In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CRIMINAL APPEAL NO: 26

MILTON RICHARDSON

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT
(In Court) [1]

Date of Hearing: October 16, 28, 2014
Date of Judgment: November 10, 2014

Mr. Michael J. Scott, Browne Scott, for the Appellant[2]
Ms. Susan Mulligan, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. On June 10, 2013, the Appellant was charged with four counts of sexual assault while in a position of trust contrary to section 182B(1)(a) of the Criminal Code in respect of a young person, C. The allegations were that on two occasions, firstly between January 5 and 12, 2013, he kissed C on the neck (Count 1), and secondly, on January 19, 2013, he kissed the ear, neck and mouth respectively of C (Counts 2-4). C was at all material times 11 years old.

2. The trial took place in the Magistrates' Court (the Worshipful Khamisi Tokunbo) on December 13, 16 2013 (Prosecution case) and February 14, 2014 (Defence case). Judgment was delivered on March 3, 2014 when the Appellant was found guilty on all four counts. On May 15, 2014, he was sentenced to 9 months imprisonment on Count 1 and 18 months' imprisonment concurrent on each of Counts 2 to 4, followed by 2

[1] The Judgment was circulated without a formal hearing for handing down.
[2] Mr. Scott did not appear in the Court below.

years' Probation including a condition that he should not have supervised care of any minor for that period. The total custodial sentence was an eyebrow-raising three times the maximum sentence suggested for a single offence in the '*Sentencing Guidelines for Sexual Offences Tried in the Magistrates' Court*' at page 9. He appeals to this Court against both conviction and sentence. The present Judgment deals with the appeal against conviction only.

3. The Appellant's Notice of Appeal was filed in this Court on May 27, 2014 by his present attorneys who did not appear at trial before the appeal record was prepared. An Amended Notice of Appeal was filed after the Appeal Record had been prepared, but that slim-line record omitted the Magistrates' notes of evidence and submissions. After the initial hearing of the appeal, the record was supplemented to include the initially omitted notes. The appeal had apparently been framed based on the Appellant's instructions to his new counsel as to what the trial Court had found, as opposed to what the Court had actually found based on the evidence before it. The result was an often non-alignment between the arguments advanced by Mr. Scott and the actual findings of the Learned Magistrate, a non-alignment Ms. Mulligan was keen to point out.

4. That said, the appeal raised important issues of legal principle which the Bermudian courts have not seemingly been required to previously fully consider or determine. What are the essential elements of the offence of sexual assault and/or sexual exploitation in circumstances where the allegations of touching do not involve acts involving the private parts of either the complainant or the victim? It is clear from the record that the trial was conducted on the basis that the Appellant disputed the key acts relied upon by the Crown in support of its case, with no submission being advanced that even if these acts were proved no offence would have been proved. It was implicitly conceded that if the intimate forms of kissing alleged did take place the offences would have been made out.

The proceedings before the Magistrates' Court

<u>The Prosecution case</u>

5. C testified that he had been a member of the Boys Day Out Club since he was six years old and the club was run by the Appellant. On Saturday January 19, 2013, C and other boys were driven to various places in the Appellant's van. The Appellant at some point offered to take C to lunch. C's brother got permission from their mother for C to go to lunch with the Appellant, and he and the Appellant did so travelling on the latter's bike. After lunch the Appellant took C back to the Club where they were alone. The Appellant said that he and another boy got to do more things because they did not tell his mother everything. The appellant invited C into his bedroom to watch television. Whilst sitting next to C on his bed, the Appellant kissed C several times on the cheek, once on the ear (leaving saliva) and twice on the mouth. During the

incident C further testified that the Appellant said "*I love you so much*" and asked "*Had enough love?*" C also testified:

> "*I felt weird…As he was doing this he was moaning. He put his tongue in my mouth. I closed my teeth so he wouldn't put his tongue all the way in my mouth. After that I asked to call my momma. I called her because I wanted to go home-I was scared…Defendant told me if my mom asked tell her I was just playing with boys because I was…* "

6. C then referred to an incident the previous week where the Appellant invited him to go for a walk by the seaside to get fish , took him through some trees to a spot where there was a mattress, approached C from behind and kissed him on the cheek and neck. Under cross-examination C insisted he was telling the truth and explained why he did not tell his mother about the first incident: "*Didn't tell mom I was uncomfortable when I went home after fish because I liked the Defendant. I didn't want to get him into trouble.*" He denied making up the allegations to get more attention from his father and denied that he had made up the entire fish incident.

