was not impressed with the Defendant as a witness….There were matters about which the Defendant testified which were not put to the Complainant and there were material conflicts between his testimony and the case put by his counsel…*
>
> *I am satisfied so as that I feel sure that the Defendant is guilty as charged on all three counts….*"
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> **Legal findings: principles governing appellate jurisdiction of the Supreme Court**

12. The governing statutory provision applicable to criminal appeals against conviction from the Magistrates' Court is section 18 of the Criminal Appeal Act 1952:

> "*18 (1) Subject as hereinafter provided, the Supreme Court in determining an appeal under section 3 by an appellant against his conviction, shall allow the appeal if it appears to the Court—*
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> > *(a) that the conviction should be set aside on the ground that, upon a weighing up of all the evidence, it ought not to be supported; or*

(b) that the conviction should be set aside on the ground of a wrong decision in law; or

(c)that on any ground there was a miscarriage of justice; and in any other case shall dismiss the appeal:

Provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction."

13. A decision can only be set aside on factual grounds where, in effect, the conviction was against the weight of the evidence. Appeals rarely succeed on this ground. More commonly, reliance is placed on an error of law or a miscarriage of justice. But the proviso to section 18(1) empowers the Court to apply its discretion to acknowledge technical errors of law which cause injustice but no substantial miscarriage of justice.

14. The statutory jurisdiction of the Court mirrors the rules governing the circumstances in which an appellant can challenge a conviction based on errors allegedly committed by his own counsel. Ms. Mulligan slightly overstated the degree of incompetence on the part of trial counsel required to impugn the safety of a conviction on appeal, as Mr. Rogers correctly pointed out. The modern approach is to focus on the impact of the failures complained of on the fairness of the trial. As Ward JA stated, giving the judgment of the Court of Appeal for Bermuda in *Fox-v-R* [2008] Bda LR 69 (at paragraph 58):

> "*We also considered* R v Day *[2003] EWCA Crim 1060 at paragraph 15 where it was held that 'while incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in* Thakrar *[2001] EWCA Crim. 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.'* "

15. These principles are important to keep at the forefront of one's mind because it is invariably possible to find some fault with the way any trial is conducted and the

criminal appeal process is not designed to protect an ideal of perfect justice but, rather, to uphold substantial justice, not overlooking the twin requirements of justice being both done and seen to be done.

16. In the present case I have been keenly aware of the need to ensure justice for the Appellant, charged with offences most right-thinking people find repugnant, and to avoid a rush to 'popular' judgment. I have equally been keenly aware of the need to ensure justice for the Complainant, as the experience of being a complainant (with a genuine complaint) in a sexual case, especially for young persons in abuse of trust cases, is a notoriously difficult and emotionally painful one.

Findings: did the Learned Magistrate err in admitting evidence which was more prejudicial than probative?

17. Mr. Rogers very forcefully and persuasively argued that the evidence about the Police Beach incident was highly prejudicial and not probative of the offences before the Court. There was nothing in the Judgment which explained the basis on which this evidence was taken into account. Ms. Mulligan skilfully brushed aside this criticism as purely technical for two reasons:

    (a) the evidence was clearly admitted as part of the background to explain how the complaint came to be made, as part of the general rebuttal of a recently fabricated complaint. It was inconceivable that an experienced Magistrate would have relied upon the indecent conduct alleged on an occasion other than that to which the charges related to support his findings of guilt;

    (b) most of the detail about the Police Beach incident was not led by the Crown but elicited by the Defence in cross-examination of C and her brother as part of a deliberate strategy of seeking to portray C as someone who was motivated to make false allegations against the Defendant. The Defendant's case was that on this occasion she falsely accused him of taking off her bathing suit bottom, having removed it herself.

