[2014] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 21/2013

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

JEROME ARSCOTT v R

Mr Peter Champagnie for the appellant

Miss Annette Austin for the Crown

10 November 2014

ORAL JUDGMENT

BROOKS JA

[1] On 10 February 2011, a young lady went home to find a group of police and soldiers in an area behind her house. One of the policemen was even picking ackees from a tree which was inside her yard. Her remonstrations with him led to a conversation. She gave one of the soldiers some seasoning with which to cook and then went out of her house to speak to that soldier about the seasoning. She went back into the house, but was followed by the police officer who had been picking the ackees.

[2] He commenced trying to force himself on her and she resisted. She went outside to escape him but her complaints to the soldiers outside led to the policeman lifting her up, taking her inside her house and trying to force himself on her again. He lay on her, pulled down her shorts, put his finger in her vagina, pulled out his penis from his trousers and put his penis against her genitals. She was resisting his actions at every step of the way. He finally relented and she went outside leaving him. She again complained to the soldiers and he left.

[3] At an identification parade held sometime afterwards, she pointed out the appellant, Mr Jerome Arscott, then a constable, as the person who had perpetrated these actions against her. He was charged with the offences of assault with intent to rape and indecent assault.

[4] His defence at his trial for those offences was that the interaction between himself and the virtual complainant was completely consensual. He made an unsworn statement to that effect. From the cross-examination of the virtual complainant it appears that the defence accepted that Mr Arscott did in fact put his finger in her vagina but, again, that was with her consent.

[5] After a protracted trial before the learned Resident Magistrate for the Corporate Area Criminal Court Mr Arscott was convicted on 17 May 2013. On 19 June 2013, he was sentenced to nine months imprisonment at hard labour.

[6] It is without doubt that the main issue that was before the learned Resident Magistrate was that of credibility and she identified that issue squarely in her reasons for judgment. She stated at paragraph 6:

> "In resolving this issue the credibility of the witness takes centre stage. It is entirely a question of credibility - whom do I believe, do I accept the complainant's version or that of the accused."

[7] Mr Arscott has appealed against his conviction and sentence, and on his behalf, Mr Champagnie has filed eight grounds of appeal. They are:

> "(1) That the verdicts are inconsistent and had the learned Resident Magistrate properly applied her jury mind to the facts of the case she could not have reasonably come to differing conclusions on the counts of the indictment.
>
> (2) The Learned Magistrate erred in law in drawing an adverse inference against the Appellant because of his refusal to answer questions in his question and answer interview.
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> (3) The learned Magistrate erred in her summation when she misinterpreted key aspects of the evidence.
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> (4) The learned Magistrate erred in law in that she admitted inadmissible evidence.
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> (5) The learned Magistrate erred when she admitted the evidence of Ricardo Smith as a recent complaint.
>
> (6) The learned Magistrate erred in rejecting the portions of Private Damane Harvey's evidence that were favourable to the Appellant without any or any sufficient reasons.
>
> (7) The Magistrate erred in not upholding the no case submission when there was insufficient evidence upon which to call upon the appellant to answer since the

complainant had been discredited in material respects.

(8) The sentence is manifestly excessive."

[8] Before us, Mr Champagnie focused on grounds 1, 2 and 8. In respect of ground 1, learned counsel pointed out that the learned Resident Magistrate accepted all that the virtual complainant had said in her testimony and yet found that the element of intent had not been proved. He argued those positions were inconsistent, for, had the learned Resident Magistrate accepted the testimony, as she stated she had, she ought to have found Mr Arscott guilty of both offences. The differing verdicts, he argued, demonstrated that the learned Resident Magistrate had not properly addressed her mind to the evidence.

[9] The learned Resident Magistrate in considering this point made very clear what her approach was in respect of this matter. At page 72 of the record, at paragraph 81, the learned Resident Magistrate set out her approach. Having gone through the complainant's evidence, assessed the evidence of the soldiers who were called on behalf of the Crown and reviewed the unsworn statement of the appellant, the learned Resident Magistrate said:

> "I reject the unsworn statement of the accused. He failed to impress me as a witness of truth. I find that he was less than forthright. I find that his unsworn statement did nothing to cast doubt on the credibility of the complainant. I do not accept what he said when he told the court that what happened on the day in question between himself and the complainant was consensual."

She then said:

> "I however, make no adverse finding against the accused simply because of my rejection of his unsworn statement and his responses or lack [thereof] in the question and answer interview but I must look back instead, at the prosecution's case to see whether the prosecution, by the evidence presented has proved the case to the extent that I feel sure of the guilt of the accused, bearing in mind that he has nothing to prove."

