In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2015: No. 18

QUINTON FRANCIS

Appellant

- and –

THE QUEEN

Respondent

EX TEMPORE JUDGMENT

(in Court)

Date of hearing: September 25, 2015

Mr. Larry Mussenden, Mussenden Subair Limited, for the Appellant
Ms. Takiyah Burgess, for the Crown

Introductory

1. In this matter the Appellant appeals by Notice of Appeal dated 28 November 2014 against the conviction entered against him in the Magistrates' Court (Wor. Khamisi Tokunbo) on or about 18th November 2014, when he was convicted of two offences:

    (1) intruding on the privacy of a woman namely [C] in such a manner as likely to alarm did in fact alarm [C] contrary to section 199(2) of the Criminal Code; and

    (2) sexual assault on [C] contrary to section 323 of the Criminal Code. The Appellant was originally charged on information dated 28 February 2013 with those two offences.

The grounds of appeal

2. The grounds of appeal can be distilled into two complaints, one in respect of each offence although they were formulated more elaborately in argument by Mr. Mussenden.

3. Firstly, as regards intruding on the privacy of a woman contrary to section 199(2) of the Criminal Code, a complaint is made that the Learned Magistrate ought to have upheld a no case submission which contended that the element of 'accosting' was not made out in the alternative. In the alternative it is contended that the Learned Magistrate erred in law in finding that the 'accosting' element was in fact proved in his final judgment at the end of the trial.

4. As far as the conviction for sexual assault is concerned, the complaint is that for various reasons the conviction ought not to be supported because the Learned Magistrate could not properly have either, firstly, found that there was a case to answer and, secondly, that he was properly satisfied of the Appellant's guilt.

Adjudication (Count 1): Section 199 of the Criminal Code: intruding on the privacy of a woman or girl

5. In my judgment only the complaint about the section 199 offence has merit and it has merit for this reason. Mr. Mussenden referred the Court as he did in the Magistrates' Court to authorities on the meaning of the offence. And the first authority that he referred to was a case of *Taylor-v- Eversley* [1998] Bda LR 27 (Meerabux J). Here, Justice Meerabux quoted from the provisions of the statute which read as follows:

> "*199(1). For the purposes of this section a person shall be deemed to intrude upon the privacy of a ……. girl if wilfully and without lawful excuse—*
>
> *(a) he accosts or follows her.*"

6. He then said this at page 2 of the report:

"*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'.*"

7. He then described the facts in this case which were as follows:

"*Ms. D'Amato was in the privacy of her home. The Defendant and another boy opened the door and walked in and sat down on the chairs in the kitchen. Ms. D'Amato did not invite them in. She told them to go. She did not know them. They did not know her. She sought assistance from her father. There was the evidence of Danielle Blackwell that Ms. D'Amato was frightened. Danielle Blackwell said that she was "frightened". She responded to the questions of the learned Magistrate as follows: "Did Michael do anything to Ashley to cause her alarm and fear—No*."

8. The next case was a case of *Cox-v-R* [2014] Bda LR 2 which dealt with another element of the offence, namely the requirements of subsection (2) of section 199 which reads as follows:

"(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.*"

9. The need to consider the requirements of subsection (2) of section 199 only arises if the requirements of section 199(1) have already been satisfied. In my judgment it is clear, when one looks at section 199, that what is contemplated is conduct that invades the privacy of a woman or girl rather than constitutes or involves any kind of physical contact. I say that because under subsection (b) of section 199 (1), the alternative way of committing the *actus reus* of the offence is if the accused "*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*".

