SC/CRIM/03/21

JUDGMENT

Regina

Respondent

And

Nigel Bishop

Appellant

before
The Honourable James Lewis QC
(Chief Justice of the Falkland Islands)

JUDGMENT GIVEN ON

16th March 2022

Representation	*Representation*
Ms Alison Inglis	*Appellant*
Mr Stuart Walker	*Respondent*

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CASE NO SC/CRIM/03/21

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

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 16th March 2022

Before:

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

- -

BETWEEN:

REGINA

Respondent

-and-

NIGEL BISHOP

Appellant

- -

Ms Alison Inglis for the Appellant.

Mr Stuart Walker for the Respondent.

- -

Redacted Judgment

This Judgment has been redacted in accordance with section 465 of the Criminal Procedure and Evidence Ordinance 2014

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THE CHIEF JUSTICE:

Introduction

1. On 10th November 2021 the Appellant was convicted by the Summary Court consisting of the Senior Magistrate (sitting as a Justice of the Peace), L Harris and M Battersby, JPs of the following offence:

> Nigel Bishop, on the 29th day of June 2021, intentionally touched the Complainant, the touching was sexual, the Complainant did not consent to the touching, and Nigel Bishop did not reasonably believe that the Complainant consented to the touching.
> *Contrary to section 205 of the Crimes Ordinance 2014.*

2. It is against this conviction that there is an appeal. The Appellant was sentenced to a fine but there is no appeal against sentence if the conviction is upheld.

3. The brief facts are that the Complainant was 18 years old at the time and employed by as a shop assistant. On Tuesday 29th June 2021 the Complainant was at work. At about 15.30 hours the store was quiet and the Complainant was stood on a small step ladder stocking shelves. The Appellant entered the store and approached the Complainant from behind. What happened next is where the dispute arises.

4. The Respondent's case is that the Appellant took hold of the Complainant by her hips with his hand covering her buttocks. The Appellant then caressed the Complainant's buttocks before letting go. The caressing was sexual.

5. The Appellant's case is that he gave the Complainant a friendly hello by a brief touching of her hips. There was no caressing and the touching was not sexual.

6. It is common ground that after the touching the Complainant came down from the step ladder and there was a brief conversation with the Appellant before the Appellant went to the office area to place an order. The Complainant returned to stocking the shelves and when the Appellant returned from the office the Complainant moved away from the Appellant to the service counter. There was a further interaction between the Appellant and the Complainant concerning the price of an item on sale and the Appellant then left the store.

7. A short time later, around 16.45 hours, the complainant gave an account of the incident to her work colleague. The following day, on 30th June 2021, the work colleague informed the store manager who then spoke to the Complainant who repeated her account. The

store manager made a written record of the Complainant's account and the incident was reported to the police.

Grounds of Appeal

8. The Appellant advanced twelve grounds of appeal, but essentially these came down to a submission that the conviction was unsafe and unsatisfactory because the evidence of the Complainant was manifestly unreliable in the light of the CCTV; and the Summary Court had failed to give sufficient weight to the medical evidence and evidence of the Appellant's good character.

9. I was taken through in detail, in oral and written argument, and with viewing of the CCTV, apparent inconsistencies in the Complainant's evidence and a submission that the Summary Court had not addressed these apparent inconsistencies in its Trial Verdict Decision Form.

10. It is clear that this appeal is not a rehearing of the trial before the Summary Court. Section 663 of the Criminal Procedure and Evidence Ordinance 2014 makes that clear:

> *663. Appeals against conviction*
> *(1) Subject to subsection (2), the Supreme Court, upon the hearing of an appeal against conviction, must allow the appeal if it thinks that —*
> *(a) the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory;*
> *(b) the judgment of the Magistrate's Court or Summary Court should be set aside because of a wrong decision on any question of law; or*
> *(c) there was a material irregularity in the course of the trial,*
> *and in any other case must dismiss the appeal.*

11. Ms Inglis solely relies on section 663(1)(a) of the 2014 Act. She places particular emphasis on the words " … <u>in all the circumstances</u> … it is unsafe or unsatisfactory". While of course I must consider all the circumstances this court does not see or hear from the witnesses and is not able to assess their demeanour from the transcripts. I do have the CCTV but it is not very clear and the most that can be adduced from it is that touching took place, timings, and that the Complainant was upset enough to immediately get off the step ladder. The CCTV is certainly not determinative of the issue of whether the Appellant caressed the Complainant's buttocks, even briefly.

