[2019] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 2/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

HUGH MYERS v R

Rudolph L Francis for the appellant

Miss Paula Llewellyn QC and Kemoy McEkron for the Crown

3 July 2019 and 15 November 2019

P WILLIAMS JA

[1] This is an appeal by Mr Hugh Myers, the appellant, from his conviction for assault occasioning actual bodily harm and malicious destruction of property in the Parish Court for the parish of Trelawny. On 19 January 2016 the learned Senior Parish Court Judge, His Honour Mr Stanley Clarke, fined the appellant $30,000.00 and ordered that in the alternative he serves 30 days' imprisonment at hard labour in relation to the conviction for assault occasioning actual bodily harm. The appellant was fined $10,000.00 and ordered that in the alternative he serve 10 days' imprisonment at hard labour in relation to the conviction for malicious destruction of property.

[2] The evidence relied on by the prosecution that led to the appellant's conviction is that he hit his neighbour Miss Adassa Palmer, the complainant, with a stone causing bruises/abrasions and swellings to her left knee. On the same occasion and arising out of the same incident, the appellant also damaged a blouse belonging to the complainant. The incident occurred on 2 January 2013 at Green Town in the parish of Trelawny.

[3] The appellant, whilst admitting that something did occur between himself and the complainant on that day, denied throwing stones at her. He also denied touching her and thereby causing any damage to her blouse.

[4] After being sentenced on 1 February 2016, the appellant, through an attorney-at-law, gave notice of his appeal against his conviction and sentence. The grounds were:

> "1. The verdict is unreasonable and cannot be supported by the evidence.
>
> 2. The conviction and sentence is not supported by the evidence."

[5] On 19 September 2018, the appellant himself filed supplemental grounds of appeal as follows:

> "1. Judge lying
>
> 2. Incompetent transcript
>
> 3. Unlawful
>
> 4. Bias
>
> 5. Unfair
>
> 6. No document serve to the defendant

7. No summing-up was allow

8. No witness."

[6] When the matter came on for hearing, Mr Francis, for the appellant, indicated he would not be pursuing the supplemental grounds of appeal. He had filed submissions that supported the initial grounds of appeal in a general way and thus he was permitted to make submissions, which had their basis in those original grounds.

The case for the Crown

[7] The complainant testified that at about 6' o'clock on the morning of 2 January 2013, she was "taking six goats to tie out". Whilst walking along the road, some of the goats ran off in the direction opposite to where she was going and she had to go after them.

[8] When she returned, she noticed that three goats had started eating some flowers belonging to the appellant. She said at that time she noticed the appellant coming through his gate. As he approached, he said "this Rass gal no hear me say she mustn't mek him animal touch mi sinting".

[9] The complainant said that as she bent down to hold one of the goats, one of the kids ran down the road and the appellant threw a stone at it, which hit it. She said "Archer, whey di backside you lick me goat for, you no see, a tek mi tek it off a you something". She described how the appellant then "grabbed [her] behind the back of [her] blouse and [she] said 'let me go' and moved away for him".

[10] She said the appellant then started to throw some stones at her. She tried to avoid them but one hit her on her left knee. At the time, she had a machete in her hand but she said she started to hunt stones to hit him back. She did not find any.

[11] The complainant then went to the Wait-a-Bit Police Station and made a report to Constable Ray Martin, the police officer who was on station guard duty. She testified that she gave the constable a blouse that she said was torn at the back. The value of the blouse was $600.00. She later visited the Percy Junior Hospital.

[12] At the completion of her evidence-in-chief, the learned Senior Parish Court Judge recorded the following:

> "Hugh Myers, None of what you say is true pure lies.
>
> 'And that I don't want to belittle myself by questioning her'
>
> Magistrate invited Accused to cross examine since he did not, he might make it easier for her to win. He insisted again he would not belittle himself by doing so. Accused proceeds to give long history of bad blood between parties."

[13] Constable Ray Martin gave evidence supportive of the complainant's evidence that she had handed over a blouse, which, he observed, was torn at the back. He also testified to seeing the bruises and swelling on the complainant's left knee. After he recorded her statement, he gave her a letter to seek medical attention at the Percy Junior Hospital. Upon her return to the police station, he went with her to the district of Green Town where she pointed out the appellant.

[14] Constable Martin said he informed the appellant of the report made against him, arrested, and charged him. Constable Martin testified that when he cautioned the appellant, in relation to the offence of malicious destruction of property, the appellant said, "officer I did not damage anything, no damage was done". In relation to the offence of assault occasioning actual bodily harm, he said, "officer, I did not hit anybody".