10. What were the facts that were relied upon by the Learned Magistrate in this case as amounting to the *actus reus* of the offence he says this pages 168 to 169 of the record:

"*Indeed I accept the Complainant's account of events and find that the Defendant put her in a headlock while walking, without warning or her permission and in the absence of any authority or permission in the company handbook to do so.*

*I find that this amounted to accosting her, in the ordinary dictionary sense of the word: '**Approaching for any purposes**' and/or that it amounted to a physical gesture in such a way as to be likely to alarm a woman or girl, and did in fact alarm the Complainant, particularly (as she testified) after he did not release her from the headlock after she agreed that she will attend self-defence classes.*"

11. It is necessary to assess the extent to which these facts can support the element of accosting against the background of the facts of this case. It was common ground that, at all material times, the Appellant was the owner of a security company which employed the complainant and that he visited a premises which the company was employed to protect, in the course of his rounds as it were. And he approached her in this context. My judgment there is nothing clear in the evidence of the Prosecution or indeed in the way the case was apparently put at trial which suggest that the initial encounter that the Appellant had with the Complainant was in and of itself an 'accosting'. And the way the Learned Magistrates formulates his findings make it clear to me that what he considered to amount to an accosting was putting her in a headlock without her permission. If anything, in my judgment, that would have amounted to an assault but the Appellant was not charged with an assault in relation to this particular physical encounter.

12. And in those circumstances I am bound to find that the learned Magistrate erred in law and finding that the facts that he accepted as being proved amounted to an accosting capable of supporting a conviction for the offence of intruding on the privacy of a woman or girl contrary to section 199 of the Criminal Code[1]. And so for those reasons I set aside the conviction entered on Count 1.

Adjudication (Count 2): sexual assault

13. The position as regards Count 2 is entirely different. There the evidence of the Complainant, if accepted, clearly supported the offence of sexual assault, albeit a sexual assault at the lower end of the gravity scale. The findings that the Learned Magistrate reached in this regard can perhaps be summarised as follows. They went into a portion of the property known as 'Garlands' and the Appellant pulled up the complainant's shirt over her head, exposing her bra and chest; and he then pulled the left bra cup off her left breast which exposed her breast.

[1] The elements of this offence were also considered by this Court in a case not referred to in argument on the present appeal: *Trott-v-R* [2014] Bda LR 37.

14. The Learned Magistrate at the end of the day found that he was satisfied beyond reasonable doubt of the Complainant's evidence and did not believe the Defendant and found that he had no doubts about his guilt.

15. The appeal was argued with considerable force by Mr. Mussenden, despite the fact that it is always very difficult to disturb findings of fact made by a trier of fact. In fact, if one were seeking to set aside the verdict of a jury, one would have to demonstrate that the jury's verdict was perverse. One that no reasonable jury properly directed could reach. It is almost unheard of for an Appellant Court to reach such a finding. Mr. Mussenden, nevertheless, in essence it seemed to me was forced to fall back upon most of the arguments he made in the Court below but which were rejected.

16. One of the important features of the defence case at trial was that the Complainant did not complain at the earliest possible opportunity and instead only made a complaint after leaving the premises, despite encountering various other company employees and other persons to whom she might have complained. It is accepted that she did complain to another employee later that night and that she resigned the next day.

17. The Learned Magistrate had the benefit of hearing the Complainant cross-examined about why it is that she made the complaint when she did and accepted her explanations. It is difficult to see how this Court can disturb those findings.

18. The question of when a complaint is made is one that is often an issue in sexual assault cases. And I except that in this case it was legitimate to raise queries as to why it is that the Complainant did complain immediately. On the other hand, it seems to me, that the nature of the assault looked at objectively was not of such violence that makes it incomprehensible that the Complainant, immediately after the incident that she described, manifested no obvious signs of distress to other people. The position might well be otherwise if the sexual assault was of a more serious nature where it would simply be inexplicable that a person having been subjected to an extremely violent attack would not show some signs of distress or, indeed, perhaps injury. This was not that type of case.

19. And so while it is easy to understand why the timing of the complaint was raised as a ground for doubting the Complainant's evidence, looked at objectively it not possible for this Court to conclude that the learned Magistrate could not properly except the explanations the Complainant gave and be satisfied of her guilt.