12. 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 Summary Court was in a much better position that I am to assess the witnesses and decide where the truth lies.

13. The proper approach for this court on a challenge to a finding of fact is to determine whether the finding which the lower court made was open to them on the evidence, or to put it another way, one which they could reasonably make. I accept this requires consideration of all the circumstances. The approach is settled and 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.*

Discussion

14. The Trial Verdict Decision Form is a pro-forma document which is completed by the Summary Court. In material part it states:

> *"Matters agreed:*
>
> (1) On 29 June Nigel Bishop touched the Complainant whilst she was up a ladder in the store, the nature of the touching is not agreed.
>
> (2) There is a CCN recording of Nigel Bishop and the Complainant in the store at the relevant time.
>
> (3) On the same day, the Complainant told the work colleague she had been touched by Nigel Bishop.
>
> (4) The work colleague reported this to the store manager the next day and the work colleague, the Complainant and the store manager had a conversation about this in the store manager's office.
>
> (5) The store manager made a note which has been exhibited in evidence […]
>
> (6) The complainant had a bruise on her left hip which she photographed on 2 July, the cause of the bruise is not agreed.
>
> (7) Nigel Bishop was interviewed by the police on 6 July.
>
> (8) It is accepted that the nature of touching alleged by the Complainant is sexual.
>
> (9) Nigel Bishop received physiotherapy between January and March this year, a statement has been provided regarding his condition at this time and treatment.

Relevant matters in dispute requiring findings

(1) Whether or not Nigel Bishop touched the Complainant on the hips and buttocks and caressed her buttocks.

(2) Whether or not the bruise on the Complainant's hip was caused by Nigel Bishop.

Findings on disputed facts

(1) We do find that Mr Bishop touched the Complainant on the hips and buttocks and caressed her buttocks.

(2) We do not find that the bruise on the Complainant's hip was caused by Mr Bishop.

Reasons for findings

The Complainant was a credible witness who was consistent under extensive cross-examination, on the central question of where the touching took place. There was no requirement for Mr Bishop to touch her. Her evidence was supported by the CCTV, which showed her moving her elbow and getting off the step ladder quickly, as she stated after he touched her.

She moved away from the step ladder to the counter when Mr Bishop returned to the shop floor, again supporting what she said as to the incident. No other reason was suggested as to why she went to the counter.

She reported the incident quickly, she has no reason to make up what she said. We do not consider if Mr Bishop touched her on the sides as he said this would have resulted in such a reaction from her.

We consider there was sufficient time for the sequence of events to have taken place.

We do not consider there is sufficient evidence to support Mr Bishop causing the bruise, which the Complainant accepted could have been coincidental."

15. There is agreement that the pro-forma identifies the correct headings. In dispute is whether sufficient reasoning was given in the pro-forma to support the findings on the disputed facts.

16. Mr Walker refers me to section 185 of the Criminal Procedure and Evidence Ordinance 2014. The Summary Court is required to keep a record of judgments and rulings which records the point or points for determination, the decision on each point and the reasons for the decision. It reads:

185. Reasons for judgment to be given

(1) The person presiding over criminal proceedings in any court must keep a record of all judgments and rulings of the court, except the reasons for the verdict of a jury.

(2) If there are facilities for electronic recording of the proceedings, an electronic record may be kept instead of a written record.

(3) Every such judgment or ruling must —

(a) contain the point or points for determination, the decision on each point and the reasons for the decision; and

(b) be dated by the person presiding at the time of pronouncement.

17. The statute at section 185(3)(a) sets out the bare minimum. It should not be taken that bare compliance with section 185(3)(a) will satisfy the requirement to give adequate reasons. The purpose of adequate reasons is so that the person affected by the decision, and any supervisory court, can see that the decision maker properly applied the law to the relevant facts. It must be possible to apply scrutiny to the decision of the Respondent on the reasons given. In *R v Brent LBC ex parte Baruwa* (1997) 29 HLR 915 at 929 Schiemann LJ said:

> "..Where as here, an authority is required to give reasons for its decision it is required to give reasons which are proper, adequate, and intelligible and enable the person affected to know …"

See also *South Bucks DC v Porter (No.2)* [2004] UKHL 33 at [26].

