SC/CRIM/11/19

JUDGMENT

Regina

Respondent

And

Anto Nekoro Danso Layne

Appellant

before

The Honourable James Lewis QC, Chief Justice

GIVEN ON

19th June 2020

Representation	
Mr Robert Wyn Jones & Mr Phil Axon	*Appellant*
Mr Stuart Walker	*Respondent*

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CASE NO SC/CRIM/11/19

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS
ON APPEAL FROM THE SUMMARY COURT

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 19th June 2020

Before:

THE HONOURABLE JAMES LEWIS QC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

REGINA

Respondent

-and-

ANTO NEKORO DANSO LAYNE

Appellant

- -

Mr Robert Wyn Jones and Mr Phillip Axon for the Appellant

Mr Stuart Walker for the Respondent.

- -

Judgment

- -

THE CHIEF JUSTICE:

Introduction

1. On 27th September 2019 the Appellant was convicted by the Senior Magistrate on one charge of sexual assault against the complainant, contrary to section 205 of the Crimes Ordinance 2014. He was sentenced to 2 years imprisonment.

2. The brief facts are that the Appellant and the complainant met in February 2019 when they were on separate nights out in Stanley. The complainant was living and working in Stanley as a teacher and the Appellant was a member of the Armed Forces. At the end of the night the Appellant and the complainant went to the complainant's home. Once there they had consensual sexual intercourse and the Appellant stayed until the morning.

3. The Appellant and the complainant stayed in contact by exchanging messages on WhatsApp messenger. The messages exchanged between them were sexually explicit. On occasions they saw each other during nights out in Stanley, but they did not have sexual intercourse again or go to the complainant's home. The last WhatsApp messages sent between the Appellant and the complainant were on 29th April 2019, ten days before the offence for which he was convicted.

4. In the early hours of 9th May 2019 the complainant woke up to find that the Appellant was in her bedroom, alongside her bed. The Appellant had not been invited into her home and he had entered through the unlocked front door as she slept. She told the Appellant to leave but he ignored her. The Appellant said that he was there for "a cuddle". The complainant made it clear to the Appellant that she was not going to do anything with him; she told him bluntly that he needed to "fuck off". The Appellant still ignored her and ultimately he climbed onto the bed and then tried to climb on top of her.

5. The Appellant grabbed the complainant's leg to pull it outwards and to move his body between her legs. The complainant could feel his bodyweight on top of her but she managed to elbow the Appellant away and get out of her bed. She managed to get the Appellant to the front porch after giving him a cigarette and some alcohol to take away with him. When the Appellant was near to the outside door she managed to get the Appellant outside and locked the door after him. The Appellant then finally went away.

6. The complainant reported the matter to the police in the morning and the Appellant was arrested just prior to boarding a returning flight to the United Kingdom.

7. At trial the Appellant accepted he had gone to the complainant's house in the early hours of 9th May 2019 but said he only went there to ask for some alcohol; and that he did not climb into the complainant's bed or touch her in any way. The Appellant's account was that was that he agreed with how he and the complainant had first met. He explained that he had exchanged text messages with her of a sexual nature. On the night of 9th May he was out in Stanley with 2 friends (both serving soldiers). He said that at the end of the night he had asked his friend to drive him to the complainant's home as he believed that more alcohol would be available there. He said he let himself into her home having first knocked but then finding the front door unlocked went in. He entered the complainant's room and spoke to her. She seemed fine with his visiting her. Indeed, given the content of the text messages sent between them he expected to be welcomed. He said that he spoke with the complainant for a number of minutes before taking the alcohol she had given him back to his friends waiting in the car outside. He denied any sexual contact as alleged by the complainant or getting into her bed.

8. His account at trial was rejected by the Senior Magistrate and she held that she was sure the complainant's version of events was correct and accordingly convicted the Appellant.

Grounds of Appeal

Conviction

9. Mr Wyn Jones put forward in oral argument essentially two grounds of appeal. The first was that there were numerous examples of the Senior Magistrate failing to properly analyse the evidence, ignoring or brushing aside inconsistencies in the complainant's account. These taken together rendered the conviction unsafe or unsatisfactory. The second ground of appeal was that the Senior Magistrate did not properly consider, and should not have been satisfied, that an essential element of the offence was made out, namely whether the Crown had proven that the defendant did not have a reasonable belief that the complainant was consenting to the sexual touching.

10. I was taken through in detail, in oral and written argument, apparent inconsistencies in the complainant's evidence and a submission that the Senior Magistrate had not addressed these apparent inconsistencies in her written judgment.