[15] The blouse the officer had received from the complainant was admitted into evidence as an exhibit.

[16] The appellant subjected this witness to cross-examination. The appellant challenged Constable Martin about his version of what had occurred when the constable had visited his home. The appellant also questioned Constable Martin about the condition of the blouse he had received from the complainant and the circumstances under which it had been collected.

The case for the defence

[17] The appellant gave sworn evidence. He said the incident took place at 6:26 am when he saw about six goats eating his plants. The goats ran off on his approach and he picked up a stone and threw it at one of the goats, which it hit "very hard".

[18] He testified that he then saw the complainant with a machete and that she was not wearing the blouse at the time. She started to throw stones at the front of his house. He said he walked along the wall of the house to avoid being hit by the stones. The complainant went further up the road, threw some more stones but none went into his yard.

[19] Under cross-examination, the appellant maintained that all he did that morning was to hit the goat with the only stone he threw at it. He insisted that he never touched the complainant.

The submissions

[20] Mr Francis, in advancing the challenge to the appellant's conviction and sentence, addressed two issues he identified as:

> (1) the defence
>
> (2) corroboration.

[21] In advancing his submissions, Mr Francis invited this court to consider the impact of the appellant failing to cross-examine the complainant and the appropriateness of a finding of guilt for the offence of malicious destruction of property.

[22] The main thrust of the attack concerning the defence was that the learned Senior Parish Court Judge failed to properly consider the defences which were available to the appellant. Mr Francis submitted that the first defence available was that of the defence of property, in that, the appellant was within his rights to drive away the goats that were eating his plants. Counsel relied on the authority of **Weaver v Bush** 8 TR 78.

> The second defence available, counsel submitted, was that of self-defence, which was available in circumstances such as this, where the complainant prosecutor assaulted the appellant first, and the appellant inflicted injuries in his own defence. It was further submitted that if in the act of defending himself, the appellant threw a stone, which caught the complainant, he would have been quite justified in doing

so. Counsel referred to **Cockcroft v Smith** 2 Salk 642 and **R v Deana** (1909) 2 Cr App R 75.

[23] Mr Francis submitted further that although the evidence of the complainant did not require corroboration in law or practice, in view of the history of animosity which existed between the parties, it was unsafe for the learned Senior Parish Court Judge to have found the appellant guilty on the oral evidence of the complainant alone. Counsel contended that the complainant could have sustained the injuries to her left knee, as borne out by the medical certificate, in some other way.

[24] Mr Francis noted the failure of the appellant to cross-examine and thereby challenge the version of the events that the complainant gave. This, Mr Francis submitted, was a flaw that affected the appellant's case. He contended that the learned Senior Parish Court Judge ought not to have permitted the appellant not to cross-examine, especially since he was an unrepresented litigant untrained in the law. In these circumstances, the appellant was denied a fair trial.

[25] Finally, Mr Francis questioned the sufficiency of the evidence on which the appellant was convicted for malicious destruction of property. He submitted that on this evidence there was nothing to prove that the damage to the blouse was in fact caused by a deliberate act on the part of the appellant.

[26] In response, Mr McEckron submitted that the elements of both offences were made out on the Crown's case without any challenge during cross-examination. He submitted that the sole issue for the learned Senior Parish Court Judge, as the tribunal of both fact and law, was the credibility of the witnesses, including the appellant who

gave sworn evidence. The Senior Parish Court Judge having assessed the witnesses and having found the Crown's witnesses to be credible, the conviction and sentence could not be said to be unsupported by the evidence.

[27] Mr McEckron submitted that the appellant never relied on the defence of property, whether expressly or by implication. The appellant's defence was a denial based on his assertion that the complainant was lying. Thus, Mr McEckron reiterated, credibility was the main issue for the learned Senior Parish Court Judge, once the Crown had satisfied and discharged its burden and standard of proof.

[28] In any event, his submissions continued, the defences Mr Francis advanced were not made out on the evidence. Firstly, the evidence was that at the time of committing the offences for which he was convicted, the appellant was not defending his property. Mr McEckron pointed out that the evidence from the Crown clearly showed that the appellant had taken steps to defend his property by hitting the goat with the stone, and thus his actions thereafter towards the complainant were excessive.