18. There is a statutory duty to give reasons and the Summary and Magistrates Court must be aware that the reasons they give are legally adequate.

19. In this case I am satisfied they are just adequate. They are pithy and perhaps could have been improved by reference to good character; the medical evidence and the inconsistencies in the Complainant's evidence. However, there is no reason to believe the Summary Court did not properly direct itself on these issues and importantly the agreed facts and disputed facts set out above at paragraph [14] were considered and approved by both the Appellant and Respondent before the Summary Court came to its determination. The finding in favour of the Appellant on whether the bruise on the Complainant's hip was caused by Mr Bishop indicates proper direction and consideration.

20. It is clear that the primary issue in this case was a simple one. Counsel agreed in oral discussion with me that it came down to whether the Appellant caressed the bottom of the Complainant, even briefly. The touching having been agreed, the nature of the touching determined whether such touching was sexual. On the Appellant's case there was no caressing and on the Respondent's case there was.

21. I have watched the CCTV a number of times. It is of poor quality even after enhancement, and apart from it confirming there was a very brief touching of the Complainant in the approximate area of the waist/bottom it does not provide reliable evidence of caressing of

the Complainant's bottom, and neither does it disprove in any way that there was not a brief caress of the Complainant's bottom.

22. It follows that the Summary Court's assessment of the witnesses' evidence and consideration of the other evidence was decisive.

23. Ms Inglis makes the following points, although she has denominated them as separate grounds of appeal:

    (1) The timings do not compute;
    (2) The CCTV evidence disproves part of the Complainant's account;
    (3) Parts of the Complaint's account is physically impossible/improbable;
    (4) The Complainant's evidence ignores the amputated thumb;
    (5) Inconsistencies in the Complainant's evidence;
    (6) Conflicting accounts by the Complainant;
    (7) First account matches the Appellant's account;
    (8) Misinterpretation of the Complainant's first account
    (9) The Complainant's shock;
    (10) The Appellant's belief the CCTV would exonerate him;
    (11) Insufficient weight given to the medical evidence; and
    (12) Insufficient weight given to character evidence

24. Dealing with the last two points first. The medical evidence does not disprove the caressing, it only goes to whether the Complainant was accurate or reliable as to being pushed or pulled forcible on the step ladder. The good character of the Appellant is clearly a matter the Summary Court must take into account and direct themselves accordingly. There is no express discussion of the point or discussion of the evidence of the Appellant in the Summary Court's findings. There should have been, but as there is no challenge as to a misdirection on this appeal, there is no reason to find that the Summary Court did not direct itself correctly.

25. On points one to ten, there is most merit in point one and five. The other points are really subsets or adjuncts to those points. The Complainant is obviously wrong on her timings as against the CCTV timings. However, as I have identified at paragraph [21] above the CCTV is inconclusive one way or the other as to a brief caressing of the Complainant's bottom. Notwithstanding the criticism made by the Appellant I am satisfied there is a core

of consistency. There was undoubtably a physical interaction (touching) which made the Complainant get off the ladder in a hurry and a supporting recent complaint.

26. As Mr Walker observed, this appeal turns on a re-examination of the evidence and is a re-run of the closing speech made on behalf of the Appellant. There is no new evidence and no new argument. This court is being asked to substitute its decision on the CCTV and transcripts of the evidence for that of the Summary Court who heard and accessed the witnesses. That is not a function of the court on appeal.

27. The Complainant was obviously very distressed and immediately came off the step ladder after the touching, and further went behind the counter when the Appellant came downstairs to leave. That it was a very brief, out of character, sexual touching is perhaps reflected in the fact a fine was imposed. However, even a brief sexual touching is an offence and it was clearly open to the Summary Court to find as they did in all the circumstances on the evidence before them.

28. I am satisfied that there are no reasons to set aside the verdict on the ground that in all the circumstances of the case, taking the grounds both individually and cumulatively, it is unsafe or unsatisfactory. Accordingly, the appeal is dismissed.