11. The difficulty faced by Mr Wyn Jones in his first ground of appeal is that this appeal is not a rehearing of the trial before the Senior Magistrate. The purpose of this appeal is to determine if the Senior Magistrate erred or misdirected herself in law, whether there was a material irregularity in the trial, and whether she could reasonably have come to the factual conclusions that she did. Of course overall I have to be satisfied that the conviction is safe and satisfactory.

12. This court does not see or hear from the witnesses and is not able to assess their demeanour from the transcripts. It is very difficult to assess reliability and credibility on documents alone and that is why the common law tradition is that the best evidence is for witnesses to give oral evidence and be cross examined. It follows the Senior Magistrate was in a much better position that I am to assess the witnesses and decide where the truth lies.

13. This fundamental approach is confirmed in a long line of jurisprudence in this jurisdiction for example *R v Alfred [2018] COA-CRIM-0317; R v Finlay* [2018] SC/CRIM/07/17; and in other Commonwealth jurisdictions for example *Thomas v Thomas [1947] AC 484 , 487-488; In Chen v Ng (British Virgin Islands) [2017] UKPC 27*; and *Re F (Children)* [2016] EWCA Civ 546 at [22].

14. I have carefully considered the two examples that Mr Wyn Jones raised in oral argument and the further four examples raised in the Perfected Grounds of Appeal. I have further considered how the Senior Magistrate dealt with such matters in her judgment.

15. The starting point is that there were full and proper legal directions, agreed by the parties, that the Senior Magistrate said she followed, dealing with consistency and inconsistency. No complaint can be made of those directions and therefore there is no discernible error of law in the way she directed herself. The challenge by Mr Wyn Jones is that despite those clear and concise directions she failed to demonstrate in her written judgment that she had followed them.

16. It is clear law that there is no requirement on the Senior Magistrate to decide every disputed point that is raised in a trial and need only decide those points necessary to reach a verdict. The Senior Magistrate made this clear in her judgment and stated that her summary of the evidence was limited to the most prominent features of the evidence. The Senior Magistrates stressed that she had considered all of the evidence that she had heard. She said at [61]:

> "The burden and standard of proof is such that I must carefully examine all the evidence to see if I can be sure of the guilt of the Defendant. In my summary of the evidence I have referred to what I consider the most prominent features of each witness's evidence but that does not mean I am not considering the evidence as a whole; I am. I do not have to decide every point that has been raised, only such matters as are necessary to enable me to say that the charge laid against the Defendant has been proved. I have full regard to the whole evidence and form my view based on which evidence is reliable and which is not.
>
> 62. I have heard both the Complainant and the Defendant give evidence, including under cross-examination. Many parts of their evidence fit together to make a clear picture of the event on 9th May 2019. The key issues lie in where their accounts are at variance…"

17. The Senior Magistrate addresses the inconsistencies of the complainant's evidence at paragraph [68]:

> "The Complainant's account of the events was not always consistent in its detail and becomes a little muddled at times. However, from the first text message sent to Lyndsay Smith at 6.08am on 9 May 2019 the Complainant has been consistent in her allegation that the Defendant climbed onto the bed and climbed on top of her…"

18. Whilst it is true the Senior magistrate does not deal seriatim with each and every inconsistency raised by Mr Wyn Jones there is nothing in her judgment to suggest she did not take into account every point made on behalf of the Appellant; and that she directed herself correctly in coming to the finding of facts that she did. In those circumstances the first ground of appeal fails.

19. The second ground of appeal argues that the Senior Magistrate should not have been satisfied that an essential element of the offence was made out, namely whether the Crown had proven that the defendant did not have a reasonable belief that the complainant was consenting to the sexual touching.

20. The immediate observation is that such fact is inconsistent with the defence advanced by the Appellant at trial. His case was that no touching happened at all. Therefore he did not advance a positive case that he had a reasonable belief that the complainant was consenting to the sexual touching.

21. Nevertheless it is the law that where an essential element of the offence must be proved by the Crown, the tribunal of fact must be satisfied to the criminal standard that the Crown have indeed proved that element of the offence; and this is true even if it is inconsistent with the defence case. However, when there is no contrary evidence to the Crown's evidence that the element is made out, it would be almost impossible to say, where the tribunal of fact has been directed correctly, that it is unsafe to come to the conclusion that the necessary element of the offence was established.

22. In this case the complainant said she repeatedly made it clear to the Appellant she did not consent to sexual activity on this occasion. She said:

> "You need to fuck off out of my house, what are you doing, why are you in my house?"
> …
> "Get off"
> …
> 'No you're not, you need to go away, you need to fuck off"
> …
> "I managed to haul my arm underneath him and push him off again."