[29] Mr McEckron contended that the appellant also did not raise the issue of self-defence. Counsel noted that nowhere in the evidence did the appellant indicate that he felt threatened by the complainant although there was evidence that she had a cutlass. Counsel also noted that it is not borne out on the evidence that the complainant attacked or threatened the appellant or was an aggressor towards him at any point in the day. The assault was not justifiable and the appellant acted out of revenge or retaliation.

[30] In relation to the issue of corroboration, Mr McEckron was content to remind the court that there was no requirement for corroboration in this case. He, however, submitted that the evidence of the investigating officer who saw the injuries and the medical report supported the narrative of the complainant.

[31] In conclusion, Crown Counsel submitted that the learned Senior Parish Court Judge, having the benefit of conducting the trial and in his assessment of the witnesses in determining their credibility, is better able as the fact finder to come to the finding of facts which he did. He referred to the case of **R v Joseph Lao** (1973) 12 JLR 1238 in submitting that the fact finder's verdict should not be disturbed unless it was shown to have been palpably wrong.

[32] Mr McEckron acknowledged the possible detrimental effect the appellant's failure to cross-examine the complainant had on his case. However, Crown Counsel submitted that from the record, it could not be said that the learned Senior Parish Court Judge did not assist the appellant. Further, he contended that it could not be said that the appellant may not have understood the implications of his failure to cross-examine the complainant but deliberately choose not to do so. Crown Counsel pointed to the cross-examination of the investigating officer by the appellant, which was extensive and appropriate. In the circumstances, Crown Counsel submitted, the appellant was not denied a fair trial and the verdict arrived at was inevitable.

Discussion and disposal

[33] A Parish Court Judge is obliged to record the findings of fact on which the verdict of guilty is founded as provided at section 291 of the Judicature (Parish Court) Act. The import of that requirement remains as was discussed by Carey P (Ag), as he then was, in **R v Lloyd Chuck** (unreported) Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 23/1991, judgment delivered on 31 July 1991. He said as follows:

> "Our firm conclusion is that a Resident Magistrate satisfies the provisions of Section 291 by recording in summary form findings of fact which go to prove the guilt of the accused. Where there is conflicting evidence between the Crown witnesses, he should state whose evidence he accepts and whose he rejects. In that case, it is expected that some reason or explanation for the choice, will be shortly stated. If a conclusion is derived from inferences, then the primary facts from which the inference or inferences are drawn should be stated. Findings in a summary form is not a licence for laconic statements, and we would think that clarity in expression is an advantage. The language therefore in which the findings are couched should demonstrate an awareness of the legal principles which are involved in the case. If he must warn himself, the findings should show he has done so."

[34] In this case, in recording his findings of fact, the learned Senior Parish Court Judge commenced by reviewing the evidence and then set out the law applicable to the offences for which the appellant was charged. In so doing, there can be no dispute that he addressed his mind to the evidence and the applicable law.

[35] In relation to the first count, he expressly recognised that the actus reus must involve assault or battery and that it must be established that it occasioned the victim actual bodily harm. Further, he stated that the mens rea is the same as in the offence of assault and must be committed intentionally or recklessly.

[36] The learned Senior Parish Judge then conducted what he described as an assessment of the evidence that was presented. Curiously, he noted the following:

> "The cross examination of Adassa Palmer by Hugh Myers, taken as a whole, was ineffectual. It focused on peripheral issues, for example, the identity of the investigating officer and which officer did (or did not) alight from the police vehicle."

[37] This was contrary to the note that he had made of the appellant's refusal to question the complainant. It was, in fact, the investigating officer who was questioned by the appellant about the visit the officers had made to his home. This error does not influence, significantly, the findings, as early in his reasons for judgment the learned Senior Parish Judge stated:

> "The accused refused to cross-examine the complainant on the basis that everything she had said in evidence is a lie and he would have belittled himself if he did."

[38] The Senior Parish Court Judge demonstrated that he believed the complainant and, based on the medical evidence, accepted that a stone was used to hit her and found that it was the appellant who threw the stone that caused the injury. He accepted the complainant as a witness of truth who gave credible evidence. He was entitled to do so.

[39] The defence of the appellant was a denial of doing anything to cause the complainant injury or to damage her blouse. There was no evidence to support the defences of either defence of property or self-defence. The learned Senior Parish Judge was obliged to consider the defences, which were available from the evidence even if the appellant did not rely on it. He could not have considered defences that had no basis in

law from the evidence presented. The complaint made about the manner in which the learned Senior Parish Court Judge dealt with the defence is without merit.