20. The additional grounds that Mr Mussenden raised were twofold. Firstly, he complained that the learned Magistrate failed to give way to the Appellant's good character he fairly acknowledged that I had rejected a similar complaint in the *Glen*

Brangman case[2] but nevertheless persisted in advancing an argument that an inadequate direction to a jury may be decisive. In this case there was no jury and a very experienced Magistrate heard character witnesses, appreciated that there was a good character defence and concluded that it did not cause him to find that there was doubt about the guilt of the defendant having regard to his previous good character. He said this at pages 167 – 168 of the Record on good character:

> "*The Defendant, on the other hand, did not impress me as a witness of truth when he testified. I do not believe he gave an honest account when testifying; and I say this, notwithstanding he is a person of previous good character and that he adduced evidence of good character from two witnesses during the trial.*"

21. In essence the complaint that Mr Mussenden made, like the complaint that was rejected by this Court in the *Glen Brangman* case and by the Court of Appeal in that same case[3], is that the Learned Magistrate did not set out the law as to good character fully, and explain why on the facts of the case it did not apply. In my judgment good character, in the context of a case that turns on the credibility of witnesses, is never likely to be a crucial consideration.

22. As I indicated in the course of argument the position might be otherwise in a case based on circumstantial evidence where the likelihood of the Appellant perhaps acting dishonestly was relevant to the way in which a particular document was to be interpreted. But it seems to me to be a straightforward issue for an experienced Magistrate to understand that a good character defence is being advanced as a partial defence and, having considered all the evidence, to find that it does not raise any doubts in his mind as to the Defendant's guilt. So I found that that additional ground had no merit.

23. The second additional ground was the criticism that the learned Magistrate failed to properly consider motive, and only made a passing reference to it. Mr Mussenden fairly conceded that the issue of motive was a subsidiary feature of the defence; that it was not the centrepiece of the defence. But again it is necessary to see how the learned Magistrate dealt with it. He said this, again at page 168 of the Record:

> "*I do not believe the Defendant when he says the Complainant asked him for money sometime earlier, that he called her and apologized for using too much force and she accepted his apology. I reject his evidence that he was*

[2] *Brangman-v-Raynor* (Police Sgt) [2012] Bda LR 85.
[3] *Brangman-v-Raynor* (Police Sgt) [2012] Bda LR 85; *Brangman-v-R* [2013] Bda LR 81 (Court of Appeal).

performing 7 or 8 self-defence moves or techniques on the Complainant and that she was a willing participant."

24. It is necessary to evaluate this type of criticism in the context of the case as a whole. And in a case where there was one prosecution witness and it was clear that the prosecution case stood or fell on whether or not the Complainant satisfied the Magistrate, in my judgment the fact that one particular issue such as motive is dealt with in passing (in the context of explaining why it is that the Defendant's evidence was rejected) cannot in my judgment constitute a ground (even together with the other complaints, which I in any event reject) for disturbing a conviction.

25. It is important to note that the Learned Magistrate made these findings at page 167 of the Record:

> "*I have now reviewed all the evidence in this case and summarized material aspects of it here. I have also recalled and reminded myself of my observations of the demeanour or each of the witnesses when testifying and considered the submissions of Counsel and the relevant law and cases cited.*
>
> *In my Judgment the Complainant, [C], was a wholly credible witness. In my view she gave an honest account of what transpired between her and the Defendant and did so with exaggeration, malice or any desire to falsely implicate the Defendant. Despite forceful and probing cross-examination by counsel for the Defendant the Complainant was steadfast and consistent with her version and gave plausible explanations for not recording the events in the log book, reporting the incident to colleagues that night on site or for continuing her rounds on the property and completing her shift that night. Indeed I find that her reporting the incident that night to Kennedy Edwards and resigning her employment on the following Monday was conduct consistent with her experience.*"

26. And so for those reasons I dismiss the appeal against the conviction of sexual assault (Count 2 of the Information).

Conclusion

27. The appeal against the conviction on Count 1 is allowed. That conviction is set aside. The appeal against conviction on Count 2 is dismissed. The matter is remitted to the Magistrates' Court for sentencing in respect of Count 2 on such date as that Court may assign.

Dated this 25th day of September, 2015 _____

IAN R.C. KAWALEY CJ