In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2011: CRIMINAL APPEAL NO: 38

LEO SIMMONS

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT
(In Court) [1]

Date of Hearing: October 9, 2015
Date of Judgment: November 16, 2015

Mr. Vaughan V. Caines, Charter Chambers Bermuda Ltd, for the Appellant[2]
Ms. Maria Z. Sofianos, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant was charged on an Information dated March 17, 2010 in the Magistrates' Court with burglary and sexual assault on March 15, 2010, contrary to sections 339(1) (b) and 323, respectively, of the Criminal Code. He was convicted on May 3, 2011 by the Magistrates' Court (Wor. Khamisi Tokunbo) on both counts and received suspended sentences of imprisonment of 12 and 18 months respectively.

2. By a Notice of Appeal dated "June 2011", the Appellant appealed against his conviction. The reasons for the delay in prosecuting the appeal were not explored at the hearing and do not appear to bear on the merits of the appeal. The grounds of appeal advanced in Mr Caines' Submissions may be distilled as follows:

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

(1) the convictions were against the weight of the evidence;

(2) the Learned Magistrate did not correctly analyse the elements of the burglary charge;

(3) the Learned Magistrate did not adequately explain the evidence or deal properly with the Complainant's credibility.

3. In the course of the hearing I indicated that the only ground which appeared to be seriously arguable was (3), as regards the sexual offence conviction. There was clearly evidence before the Court potentially capable of supporting the convictions so it was impossible to conclude (without more) that the findings of guilt were wholly unsupportable. The elements of the offence of burglary (entering as a trespasser and committing the offence of actual bodily harm) were simply and clearly dealt with in the Judgment delivered at the end of the trial and there was no proper basis for suggesting that the evidence did not support the 'bodily harm' element of the charge.

4. The only distinction between the two offences was that the burglary offence was substantially admitted by the Appellant when interviewed by the Police shortly after the incident at the home of the Complainant, his "on again, off again" girlfriend. His admission apart, her external injuries also corroborated her on testimony about the assault element of the burglary charge.

5. The sexual assault was denied by the Appellant, despite the fact that prior to his interview swabs for DNA testing had been taken from his hands which would potentially have proven his guilt of that charge. He had been arrested at the scene of the crime without any apparent opportunity to sanitize his hands. No DNA testing was ever done, and there was no other conclusive evidence corroborating the Complainant's evidence in relation to the sexual assault charge. The Learned Magistrate expressly found that the Complainant admitted engaging in deceit in the course of her stormy relationship with the Appellant, but was ultimately satisfied about the reliability of her evidence in relation to both charges.

The crucial findings

6. The Learned Magistrate expressly found:

- "*this is/was a case of the defendant and the complainant being intimately involved with each other in an on and off basis for several years*"

- The Complainant admitted "*several instances of lying and deceit at different times during their relationship*"

- "*contrary to the Complainant's evidence that she was afraid of the defendant and what he would do, I find that she was not afraid of the Defendant-but rather her fear was only of being caught out in any deception*"

- "*even if she was physically aggressive and attacking the Defendant on 15th March 2010 when he entered her house, I don't believe the injuries were all the result of the Defendant defending himself, and therefore self defence is not available to him*"

- "*As regards the sexual assault, I find, and am satisfied so that I feel sure that the Defendant did, during their emotional encounter on 15th March 2010 insert his fingers in the Complainant's vagina through her pyjamas. I find that that act was sexual…I do not accept that this allegation is being falsely made by a jilted woman…*"

Adequacy of findings on Count 1

7. On Count 1, there was an explicit finding that the Appellant entered the premises without the Complainant's consent and unlawfully inflicted the injuries complained of. This finding was open to the Learned Magistrate to reach on the evidence. Although he made no express findings in this regard, he implicitly found that the testimony of the Complainant was supported by the injuries he found the Appellant had caused. He expressly considered and rejected the defence of self-defence. In addition to this, as Ms Sofianos pointed out in her written submissions on behalf of the Respondent, the Appellant admitted to the Police entering the premises through a window and assaulting the Complainant shortly after the offence.

8. Mr Caines advanced no arguable basis for disturbing the key findings made or the conviction. His arguments in large part effectively invited this Court in its appellate jurisdiction to re-hear the matter *de novo* and make fresh findings of fact. The surprising suggestion that the various abrasions did not amount to "actual bodily harm" was not supported by any relevant or persuasive authority.

9. The appeal against the conviction on Count 1 must be dismissed.

Adequacy of findings on Count 2

10. On Count 2, the only explicit findings made are based solely on the evidence of the Complainant. In these circumstances, the submission of Mr Caines that the "*evidence relevant to the issues of guilt and that are relevant to the Complainant's credibility, has been reduced to vanishing point*" calls for careful scrutiny. How far can an appellate court properly go in assuming that a trial judge must have made findings which are not recorded?

11. Two guiding statutory rules are pertinent to answering this question:

    (1) if important findings are not recorded in the trial judgment, an error of law has been made. The Summary Jurisdiction Act 1930 provides:

> "*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.*";

(2) the Court can ignore purely technical errors of law and uphold a conviction if it appears that "*no substantial miscarriage of justice in fact occurred*" (Criminal Appeal Act 1952, proviso to section 18(1)).