7. C's older brother (then 17) under cross-examination described the atmosphere at home when C was eventually telling his mother about the January 19, 2013 incident as "*sad and intense*". C's mother testified that she knew the Appellant from church and was fond of him. After C reported the 19 January incident to her, she resolved to confront the Appellant together with her husband and record the conversation on her iPod. A transcript of the recorded meeting was produced in evidence, together with a Facebook apology the Appellant subsequently sent to C's mother. No objections were raised as to the admissibility of this evidence. In the course of the meeting, the Appellant denied any sexual motivation, admitted kissing C on the corner of the mouth and apologised profusely numerous times, accepting that this was inappropriate and expressing regret for any unintended distress he had caused C. He denied the more intimate kissing C alleged in a somewhat subdued manner, but was also often silent when the detailed allegations were put to him.

The Defence case

8. The Appellant in his evidence-in-chief accepted that on January 19, 2013 C came into his bedroom while he the Appellant was watching television. He admitted: "*Skylarking-tickling-just acting silly-making noises roaring*". He admitted telling C he loved him and said that was not unusual as he loved him like a son. He admitted kissing C on the cheek, denied moaning and described the accusations as "filthy and disgusting". As to the seaside incident, he admitted kissing C on the cheek but denied kissing C on the neck. Under cross-examination, the Appellant sought to explain the allegations C was making as a result of pressure by his mother, who he suggested had various challenges which he had previously been sympathetic about. He stated that during the recorded meeting with C's mother and her husband he was shocked and

had a headache, and did not respond more fully to the allegations because he decided to just let C's mother talk. He stated that he suffers from chronic fatigue syndrome. He accepted that he might have kissed the side of C's mouth, but implied that this was accidental. He insisted his motivations were purely affectionate. He also admitted that he kissed C on the cheek by the sea but denied other aspects of C's evidence.

Submissions

9. The Appellant's trial counsel made a no case submission which was refused on the grounds that the arguments being advanced were more appropriate for the closing submissions stage. The Defence case as summarised in the Learned Magistrate's notes appears solely have been based on challenging the reliability of C's evidence. It was suggested that:

    (a) C had a difficult home life;

    (b) there were inconsistencies in his evidence;

    (c) he had admitted that he would do what he could to keep his mother happy and she had interrogated him and put ideas into his head;

    (d) all the Appellant had done was to display fatherly affection i.e. the touching was not done for a sexual purpose.

Judgment

10. The Learned Magistrate in a typically careful judgment stated that he believed the Prosecution witnesses and disbelieved the Appellant. He found no reason to accept the idea that C's mother who was on good terms with the Appellant would have encouraged C to make false charges against him. He was satisfied so as to feel sure of the Appellant's guilt. The Learned Magistrate specifically found:

    (1) the Appellant told C that another boy got to do more things because he does not tell his mother everything;

    (2) the Appellant did tell C if his mother asked to say he had been playing with other boys;

    (3) the Appellant did make a moaning noise while kissing C;

    (4) on January 5, 2013 the Appellant kissed C on his neck;

(5) on January 19, 2013 the Appellant kissed C on the on his neck, ear and mouth (attempting to put his tongue in C's mouth);

(6) that (4) and (5) were in addition to kisses on the cheek;

(7) that the kissing was accompanied by words such as "*I love you so much*" and "*have you had enough love*";

(8) the Appellant was in a position of trust in relation to C;

(9) the Appellant's attraction to C was more than innocent or normal and the kissing described in (4) and (5) (i.e. in the charges)was for a sexual purpose;

(10) C was at the material times a young person.

11. Ms. Mulligan, who also appeared for the Crown below, pointed out significant differences in the way the Appellant's case was put in cross-examination and his evidence in the witness box. The case put to C was that his evidence about the earlier of the two incidents at the seaside was completely made up. When the Appellant gave evidence in his own defence, he agreed that this incident had occurred, but differed as to the details of his interaction with C. She submitted that C gave his evidence in a clear and straightforward manner.