[40] Also without merit is the assertion that it was unsafe for the learned Senior Parish Judge to have found the appellant guilty on the evidence of the complainant alone. The learned Senior Parish Judge was satisfied that the complainant was credible. There is evidence to support the conviction; it ought not to be disturbed.

[41] In relation to the count for malicious destruction of property, the learned Senior Parish Court Judge appreciated that the damage to the property must be shown to have been done either wilfully or at least recklessly.

[42] For the offence of malicious destruction of property, the question is whether there was evidence which showed that some physical act of the appellant caused the damage to the blouse of the complainant, with an actual intention to do the harm that was done, or recklessly as to whether such harm should occur or not (that is with the appellant foreseeing that the particular kind of harm might be done and yet had gone on to take the risk of it), see **R v Pembliton** (1874) LR 2 CCR 119 and **R v Cunningham** [1957] 2 QB 396.

[43] The first issue therefore is whether there was evidence of any act by the appellant which could have caused the damage. The evidence recorded by the learned Senior Parish Court Judge concerning this issue is as follows firstly from the complainant herself:

> "I was bending down to hold on to the goat rope. And Hugh Myers grabbed me behind the back of my blouse and I said 'let me go' and moved away from him…
>
> "My blouse was torn at the back. The front of the blouse had patterns and blue and black. Value Six Hundred Dollars. I left it with the police."

[44] The investigating officer testified that he noticed the complainant had a blue blouse "torn at the back". In cross-examination, the appellant invited the officer to give an opinion as to whether someone would wear that blouse to tie out goats. The appellant, when arrested and cautioned said he "did not damage anything, no damage was done".

[45] The learned Senior Parish Court Judge made the following finding:

> "The subject matter of this offence was the blouse the complainant wore to the police station. The investigating officer, I accept, saw the item in its damaged state. The evidence of the complainant coupled with that of the investigating officer was more credible than that of the [appellant] who insisted that he never touched her. But I'm satisfied that he touched her blouse enough in circumstances to cause the damage complained of."

[46] The evidence of the complainant stopped short of saying the appellant actually held the blouse when he grabbed her "behind the back of [her] blouse" such that in moving away from him the blouse was torn. However, there was sufficient evidence from which the learned Senior Parish Judge could have inferred that the appellant had caused the damage. He would have seen and been able to examine the blouse for himself. He saw and assessed both the complainant and the appellant. The finding of fact he made

about this count has not been shown to be palpably wrong such that it should be disturbed.

[47] The failure of the appellant to cross-examine the complainant was cause for anxious consideration. This failure meant that the complainant's evidence remained unchallenged. The learned Senior Parish Judge was required to ensure that the appellant, as an unrepresented or self-represented litigant, had a fair trial and this included advising him of the significance of this failure to cross-examine the witnesses.

[48] The fact that there is no verbatim record of what transpired when the complainant completed her evidence-in-chief is significant in a consideration of this issue. What the learned Senior Parish Judge recorded, as already noted at paragraph [12], can best be a summary of what occurred. It is noted that the appellant was told that it would be easier for the complainant to win if he did not cross-examine her. This certainly was in terms the appellant ought to have understood. The response recorded is that the appellant "insisted again" that he would not belittle himself by doing so. This suggests that there was some discussion between the learned Senior Parish Judge and the appellant, which ended with the appellant proceeding to give a long history of bad blood between the parties.

[49] From this record of the exchange between the learned Senior Parish Judge and the appellant, it is clear that the appellant was afforded the opportunity to cross-examine the complainant after being made aware of what his refusal to do so would mean. In the

circumstances, the learned Senior Parish Judge was dealing with a difficult situation and did the best he could.

[50] The appellant's cross-examination of the investigating officer demonstrated his awareness of the issues. The appellant was sufficiently incisive in his questioning which showed that he was competent to adequately represent himself and advance his case. It made it even more apparent that he was deliberate in his choice not to cross-examine the complainant.

[51] The question remains whether the appellant was denied a fair trial. Having carefully considered the conduct of the trial as a whole, the refusal of the appellant to cross-examine the complainant, whilst significant, does not affect the overall fairness of the trial to justify setting aside the learned Senior Parish Judge's finding.

[52] In the circumstances, based on this analysis, there is no basis to disturb the conviction founded on the findings of fact of the learned Senior Parish Judge. The evidence was sufficient to support the conviction, which cannot be said to be unreasonable.

[53] The result is that the appeal must be dismissed and the conviction and sentence affirmed.