12. In assessing what findings a trial judge is required to make for section 21 of the Summary Jurisdiction Act purposes, the main focus must be what the main controversies at trial actually were. The best indicator of what was in controversy is the written no case submission made by the Appellant's trial counsel Llewellyn Peniston. The points made included the following:

(a) the Complainant admitted to recent sexual activity with another man (by implication, in light of the case put in cross-examination to the SART Nurse, the vaginal injury might have attributable to this rather than the digital penetration by the Appellant of which she complained);

(b) the Complainant did not allege sexual assault when the Police first arrived in the Appellant's presence;

(c) the Complainant was not a credible witness; and

(d) despite taking DNA samples from the Complainant and the Appellant (who was arrested immediately after the alleged sexual assault, no DNA evidence was adduced by the Prosecution at trial.

13. Looking at the case broadly, since the Learned Magistrate found that the parties had a tempestuous relationship and the Defence case was that the allegation was fabricated it was clearly desirable to look for corroboration of the Complainant's testimony. An express finding on whether any contested evidence relied upon by the Crown as corroboration of the Complainant's testimony was accordingly required.

14. To the extent that the vaginal tear was relied upon by the Prosecution as attributable to the injury and accordingly corroborative of the Complainant's testimony, an express finding as to what reliance if any was placed on this injury was required. The SART Nurse was admitted as an expert and testified that in her opinion something sharp caused the tearing and that the injury was inconsistent with consensual sex. It is unclear form the Record whether she positively opined that fingers might have caused the injury. It is difficult to infer that the learned Magistrate relied on this injury as

corroboration in the absence of any express reference in his Judgment to such reliance.

15. The failure to make a complaint of a sexual assault at the earliest opportunity may often be a wholly irrelevant consideration. This will particularly be the case where the complainant is to some extent in a vulnerable position and may be understandably reticent about making a complaint for fear of reprisals, for instance[3]. In the present case, in my judgment, the very briefly delayed complaint was material for three reasons:

    (a) the Learned Magistrate expressly found that the Complainant was not frightened of the Appellant and was quite capable of being aggressive towards him; and

    (b) the Complainant did make a complaint to the first responding Police Officer, WPC Saltus, in the presence of the Appellant. However, all WPC Saltus recorded her as saying was (indignantly): "*Look, you ripped my clothes.*" That was consistent with a fight in which the Complainant had sustained minor injuries of which she might not immediately have been aware. It was, potentially at least, inconsistent with the far more invasive and humiliating sexual assault of which she later complained;

    (c) the Defence case was that the allegation was fabricated.

16. What did the Learned Magistrate make of this part of the Prosecution's own evidence which potentially raised a doubt about the Complainant's veracity? Why did the Complainant make the comparatively trivial torn clothes complaint in the presence of the Appellant but not the more serious sexual assault complaint? Had she torn her pyjamas (including the crotch) herself with a view to exaggerating the extent of the assault? Was the vaginal tear a self-inflicted injury? It is impossible for this Court to fairly assume, in the absence of any express findings on the issue, that the Learned Magistrate asked all the questions this part of the Defence case raised and resolved them in favour of the Prosecution.

17. I initially felt that the absence of DNA evidence was a very significant factor in favour of the Appellant. However, when Ms Sofianos explained that the swabs taken from the Appellant's hands shortly after the incident were never sent away for testing,

[3] See e.g. *Quinton Francis-v- The Queen* [2015] SC (Bda) 69 App (25 September 2015), paragraph s 16-19.

it was clear that this was a less important consideration. While the failure to adduce any DNA evidence incriminating the Appellant (where no test results were ever obtained) was not as significant as DNA results potentially exonerating him, this factor merited an express finding. One must bear in mind in this regard the fact that the Appellant when interviewed on the evening of the incident substantially admitted Count 1 but vehemently denied Count 2. When asked if he touched the Complainant with his hands, and being told "*they swabbed your hands and they're gonna check it for…*" the Appellant replied: "*They won't find whatever…officer at the house. I hit her, yes…but in a fit of rage…I did not sexually assault her, no way shape or form…*" (Appeal record, page 216).

18. Where an accused person positively asserts in interview that he will be vindicated by DNA evidence which the Prosecution does not bother to have tested for budgetary reasons, this may be acceptable and understandable in administrative terms. An accused person would of course be entitled to insist on having the tests carried out at his own expense. But when the accused person, as did the Appellant here, relies on the absence of DNA evidence at a trial in which credibility of the Complainant is centrally in issue, and no other corroborating evidence has been found to exist, in my judgment:

    (a) Some express finding is required on the absence of DNA evidence issue; and

    (b) in the absence of any express finding by the trial judge explaining why the absence of DNA evidence, combined with the other grounds for doubt raised by the Defence, it is impossible for an appellate court to properly resolve these potential doubts in favour of the Crown.

19. In these circumstances, I am bound to find that the Judgment failed to record determinations on all of the issues arising for determination and that a failure to comply with section 30 of the Summary Jurisdiction Act 1930 occurred. This caused a substantial injustice in the sense that it is impossible to fairly conclude that no substantial miscarriage of justice occurred when the Appellant was convicted on Count 2 of the Information.

Conclusion

20. The appeal is allowed in part and dismissed in part. The conviction on count 1 (burglary) is affirmed. The conviction on Count 2 (sexual assault) is quashed and an acquittal substituted for the finding of guilt imposed in the Court below.

Dated this 16th day of November, 2015 _____

IAN RC KAWALEY CJ