12. It was effectively common ground at trial that if C's version was accepted by the Court to the requisite standard of proof, the disputed element of sexual purpose would be made out.

Grounds of appeal

13. Although the Notice of Appeal as amended on September 15, 2014 contained 11 grounds of appeal, Mr. Scott indicated at the opening of the substantive appeal hearing that the main focus of the appeal was the question of whether the legal requirements for the sexual purposes element of the offence had been made out. In this regard, (a) complaint was made that no adequate reasons for the Court's findings had been recorded as required by section 21 of the Summary Jurisdiction Act 1929, and (b) although the Canadian authorities relied upon by the Crown did articulate the correct test, the requisite test was not met on the facts of the present case. However, the Appellant's Supplemental Grounds additionally complained:

(1) expert medical evidence was required to justify the findings in relation to the nature of the Appellant's attraction to C;

(2) the Learned Magistrate erred in failing to consider each count separately;

(3) the Learned Magistrate erred in failing to consider the reliability of the transcript.

14. I did not understand the Appellant to have pursued or seriously pursued supplementary complaints (1) and (3). These complaints were in my judgment obviously hopeless. The failure to consider each count separately point was addressed in oral argument and will be considered in conjunction with the main grounds of appeal below.

Findings: Merits of appeal against conviction

Applicable law

15. The Appellant was convicted under the following statutory provision:

> "***Sexual exploitation of young person by a person in a position of trust***
> *182B (1) A person who, being in a position of trust or authority towards a young person or being a person with whom a young person is in a relationship of dependency—*
>
> *(a) for a sexual purpose touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or*
>
> *(b) for a sexual purpose invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,*
>
> *is guilty of an offence and is liable—*
>
> *(aa)on conviction on indictment to imprisonment for twenty-five years;*
>
> *(bb) on summary conviction to imprisonment for five years.*
>
> *(2)"Young person" in this section means a person under the age of sixteen years.*" [emphasis added]

16. It is clear on the face of these provisions that section 182B(1)(a) of the Code prohibits all forms of physical contact with a young person by an adult in a position in trust where the contact is for a sexual purpose. Provided that a sexual purpose is present,

the nature of the contact concerned, in terms of the parts of the body involved and/or the degree of physical compulsion deployed by the accused, is wholly irrelevant to the question of whether or not the elements of the offence have been proved.

17. This straightforward reading of the statute is supported by authority. Ms. Mulligan rightly submitted that section 182B of our Code is derived from section 153[3] of the Canadian Criminal Code. Canadian cases dealing with this and related provisions are potentially highly persuasive in terms of illuminating the meaning of "*for a sexual purpose*". The Court of Appeal of British Columbia has unanimously held in *R-v-G.B.* [2009] BCCA 88 that the Prosecution is not necessarily required to prove that the accused was motivated by his own sexual gratification. The test is a broad objective one. Kirkpatrick J opined as follows:

> "*[25] In my opinion, the trial judge erred in implicitly finding that the Crown must prove the accused touched the complainant for his or her own sexual gratification as an element of the offence. All the Crown must prove is that the touching be for a sexual purpose. In this case, no matter how one views the facts, the touching was for a sexual purpose…*"
>
> *[27] Even assuming for the sake of argument that the remarks in* ***Sears*** *support the respondent's position, it is apparent that such remarks have been overtaken by the decision of the Supreme Court of Canada in* ***Audet***[4]*. In that case the Court made it clear that the section is aimed at the protection of the sexual integrity of children. The forceful remarks at para. 25, while made in the context of the issue of consent, make it plain that a person in a position of trust or authority is prohibited from engaging in sexual activity with a child…*"

18. However, in many cases, the Crown will allege that the sexual purpose is the accused's own motivation to gratify himself. Where, as here, such is the case, it is for the triers of fact to decide for what purpose the touching occurred. In the broadly similar case of *R-v-Conrad*[1999] BCCA 404 where the accused was the teacher of the complainants, the British Columbian Court unanimously (Cumming J) held:

> "*[31] Utilizing its special position as trier of fact, the jury rejected the appellant's evidence that his kisses were motivated by gratitude and intended to convey no other message. The advantage the jury possessed over this Court in making that assessment cannot be overemphasized. In a similar fashion, the jury saw and heard the evidence of the three young women who testified for the Crown. In particular, the jury saw and heard S.S.'s and S.B.'s respective descriptions, not only of the nature of the admitted kisses on the lips but also of the greater context in which they occurred. These are the sort of intangible aspects of credibility assessments left in the hands of the trier of fact precisely because they are not susceptible of reasoned appellate review.*

[3] The section number appears to have changed from time to time over the years.
[4] [1996] 2 S.C.R. 171, 135 D.L.R. (4th) 20.