18. A careful review of the record confirms that C mentioned the Police Beach incident in the context of explaining the chain of events which culminated in her being interviewed by the Police. The Defence clearly elected to explore this issue extensively in cross-examination with a view to proving C a liar, in relation to the charges and that other indirectly related incident. Ideally, the Judgment would have expressly stated what reliance was placed on that portion of the evidence, namely that it was taken into account by way of background and in relation to credibility, but not otherwise. However, the primary purpose of a judgment in the Magistrates' Court is defined by the Summary Jurisdiction Act as follows:

> "*21 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.*"

19. The Judgment in the present case set out the charges, summarised the evidence, analysed the credibility of the main witnesses and then recorded the relevant findings, applying the correct burden and standard of proof. This standard was clearly met. There was no dispute at trial about the admissibility of the Police Beach incident. Moreover the Court is able to find implicit support in the Judgment for the way in which reliance was placed on the Police Bay incident. Firstly, at page 1 of the Judgment (Appeal Record, page 28), the Learned Magistrate stated:

> "*She also testified about how the assaults eventually came to be reported or exposed on at least two occasions.*"

20. Secondly, at page 4 of the Judgment (Appeal Record, page 31), his findings reflect his appreciation of the fact that the Defendant himself relied on his version of the Police Bay incident to discredit C:

> "*…He was not honest about his history with the Complainant as a young child. I do not believe him when he says she threatened at the beach, removed her pants, was yelling and falsely blaming him and not upset.*"

21. I find that the Learned Magistrate did not err in law in the way he had regard to the Police Beach evidence which was admissible to explain how the complaints came to be reported to the Police and made relevant by the Defendant to the issue of C's credibility. Further and in any event no substantial miscarriage of justice occurred, in all the circumstances, from the admission of this evidence.

22. For the avoidance of doubt I also find that the Learned Magistrate was also correct to admit the evidence of A about that incident, and how the offences were first reported to her by C, to rebut the allegation of recent fabrication. Mr. Rogers made a few other minor criticisms about supposed inaccuracies in the Judgment which amounted to nit-picking and did not raise an arguable basis for contending that the convictions were unsafe.

Findings: did a substantial miscarriage of justice occur due to the incompetence of the Defendant's counsel?

23. It follows from my findings on the first main ground of appeal that the complaints about the incompetence of counsel must also be rejected. I feel obliged nevertheless to

note that where criminal defence counsel fail to take written instructions from their clients, they expose themselves to unmeritorious attacks and the need to respond to allegations of incompetence or worse which might otherwise be avoided.

Failure to object to inadmissible evidence

24. The complaint that the Appellant's counsel ought to have objected to C's evidence (and that of the other witnesses) about the Police Beach incident lacks substance because (a) the evidence was admissible by way of background, and, more importantly, (b) the Defendant at trial relied on his version of that incident as a positive part of his case. I have already found that the Learned Magistrate did not rely upon this evidence in any impermissible way.

25. B's hearsay evidence about C's complaint to him of what the Defendant had done to her could perhaps have been objected to. But this would probably have been ruled admissible to rebut the recent fabrication argument. It can hardly be suggested that any material prejudice flowed from any failure to object because B's most damaging evidence was clearly admissible: that the Defendant on one occasion during the same period touched him by mistake when trying to touch C.

26. I did not find it necessary to cross-examine the Appellant on his Affidavit or to resolve the conflicts between his evidence and that of his former lawyer, Mr. Daniels, as regards whether or not the Appellant's case was adequately advanced at trial. The Defendant's central complaint lacked merit. He deposed that Mr. Daniels' failed to put and ought to have put an entirely different case, namely that the allegations were motivated by C's mother desire to extort money from him. He wanted his counsel to:

    (a) require the Crown to make C's mother available at trial so he could cross-examine her on some July 2010 Face Book communications with the Appellant; and

    (b) put to C 's aunt (A) an email sent to C's school in 2007 which the Appellant considered was inconsistent with the case subsequently made in the criminal case against him.

27. Assuming in the Appellant's favour that Mr. Daniels ignored his client's instructions in this regard, no arguable miscarriage of justice occurred. In the communications with C's mother, she called him a "pervert" which suggested that she genuinely believed an offence had occurred. It is difficult to see how this correspondence would have materially assisted the Appellant and undermined C's credibility. The email from A to C's school may well have described the Police Beach incident in minutely different terms. But it confirmed the central allegation that the Appellant had removed her pants. It is difficult to see how this line of cross-examination could have materially assisted the defence at trial.

