

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 14/2014

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA**

SEPP HOFF v R

Martyn Thomas instructed by George Thomas & Co for the appellant

**Miss Paula Llewellyn QC, Director of Public Prosecutions and Gavin Stewart
for the Crown**

24, 25, 26 and 28 November 2014

ORAL JUDGMENT

BROOKS JA

[1] Mr Sepp Hoff, a German national who was holidaying with family and friends in Jamaica, was convicted on 7 May 2014 in the Resident Magistrates' Court for the parish of Saint James for indecently assaulting a 17 year old boy who was a member of his party. As a penalty for the offence, Mrs Natalie Hart-Hines, the learned Resident Magistrate who heard the case, sentenced him to serve six months' imprisonment at hard labour. She, however, granted him bail when he gave verbal notice that he would

appeal against the conviction and sentence. The sentence was passed and bail granted on 15 May 2014.

[2] He, through his counsel, pursued his appeal. The appeal first came on for hearing before us on 24 November 2014 in this sitting of the court in Lucea in the parish of Hanover. Although counsel was present to represent him, Mr Hoff did not show up. Investigations revealed that, in disobedience of one of the conditions of his bail, he had ceased weekly reporting to the Barrett Town Police Station from as far back as July 2014. In this court, his surety was unable to account for Mr Hoff's whereabouts. On 25 November 2014, we therefore ordered that the sum that had been paid as a condition for the grant of bail, should be forfeited. We nonetheless heard the appeal, as indicated above, on 26 November 2014.

[3] The prosecution's case against Mr Hoff was that while the complainant and Mr Hoff were alone on the same bed in their hotel room, Mr Hoff, inappropriately and without the complainant's consent, fondled the complainant's genitals and buttocks. Mr Hoff's defence to the charge was that he was unaware of any such actions on his part, as he was asleep at the time.

[4] Mr Martyn Thomas, on Mr Hoff's behalf, argued three supplemental grounds of appeal, namely:

- "(a) That the learned Resident Magistrate failed to properly analyze the elements of the offence and in particular whether or not it was possible for the Appellant to have the necessary *mens rea* to have committed the offence given the factual

circumstances of the case and the learned Resident Magistrate therefore erred in failing to accede to the submission of no case to answer when it was clear that a necessary ingredient of the offence had not been established namely the required mens rea.

- (b) The learned Resident Magistrate failed to appreciate the defence of the appellant and demonstrated this by embarking on the analysis of a defence which was not relevant to the issue of fact that she had to determine.
- (c) The learned Resident Magistrate failed in her consideration of the appropriate sentence all the mitigating factors and thereby did not consider properly the context in which the incident occurred.”

The grounds of appeal will be assessed in the order set out above.

Ground one – The analysis of the ingredients of the offence

[5] In his submissions, although accepting that the complainant’s evidence of the touching, if believed, would have amounted to proof of an indecency, Mr Thomas argued that the learned Resident Magistrate failed to appreciate that the prosecution had not established the necessary ingredient of intention in respect of the offence. Learned counsel submitted that the learned Resident Magistrate did not deal adequately with the defence that, being asleep, Mr Hoff could not have had the intention to commit the offence.

[6] Mr Thomas pointed specifically to the fact that the learned Resident Magistrate erred in her understanding of the evidence. He submitted that that error led her to make a finding adverse to Mr Hoff. The error, Mr Thomas submitted, occurred when the learned Resident Magistrate stated that the complainant’s evidence was that when

he felt a hand in his trousers, he grabbed the hand and took it out of his trousers, the hand, however, pulled away.

[7] The learned Resident Magistrate said that from that evidence, she found “that [although there was no verbal response] there was evidence of a physical response [from Mr Hoff] prior to the complainant leaving the room” (page 40 paragraph 4 of the record). That understanding, Mr Thomas submitted, was contrary to the evidence. The complainant had in fact said something different. He said:

“So at this moment I was fully awake. My brain worked completely so I grabbed the hand **and pulled it away from me**” (page 4 of the record). (Emphasis supplied)

There was in fact, Mr Thomas pointed out, no physical response as the learned Resident Magistrate had understood the evidence to be. That error, learned counsel submitted, caused her to find that there was deliberate action by Mr Hoff.

[8] We accept that the learned Resident Magistrate did in fact make the error pointed out by Mr Thomas. We do not accept, however, that it is that error that led the learned Resident Magistrate to make the finding that she did. In her very commendably compiled reasons for judgment, the learned Resident Magistrate thoroughly assessed the evidence of both sides and identified that the issue amounted to a question of fact as to whether Mr Hoff was asleep at the material time. She dealt with the issue squarely at paragraph 29(7) of her written reasons and stated that she believed that Mr Hoff was not asleep at the time, and that his actions were conscious and deliberate. She said:

“(7) Whether or not the defendant was asleep is a question of fact to be determined by assessing the credibility of the complainant and the defendant. I have accepted the complainant as a credible and reliable witness. Whilst the defendant is entitled to a good character direction, **I nonetheless do not find that the defendant was credible when he said he was asleep at the time of the acts. I find that it was the defendant’s intention to touch the complainant, and that the defendant was not asleep when he touched the complainant three times. As there were three (3) instances of touching, and in light of the fact the defendant’s hand was seen and felt inside the complainant’s trousers, I find that this was not due to accidental or involuntary action.** I have noted counsel’s suggestion that the complainant was speculating when he said the defendant was not asleep as he was breathing quickly and it is unusual to breathe quickly while asleep. Even after I disabuse my mind of this speculative statement, **I still find that the defendant was not asleep.** The act of touching was not a mere ‘brush’, but rather fondling of the buttocks and two deliberate attempts to touch the genitalia by inserting his hand into the complainant’s trousers.” (Emphasis supplied)

That extract demonstrates that the learned Resident Magistrate, as she was entitled to do, found that the way that the touching was done, including the fact that his hand was inside the complainant’s trousers, and the fact that there were three instances of touching, meant that the touching was conscious and deliberate. It is to be noted that the complainant also gave a demonstration of the way in which the touching was done. That would also have made an impression on the learned Resident Magistrate. The issue of intention was squarely addressed.

