In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CRIMINAL APPEAL NO: 33

MAURICE HARVEY JR.

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT
(In Court) [1]

Date of Hearing: October 29, 2014
Date of Judgment: November 10, 2014

Mr. Bruce Swan, for the Appellant
Ms. Susan Mulligan, Office of the Director of Public Prosecutions, for the Respondent

Background

1. The Appellant appeals against his conviction in the Magistrates' Court (the Worshipful Khamisi Tokunbo) on June 6, 2014 for stalking Beverley Pitt between January 1, 2013 and March 12, 2013. The grounds of appeal which were pursued can be summarised as follows:

    (1) the Court erred in permitting the Crown to adduce new evidence (voicemail messages and related transcripts) after the close of the Prosecution case and/or the Appellant was prejudiced because the Crown failed to disclose this evidence pre-trial;

    (2) The Judgment failed to identify evidence supporting the *mens rea* for the offence of stalking.

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

The admission of the voicemail evidence

2. Ms. Mulligan conceded that the voicemail evidence would normally have been disclosed prior to the trial but explained that it only came to the attention of the Crown that the Complainant had retained the messages after she gave her evidence at trial. The evidence was supplied to the Appellant's counsel on June 4, 2013, after the Crown's case had closed, but two days before the Defence case opened on June 6. No adjournment was sought and it was the Appellant himself under cross-examination who insisted the Crown play the recordings to the Court. This account of the course of the trial was not challenged.

3. Once the voicemail messages were played in Court, the Learned Magistrate described the Appellant's response in the witness box as follows:

> "*He…ultimately admitted when the voice messages were played that he would have said anything; that it was he who called her several times on her private phone with hostile, offensive and threatening conduct*…"

4. Section 18 (1) of the Criminal Appeal Act 1952 sets out three possible bases on which an appeal against conviction may be allowed, the second of third of which potentially apply to the present complaint:

> "*(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*…"

5. The Appellant's counsel identified no legal principle which was infringed by the Court permitting the Crown to cross-examine the Appellant at trial on evidence which was not led as part of the Prosecution case but which was disclosed two days before it was put to the Appellant in cross-examination. Nor was any related miscarriage of justice identified.

6. Ms. Mulligan argued, in reliance upon *Ruddy et al-v-Procurator Fiscal, Perth* [2006] UKPC D2, that the Appellant had waived the right to complain about any procedural defect which may have occurred. I accept that submission. As Lord Hope opined in that case:

> "*15. It is sufficient for present purposes to say that the defect which is complained of in this case falls plainly outside the category of defects that have so far been recognised as incurable. The fact that it was held in* Millar v Dickson, *2002 SC (PC) 30 that it was a defect of a kind that could be waived is a powerful demonstration of this fact.*

Waiver and acquiescence have this point in common in the criminal context, that they both support the inference that the accused has chosen not to object to the procedural defect. It does not matter, for this purpose, whether the conduct that leads to this inference preceded or followed the proceedings to which the objection is being taken. As can be seen from the decision in Hull v H M Advocate, *1945 JC 83, a defect which is incurable leads inevitably to the proceedings being quashed, irrespective of whether the accused agreed to the irregularity. A defect which is not of that character can be waived, and it can also be acquiesced in.*"

The mental element of the offence

7. The Complainant was a security officer at the same place of employment as the woman the Appellant once had a relationship with and who was the real subject of his animosity. In the line of duty she took steps to prevent the Appellant contacting her colleague while at work and ended up being directly contacted by him. Putting aside the evidence of the voicemail messages, her direct evidence of how his calls affected her seems somewhat understated. Since a no case submission was made (on the grounds that the elements of the offence were not made out) and rejected, it is necessary to consider whether the complainant's evidence did support a *prima facie* case. She crucially testified:

    (a) as a result of an incident involving her colleague, she sent the Appellant a "no trespass letter";

    (b) she was concerned that he subsequently called her on her private phone and did not know how the Appellant obtained the number;

    (c) she reported the calls to the Police as annoyance or harassment;

    (d) "*I almost felt threatened that this person would bring harm on me*";

    (e) "*I remember words to the effect 'you don't know me. I'll kill you*";

    (f) "*I was very concerned for my own safety.*"

8. Section 3 of the Stalking Act 1997 ("Meaning of 'stalking'") provides as follows:

> "*3. (1) For the purposes of this Act, a person stalks another person (the "victim") if—*
>
> *(a) without lawful authority the first-mentioned person engages in conduct described in subsection (2)—*
>
> *(i) with the intention—*

(aa) of causing physical or mental harm to the victim; or

(bb) of inducing in the victim apprehension or fear for the victim's safety or for the safety of a connected person; or

(ii) when he knows that that conduct is likely to cause such harm to the victim or to induce in the victim such apprehension or fear; and

(b) that conduct actually has that result.

(2) The conduct referred to in subsection (1) is conduct consisting of acts, done over a period of time, which include any one or more of the following—

(a) following the victim or a connected person;

(b) telephoning or sending electronic messages to, or otherwise contacting, the victim or a connected person;

(c) interfering with property in the possession of the victim or a connected person;

(d) entering the place of residence or employment of the victim or a connected person, or any other place frequented by the victim or a connected person, and loitering there;

(e) loitering outside the place of residence or employment of the victim or a connected person, or outside any other place frequented by the victim or a connected person;

(f) keeping the victim or a connected person under surveillance."

9. The essential elements of the offence in the present case were:

(1) telephoning the victim;

(2) with the intention:

(a) "*of inducing in the victim a fear for the victim's safety*", or

(b) with the knowledge that "*the conduct is likely to cause such harm to the victim or to induce in the victim such apprehension or fear*"; and

(c) the conduct has the result described in either (a) or (b).

10. I reject Mr. Swan's submission that a fear of "imminent harm" is an element of the offence. It was clearly open to the Learned Magistrate to find that the Prosecution had made out a *prima facie* case. The complainant's direct evidence supported a finding that calls had been made which caused her to fear for her safety. The only reasonable inference from her direct testimony (that he obtained her private number by unknown means and threatened to kill her on one occasion) was that the Appellant intended to make her fear for her safety. Once the voicemail records were put in evidence, at the insistence of the Appellant himself under cross-examination, the Prosecution case became even stronger.

11. However, the Appellant's counsel was in a very limited technical sense correct to complain that the Judgment did not record a flawless finding in relation to the mental element of the offence. The Court held:

> "*Having heard the evidence I am satisfied so that I feel sure that pursuant to section 3 of the Stalking Act the Defendant's conduct was likely to cause an apprehension o*[r] *fear to the complainant and* [did] *cause her to be concerned for her safety.*"

12. The missing element in the quoted passage was a finding that the Appellant knew that his conduct was likely to have the effects correctly recited. However, looking at the Judgment as a whole, it is impossible to fairly conclude that this element of the offence was overlooked. In the previous paragraph, the Learned Magistrate notes the Appellant's admission in the witness box that he engaged in "*hostile, offensive and threatening conduct*". This was, in effect, a finding that the Appellant admittedly knew that the calls were likely to cause an apprehension or fear for the complainant's safety. In substance, no misdirection or error of law occurred.

13. So this ground of appeal also fails.

Conclusion

14. For the above reasons, the appeal against conviction is dismissed.

Dated this 10th day of November, 2014 _____

IAN R.C. KAWALEY CJ