23. However, there is some evidence from the complainant herself which may have raised the issue. She said:

> "then I'd kind of spooned him we were still lying on the bed, there was no in the bed, we were just lying on top of the bed,"

24. Mr Wyn Jones submits that the Senior Magistrate appears to dismiss the previous sexual encounter and text messages as possibly giving rise to a reasonable belief in consent at all. He relies on what she says in paragraph [28] of her written judgment:

> "It is important to recognise that just because the Complainant had consensual sexual intercourse with the Defendant on a previous occasion, or sent sexual messages, does not mean that the Complainant must have consented to sexual activity with the Defendant on this occasion. It also does not mean that this would have given the Defendant grounds for reasonably believing that the Complainant consented to sexual activity on this occasion" [My Emphasis]

25. Mr Wyn Jones argues that the underlined sentence is wrong. He emphasises that such previous sexual encounter and sexual messages may have given the Appellant a reasonable (even if mistaken) belief in consent, given the particular facts of this case.

26. In my judgment, what the Senior Magistrate was trying to convey was, taken on their own, the fact of a previous sexual encounter and the sending of sexual messages, is insufficient to raise a doubt whether the Appellant had a reasonable belief in the complainant's consent on this occasion. It is not a misdirection, but even if it were, it is not enough to render the conviction unsafe.

27. It is clear that the Senior Magistrate did in fact carefully consider whether this element of the offence was made out. She directed herself correctly in accordance with an agreed direction. She meticulously went through the steps to verdict which required a decision on whether the Crown had satisfied her that the Appellant did not have a reasonable belief in the complainant consenting to the sexual touching.

28. The Senior Magistrate made clear and separate findings in relation to the issue of reasonable belief in consent and found that she was sure that the Appellant did not have a reasonable belief in consent. At paragraph [84] in her judgment she said:

> "Question 4: Have the Prosecution made me sure that the Defendant did not reasonably believe that the Complainant consented to the touching? The same facts and evidence relate to the formation, as a result of their previous connections in person, by telephone calls or text messages, of any reasonable belief that the Complainant consented to the touching. I have scrutinised the text messages a second time to see whether they could give rise to a reasonable belief. I have, in effect, asked myself is there anything in any of the communications that passed between the Defendant and the Complainant that could have made the Defendant reasonably believe that he could go into the house, climb on the bed and touch her in the way that I have already indicated I am satisfied actually[sic] happened, that is by climbing on top of her and trying to pan her legs, on 9th May 2019? I am sure that he did not reasonably believe that the Complainant consented."

29. In those circumstances it is not possible to say the Senior Magistrate misdirected herself or failed to properly consider an element of the offence was made out. The ground accordingly fails.

30. In these circumstances the appeal against conviction is dismissed.

Sentence

31. The Appellant was sentenced to 2 years imprisonment by the Senior Magistrate. It was agreed by the parties that the appropriate category to be found in the United Kingdom Sentencing Guidelines were harm category 1 and culpability category B. This is clearly right. To uninvitedly enter and assault a person at night in their own bed, in their own home is a very frightening experience. This provides for a starting point of 2 ½ years with a range of 2 years to 4 years.

32. Mr Wyn Jones makes no complaint of the sentence of imprisonment of 2 years, nor could he. His complaint is that it should have been a suspended sentence and the Senior Magistrate did not properly consider the imposition of such suspension.

33. He carefully argues for the Appellant that all of the features indicating that a suspended sentence may be appropriate were to be found in this case. I am not sure I agree. The Appellant was convicted after the complainant had given evidence; and moreover his case was she was lying. That is not full remorse.

34. It is true he had personal mitigation and an immediate custodial sentence would have an impact on his army career and on others. He had been effectively detained on his base on the Island since his arrest in May 2019. He has 4 young children for whom he provides

for financially. They will be left without his support or the ability to see him if an immediate sentence is imposed. Finally Mr Wyn Jones says there is no risk or danger to the public identified.

35. In dealing with sentence the Senior Magistrate stated that the circumstances did not warrant suspending the sentence. Complaint is made she did so without addressing the appropriate guideline.

36. In my judgment the only appropriate punishment for entering at night a person's home, entering the bedroom and getting into bed with them uninvited, is immediate custody. While the personal mitigation is strong and it is sad to see a soldier, effectively of good character, throw away his promising career, he chose to contest the matter and therefore did not benefit from the mitigation of true remorse and regret. He wanted to see if he might get away with it. This court sees no alternative but to immediate custody.

37. It follows the appeal against sentence is dismissed.

38. I finally note that this appeal was conducted by video-link owing to the coronavirus pandemic. That was made possible by the recent legislative provisions passed to deal with the crisis. Through the diligence and endeavour of counsel, and the court staff, this appeal was conducted exactly as if we had all been in court in person in Stanley; and they are all to be commended for that. I thank counsel for the comprehensive and detailed submissions which has made this court's function straightforward.

19 June 2020