[9] Her error, mentioned above, was not repeated in this phase of her analysis of the case and we agree with the learned Director of Public Prosecutions that the error would not fatally undermine the reasoning. This ground fails.

Ground two – The consideration of the issue of non-insane automatism

[10] For this ground, Mr Thomas submitted that the learned Resident Magistrate misunderstood the defence and that her excursion into an examination of the defence of non-insane automatism demonstrated that misunderstanding. Learned counsel submitted that the misunderstanding of the defence led the learned Resident Magistrate to reject the defence and thereby convict Mr Hoff. He argued that the evidence did not address the issue of automatism, what it spoke to was that Mr Hoff was asleep. According to learned counsel that was the central issue and the learned Resident Magistrate ignored the issue and spoke instead to the question of credibility.

[11] Again, we cannot agree with Mr Thomas. Paragraph 29(7) of the learned Resident Magistrate's reasons for judgment (cited above) does not support his submissions. It is true that the learned Resident Magistrate did address the issue of non-insane automatism as part of her reasoning. After having made her findings at paragraph 29(7), she addressed and dismissed two other possible defences which she apparently thought arose on the evidence. The first was the aspect of automatism and the second was drunkenness. She said at paragraph 29(8):

“Further, I am not satisfied that the defendant has laid the proper evidential foundation for the defence of non-insane automatism as no medical evidence was supplied to support this, or as regards any

underlying medical condition, or medical history of previous episodes of sleep-walking, or the effect of any external factor (excluding alcohol)...The only possible 'external factor' on the evidence could be alcohol consumption. It would seem the defendant was reckless as to the possibility of becoming intoxicated and acting inappropriately... **Since voluntary intoxication is not a defence to the offence of indecent assault**, which is an offence of basic intent, the defence of non-insane automatism would not assist the defendant..." (Emphasis supplied)

The learned Resident Magistrate at paragraph 29(9) went on to find that there was "no evidence of a total destruction of voluntary control" and that she did "not accept that [Mr Hoff] unknowingly and unintentionally touched the complainant during his sleep".

[12] The learned Director correctly pointed out that it was the defence counsel that raised the issue of automatism. Learned Queen's Counsel observed that defence counsel at the trial cited the case of **Bratty v Attorney General for Northern Ireland** [1961] 3 All ER 523, which is a leading case dealing with automatism.

[13] We agree with the learned Director that in referring to the issues of non-insane automatism and drunkenness the learned Resident Magistrate was, perhaps overcautiously, seeking to assess every probable defence raised on the evidence to ensure that there could be no complaint that the defence had not been properly considered. We agree with her that neither of those elements affected the case.

[14] We do not agree with Mr Thomas' arguments in respect of this ground. It also fails.

Ground three – The appropriateness of the sentence

[15] Mr Thomas, in arguing this ground, submitted that the learned Resident Magistrate did not show that she appreciated that incarceration should be a penalty of last resort. He argued that she did not give sufficient weight to:

- a. the evidence of Mr Hoff's previous good character, including the evidence of the complainant that Mr Hoff was a long-time family friend;
- b. the fact that this was a "one-off situation", bearing in mind that Mr Hoff had been on vacation with the complainant's family before, without incident;
- c. the fact that Mr Hoff was from overseas;
- d. the fact that the goal of punishment should be rehabilitation.

Learned counsel argued that a "strong fine" or community service would have been the appropriate sentence in the circumstances.

[16] Mr Thomas' submissions, as persuasive as they were on this point, suffered from a fatal defect, namely, Mr Hoff's absence. Whereas, bearing in mind the several attestations as to Mr Hoff's good character, the age of the complainant, the fact that the offence was not more intrusive, and the fact that Mr Hoff does not normally reside in Jamaica, would have led us to consider a non-custodial sentence, this court cannot

act in vain. It could not seek to substitute a sentence which, in light of Mr Hoff's absence, it could not see enforced. Regrettably this ground also fails.

Conclusion

[17] The main issue in this case was the question of whether Mr Hoff was asleep at the time that the complainant felt the touches to his genitals and his buttocks. The learned Resident Magistrate, after seeing and hearing both the complainant and Mr Hoff, found, based on the evidence, that he consciously touched the complainant in a manner that constituted the offence of indecent assault.

[18] Although she did make an error in one aspect of her finding of fact, it was not fatal to her assessment of the case or her conclusions thereon. We find that the evidence entitled her to make that finding and that the conviction cannot be properly disturbed.

[19] Whereas we would have been inclined to set aside the custodial sentence, Mr Hoff's absence has prevented us from doing so. His failure to surrender to custody and attend the hearing of the appeal means that he is, at least for now, beyond the jurisdiction of the court. The court will not impose a penalty that it cannot see enforced.

Order

[20] The appeal is dismissed and the conviction and sentence affirmed. A warrant for the arrest of Mr Hoff is ordered so that the sentence can be served.