[10] Having gone back over the prosecution's case, the Resident Magistrate made findings believing the complainant in her testimony but said at page 74 of the record:

> "In relation to count 1, which charges the accused with assault with intent to rape, the evidence has left me in a state where I am not satisfied to the extent where I feel sure, that the ultimate intent of the accused was to have sexual intercourse with the complainant without her consent, or whether in so far as penile penetration is concerned, he was reckless as to whether or not she was consenting to this."

[11] The learned Resident Magistrate having heard the evidence and seen the various witnesses, the issue of intent was a matter for her, and she was entitled to find, as she did, that the evidence did not convince her of intent. It is no inconsistency to find that she accepted what the complainant said, but did not think it amounted to proof of an intent to commit the offence of rape. We therefore do not agree with Mr Champagnie in respect of ground 1 of the grounds of appeal.

[12] In respect of ground 2, learned counsel submitted that the learned Resident Magistrate drew an adverse inference against Mr Arscott because of his refusal to answer the questions in the question and answer interview. This aspect was addressed by the learned Resident Magistrate at paragraph 81 on page 72 of the record:

> "I find also that in his voluntary question and answer tendered as exhibit 1, the accused also came across as being less than frank."

[13] We are convinced that Mr Champagnie is not on good ground in respect of this ground. The learned Resident Magistrate's approach, from the extract quoted at paragraph [9] above, was unimpeachable. After stating that her rejection of the unsworn statement was not conclusive of the matter, she properly went back to assess the prosecution's case. She found that she was convinced by the latter. The issue was one of credibility and the learned Resident Magistrate's approach was in accordance with the requirements of such tribunals of fact. We find nothing wrong with that approach. There is no merit in respect of ground 2.

[14] Before going to the final matter raised by Mr Champagnie, we must address the ground that the learned Resident Magistrate wrongly admitted evidence from Special Constable Ricardo Smith concerning a recent complaint. The complainant testified that she told her police friend "about the situation". Special Constable Smith, who was the "police friend", thereafter gave a detailed account of what the complainant had told him concerning the sexual assault by the police officer.

[15] In her summation, in her reasons for judgment the learned Resident Magistrate quite candidly directed herself that there was no basis for admitting that evidence. She specifically directed herself that it should not be considered. The learned Resident Magistrate was of the view that she had erred in admitting the evidence because the

complainant's reference concerning the occurrence was vague. She said at page 62 of the record:

> "However, upon a review of the evidence, it was noted that no evidence was elicited by the crown through the complainant, of what is alleged to have been said by the complainant to Constable Smith. All the complainant said is that she told him 'of the situation', hence, I will disregard the evidence of Constable Smith in so far as it relates to recent complaint. It will have no bearing on my decision."

[16] The authorities suggest that it may be that the learned Resident Magistrate did not err in admitting the testimony of Special Constable Smith. In **Regina v Gene Taylor** SCCA No 132/1997 (delivered 18 December 1998) this court considered a case where the complainant testified that she told her father "what happen at Taylor's house". The court opined that the trial judge in that case "fell into error when he disallowed the evidence of the father as to the story related to him by [that complainant]". The court found, however, that the error benefited the appellant.

[17] In the instant case, it may be said that the learned Resident Magistrate erred when she indicated that she would not take the complaint into consideration. As a learned tribunal sitting without a jury, she was entitled to direct herself as to the evidence that she would consider. The error was, however, in favour of Mr Arscott. This ground is, therefore, misconceived.

[18] On the challenge in relation to sentence, contained in ground 8, the learned Resident Magistrate sentenced the appellant in respect of the offence of indecent assault to nine months imprisonment at hard labour. She said at pages 76-77 of the

record that she had considered his antecedents, the fact that he was a family man, that he was a police officer and she found that the antecedents were in his favour. However, she found at paragraph 6 of her reasons for sentence, and we say quite properly so, that the offence was a serious one and would have far reaching implications for the complainant. She found that the circumstances were aggravating of the assault. Mr Arscott, being a police officer, was in breach of a trust imposed by his office.

[19] At paragraph 10, page 78 of the record, the learned Resident Magistrate said:

> "To impose a non custodial sentence, could send a wrong signal to the general populace and to members of the police force that this type of behaviour is acceptable. I say this against the background of the prevalence of these types of offences in our society. Having looked at all the relevant factors and the sentencing options available to me, I am of the view that a short custodial sentence is the most appropriate method of punishment."

[20] We are in agreement with the learned Resident Magistrate's approach. It was a balanced one in that she took into account the circumstances in favour of the appellant, took into account the aggravated nature of the offence and the position that he held. In our view she took the appropriate approach of imposing a sentence of nine months imprisonment at hard labour, which in the circumstances of what is the maximum allowed, which is three years, could never properly be said to be manifestly excessive.

[21] In the circumstances, we did not call on Miss Austin for the Crown to respond.

[22] The appeal must be dismissed. The conviction and sentence are affirmed and the sentence is to commence today 10 November 2014.