19. Ms. Mulligan placed various authorities before the Court which buttressed her central position that the common sense approach the evidence adopted at trial was consistent with legal principle. In *R-v-Laughlin (No.1),* Judgment dated June 15, 1999, Dielschneider J observed: "*The average and ordinary man will recognize a touching for a sexual purpose when he sees one*". I am guided by all of the above authorities as to the correct approach to be adopted in interpreting and applying section 182B of the Bermudian Criminal Code.

20. The most eminent authority cited in support of an objective test for deciding how the sexual purpose requirement is met came from the related context of sexual assaults. In *R-v-Chase* [1987] 2 R.C.S. 293, the Supreme Court of Canada (McIntyre J, at page 302) held:

> "*The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: 'Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer…The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant...The intent or purpose of the person committing the act, to the extent that this may appear from the evidence in considering whether the conduct is sexual*…"

21. This test was adopted in relation to the Canadian counterpart provision of our own section 182B by the Alberta Provincial Court in *R-v-Menjivar,* 2010 ABPC 164 at paragraph [25]. I adopt the reasoning of the Canadian Supreme Court in *Chase* as reflecting the corresponding Bermudian law position.

Section 21 Summary Jurisdiction Act 1930

22. Section 21 of the Summary Jurisdiction Act 1930 provides 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.*"

23. Based on the way the case was argued at trial, I find that the trial judgment fully complies with section 21 of the 1930 Act. The issues for determination were whether or not the acts described in the charges were proven. This turned on a straightforward choice between C's evidence as supported by other witnesses and the Appellant's. No legal issues were raised for determination. It was implicitly common ground between the parties that (a) if the Prosecution case was made out, the disputed element of sexual purpose would have been established, and (b) if the specific allegations

'pleaded' in each charge were not proven to have been committed by him, the Appellant would be entitled to be acquitted.

Was it open to the Learned Magistrate to find that the Appellant touched C for a sexual purpose

24. The facts found by the trial judge clearly supported a finding that the sexual purpose element of the offences charged had been proved. Even if the Appellant convinced himself that his affection for C was wholly pure, platonic and/or paternal, the law requires his conduct to be judged in objective terms. And, for the avoidance of doubt, this conclusion is in no way impacted by the fact that this was a same-sex assault. It is inconceivable that any reasonable bystander observing the circumstances C described in relation to the Appellant on the two occasions in question would fail to conclude that the intimate kissing described was "for a sexual purpose". In these circumstances, it is wholly irrelevant if the Appellant, as the evidence suggests may have occurred, re-created in his own mind a sanitised version of the relevant events to shield his conscience from the full implications of a breach of trust which was seemingly out of character.

25. Although it was unclear at the commencement of the present appeal whether the evidence supported the findings reached, the transcript of the evidence made it ultimately inevitable that the findings reached by the Learned Magistrate could not be impeached by this Court.

Need to consider the evidence on each charge separately

26. Mr. Scott complained that the Judgment was flawed because it failed to adequately demonstrate that separate consideration was given to each of the four charges. This complaint was purely technical, because in reality all the Court had to consider was whether it was satisfied so as to feel sure that C's account of two incidents was correct. No prejudice flowed from approaching the facts in the way the Learned Magistrate did, because it was clear that each of charges 2 to 4 alleged distinct acts alleged to have been committed in the course of one extended incident. The elements of each offence were precisely the same.

Conclusion

27. The Learned Magistrate's Judgment convicting the Appellant of each of the four counts with which he was charged is unimpeachable. The appeal against conviction is dismissed.

Dated this 10th day of November, 2014_____

IAN R.C. KAWALEY CJ