In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2014 No: 40

A[1]

Appellant

-v-

THE QUEEN

Respondent

EX TEMPORE JUDGMENT

(in Court)

Date of hearing: February 3, 2015

Mr. Michael J. Scott, Browne-Scott, for the Appellant
Ms. Larissa Burgess for the Respondent

1. In this matter the Appellant was charged with one count of stealing on an Information laid on August 28, 2013 in the Magistrates' Court. It was charged that:

> "*…on the 26th day of April in Pembroke Parish he stole a white, gold and cross pendant valued at $2300 belonging to Suzanne Moniz contrary to section 337(2) of the Criminal Code.*"

2. The crucial evidence in this case, which was clearly accepted by the Juvenile Panel, was that the Complainant's car had been vandalized and was taken in to the garage where the Appellant worked as an apprentice. The Complainant's evidence, I should add, was that the relevant item of jewellery was a very precious family heirloom and

[1] This Judgment has been anonymised because the Appellant was 14 years old on the date of the alleged offence, 15 years old at the date of trial and 16 years old at the date of the hearing of his appeal.

it had been left by her and was last seen by her hanging on the driver's rear view mirror.

3. The Prosecution relied heavily on a Mr. Y, who was the Appellant's supervisor in the garage who worked with him on repairing the car. His evidence was that the Appellant, at some point during the repair process, produced a pendant which met the general description of the item which forms the subject of the charge. Mr. Y then testified in his evidence-in-chief that he told the Appellant that he should not interfere with people's property and that he should return the item to the vehicle. At the end of his evidence- in-chief, he was asked "what happened after that?" and his answer to prosecution counsel was: "Nothing." Under cross-examination by Mr. Scott, who appeared below as well as on this appeal, Mr. Y conceded that in fact the Appellant had complied with his request to return the item to the car. And under re-examination he made this explicit when he was asked the following question by Prosecuting counsel Ms. Swan. Q: "*When you told him* [A] *to put it back in the car, did you see him put it back in the car?*" A: "*Yes, he put it back in the car.*"[2]

4. The Defence made a no case submission which was rejected and the Defendant gave evidence in the course of which he clearly did not impress the majority of the Panel in any event. He described seeing a pendant of a totally different description which did not resemble any piece of jewellery that the Complainant in fact owned. His case, it should be emphasised, was a complete denial of having produced the pendant from his pocket as Mr. Y testified.

5. Submissions were made at the end of the case and the Defence case was, in essence that in light of Mr. Y's evidence there was insufficient evidence on which the Defendant could be properly convicted. And the Crown's case was that the Court could infer that the Defendant must have taken the pendant, having regard to the initial evidence that he had put it in his pocket combined with the fact, in effect, that there was no other explanation as to who could have taken the pendant. The Appellant knew of its existence and had an opportunity to take it.

6. The Appellant, somewhat unusually, was convicted by a majority of the Panel (which was chaired by the Worshipful Tyrone Chin). In a Judgment dated November 21, 2013 the Learned Magistrate explained the basis on which the Court reached its conclusion. It is worth quoting, perhaps, from the second half of that short Judgment:

> "*The Court heard the evidence of S who is the Body Shop Manager at* [the Garage]. *Mr. S stated that he took photographs which is the normal practice. Those photographs were produced and entered as exhibits. The photographs do*

[2] This Court was greatly assisted by the Learned Magistrate's impressively comprehensive and legible handwritten notes of the evidence.

not show the 14kt white gold chain. The Court is of the opinion that S is a witness of truth.

The Court heard the evidence of the Defendant A. Mr. A denied bringing a gold chain out of his pocket as was stated by Y. Mr. A stated that he was never told to put back the gold chain in the car as it 'never happened'. However, Mr. A stated in his evidence and in the Police interview DVD which was entered as an exhibit that he found a black beaded chain in the car. Mr. A described the black beaded chain as the type of chain you would wear to a funeral. It must be noted that Suzanne Moniz denied any other chain in her car and it was later revealed that Suzanne Moniz has never owned such a black beaded chain. Did a black beaded chain ever exist? The Court does not truly hold Mr. A as a witness of truth. The evidence of Mr. A showed periods of inconsistency which did not corroborate each other.

The Courts finds the Defendant guilty beyond reasonable doubt of stealing a 14kt white gold chain with a cross pendant belonging to Suzanne Moniz contrary to section 337(2) of the Criminal Code."

7. The introductory segment in the Judgment found that Mr. Y was a witness of truth and the Judgment also revealed that the basis of the dissent embraced by a Panel member related to the evidence of Mr. Y that "*he put it back in the car*". So there was some indication in the Judgment that a crucial part of the deliberations of the Panel centred on what was a very obvious dispute between the Prosecution and the Defence as to whether or not, in light of the evidence that the chain was seen being put back in the car, the Appellant was in fact proved to have taken it.

8. There is in fact no explicit finding recorded in the short Judgment which explains on what basis the majority of the Panel was satisfied beyond reasonable doubt that the Appellant had been proven to be guilty of stealing the chain. This was not a case where it was obvious that if the Defence version of events was rejected that the Appellant was guilty. Because the Prosecution evidence itself raised serious doubts as to whether or not the Appellant had actually taken the chain.

9. It is true that the Appellant might have been found to be guilty on a different theory altogether, and that is that the offence of stealing was complete when he put the chain in his pocket in the first instance. But that case was not advanced and there is nothing in the Judgment to indicate that the Court convicted the Appellant on that view of the facts. There were a number of important matters which mitigated in the Appellant's favour which were not expressly rejected by the Panel majority. And those included the fact that the Appellant produced the pendant to his supervisor, which raises questions of whether or not he had the requisite intention to permanently deprive the owner of the pendant.

10. In addition, because the Prosecution's witness said that he saw the item being returned to the car, in my view it was not obvious without some explanation as how the Panel analysed the facts that the Appellant must have at some subsequent stage taken the item. He might well have left the item there and it might have been taken by somebody else.

11. Obviously there were very strong reasons for suspecting the Appellant, but that is not in my view the same as evidence which is so compelling that would justify this Court in concluding that, despite the failure of the Learned Magistrate to record adequate reasons for his decision[3], no miscarriage of justice has occurred[4]. So in those circumstances I am bound to allow the appeal and set aside the conviction.

12. Ms. Burgess in answer to the Court indicated to the Court was minded to set aside the conviction she would not seek a retrial. And so, in those circumstances, the conviction is quashed and I make no further Order.

Dated this 3rd day of February, 2015 _____

IAN R.C.KAWALEY CJ

[3] Section 21 of the Summary Jurisdiction Act 1930 provides so far as is relevant:

"*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…*"

[4] Section 18 of the Criminal Appeal Act 1952 provides:

" *(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—*

(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."