28. Indeed in his examination-in-chief at trial, the Defendant mentioned that the last contact he had with C's mother was when she "*face-booked me in 2010. It was negative*". This suggests that the Appellant agreed with his former counsel not to pursue the fantastical notion that C had fabricated all of her evidence to assist her mother to get money from him. The complaint that the Appellant's former lawyer failed to follow his instructions by putting A's email to C's school to her in cross-examination is wholly inconsistent with his other complaint that counsel ought to have objected to evidence about the Police Beach incident being admitted into evidence. This part of the Appellant's appeal provides very compelling support for the conclusion reached above in which I adopt Ms. Mulligan's central thesis on the ground of appeal which I initially found most substantive. The Appellant's positive case at trial, which was entirely consistent with what he now contends were his instructions, was to explore and exploit the Police Beach incident with a view to discrediting C.

29. The Appellant also complained under cross-examination that he had not instructed his lawyer to suggest to C that she bore him ill-will because he teased her about wearing dirty underwear. The true position, according to him, is that he spoke to her about wearing dirty underwear. That is a very minor distinction of emphasis rather than of substance. However, it is noteworthy that the Appellant was forthright enough to criticise his own counsel at trial, and only complained that he had not put his case adequately in this very marginal respect. However, it is true that the Learned Magistrate took this into account with respect to the Appellant's credibility, alongside two other inconsistencies between what was put by counsel in cross-examination and the Defendant's evidence at trial. The Appellant contends that he did not instruct counsel to suggest that:

    (a) C was jealous of attention the Appellant gave her brother;

    (b) she was only permitted to sleep in the same room as the Appellant when she was scared.

30. These allegations were disputed in Marc Daniels' Affidavit. I found the allegation that counsel would put such detailed matters to C without instructions inherently unbelievable. These assertions do not to my mind warrant any further formal enquiry into their truth.

31. Further and in any event I do not find that any substantial miscarriage of justice occurred. The case that counsel put was to my mind more likely to secure an acquittal than the case the Appellant now contends he wanted to be put, for the reasons I have mentioned above.

Conclusion on adequacy of trial representation

32. The oddest thing about the trial, from my perspective, was the fact that the Defence waived the right to make a closing speech. I have described the importance of the closing speech in the criminal non-jury trial context with reference to the following Singaporean academic authority in *Butterfield-v-Lyndon Raynor* [2013] SC (Bda) 25 App (8 April 2013); [2013] Bda LR 25, a case where the central complaint was that the Court had deprived counsel of the opportunity to be heard. In that case I stated:

> "*20. Professor Jeffrey Pinsler in 'Evidence, Advocacy and the Litigation Process', 2nd ed, explains the role of advocacy and the closing speech in a common law system thus:*
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> > *'In granting the parties considerable independence in the preparation and presentation of their cases, the adversarial process imposes considerable responsibility on the advocate. His role is fundamental to the process of adjudication for a party's chances of success very often depend on the quality of the legal representation which he receives…The objective of advocacy is to persuade the court to accept the position taken by the advocate on the facts and the law…The importance of the closing speech cannot be overestimated.*
> >
> > *Since most cases which go to trial are closely fought, the strength of the closing speech can often make the difference between winning and losing a case and may be very significant if the matter goes on appeal….The closing speech offers the advocate the opportunity of crystallising his theory of the case (that is, his view of what actually occurred), which should have been evident from his opening speech, the evidence-in-chief of his own witnesses and his cross-examination of the opposing witnesses. This is achieved by scanning the whole case for the facts which support his theory and weaken the position of his opponent. These facts must be brought out of the background to make their significance clear*."

33. Ms. Mulligan reminded me that in that case I held that the right to make a closing speech could be waived. She speculated that counsel might have been professionally embarrassed and unable to address the Court. On reflection, that speculation is not wholly improbable as the Defendant in his cross-examination at trial appeared to suggest that he gave no instructions on cross-examination and departed from the case put in cross-examination in one comparatively minor respect. Be that as it may in this case the right to make a closing speech was waived and no complaint was made of this waiver in the context of an appeal in which the Appellant has launched a wholesale attack on his trial counsel.

34. The complaint that inadequate representation caused a miscarriage of justice fails.

Conclusion

35. For the above reasons, and despite the able arguments advanced by Mr. Rogers on the Appellant's behalf, the appeal against conviction is dismissed.

Dated this 26th day of September 2014 _____
IAN RC KAWALEY CJ