



In The Supreme Court of Bermuda

CIVIL JURISDICTION

APPELLATE JURISDICTION

2021 No. 19

BETWEEN:

AMIR MIZRACHY

Appellant

-and-

THE KING

Respondent

Before: Hon. Assistant Justice Mark Diel

Appearances: The Appellant in Person
Ms Shaunte S Simons-Fox of the Department of Public Prosecutions
for the Respondent

Date of Hearing: 17 April 2023

Date of Judgment: 6 December 2023

JUDGMENT

1. This is an appeal from a decision of Magistrate Mr T Chin convicting the Appellant of three offences.

(1) Use of offensive words in a public place;

(2) Oral communication intending to cause fear or alarm contrary to Section 200A of the Criminal Code; and

(3) Willful and unlawful damage to a vehicle owned by the Complainant Ms Gremarie Armstrong.

2. The Appellant left no legal stone unturned in his appeal and I do not intend to deal with each and every one of them.

3. Two aspects of the appeal were of note. Firstly, the decision of the Learned Magistrate seemed almost entirely devoted to statements made by him of his preferring the evidence of the prosecution witnesses over that of the prosecution some instances will suffice:

“I found all witnesses, the complainant and the independent civilian witnesses and police officers to be credible witnesses. All which gave true evidence of what they witnessed or saw without any attempt to falsely implicate the defendant or mislead the Court.

At the close of the prosecution case, the defendant gave evidence on his own behalf. When his case was finished, he called 1 witness, that 1 witness being this morning. That witness was not a witness to any of the alleged offences, but rather a witness to Mr Mizrachy’s character.

Having reviewed all the evidence, I am satisfied so that I feel sure that the allegations against Mr Mizrachy have been made out. I do not believe Mr Mizrachy was a credible witness, that he was entirely honest about what took place when he represented himself, which he was entitled to do, and didn’t do badly I might say, but nonetheless had some difficulties. The main one I found was that he did not challenge any of the prosecution witnesses, namely the complainant or the independent civilian witnesses about what they witnessed.”

4. It is to be noted in the above extract the Learned Magistrate made note that the Appellant failed to put his case to the Prosecution witnesses. Whilst the Appellant is clearly a man of some considerable legal training from another jurisdiction, he is not an attorney in this jurisdiction and cannot be expected to know the niceties of criminal procedure in the jurisdiction in similar fashion. It would be unfair to fault him for this falling when he was unrepresented.

5. I am guided by the comments of my very Learned colleague, Mr Duncan AJ, in *Wilson v Miller* 2017:53 where he cited extracts from the Magistrate's judgment which are strikingly similar to the comments made by the Magistrate at the case at Bar.

Mr Duncan AJ at paragraph 5 of the decision had this to say:

The Worshipful Magistrate Tokunbo was not impressed with Mr. Wilson's evidence. He said:

"As regards the Defendant's testimony, he did not impress me as a witness of truth. I did not find him to be fully credible about his interest in, and connection with the package or about why he never told his mother about the arrival of the package for her, of which he had no interest."

The Learned Magistrate also found:

"The Defendants explanation that he was merely collecting his mother's package is not satisfactory in all the circumstances, and as stated earlier, I did not find him to be truthful about his involvement".

On the 3rd March 2017, he convicted Mr. Wilson on the single charge he faced.

I find in the present case that the Learned Magistrate failed to provide proper reasons in his judgment.

6. But the above does not end the matter in my view. Absent from the decision at Bar was the telling evidence of two independent witnesses who observed most of the argument between the Appellant and the Complainant. Ms Robinson watched the events from her office window. She saw the Appellant use an item (she thought it was a key but could not be sure) and drag it along the side of the Complainant's vehicle. This happened again a few minutes later, this time she saw it with a colleague, Mr Robert King. Mr King clearly formed the view something was amiss as he went down the three flights of stairs to report what he had seen to the police, namely PC Clyde. PC Clyde also observed that the car had scratch marks on both sides of the vehicle and on the "rear gate" of the car. Clearly Mr King was so concerned at the actions of the Appellant that he thought it necessary to report it to the police.

7. Whilst I agree that the Learned Magistrate's decision was lacking in reasons given the independent evidence of the two witnesses, I am not persuaded that there has been a miscarriage of justice. Accordingly on Count 3, I dismiss the appeal.
8. Turning to the second Count of the oral communication, namely "move your fucking car black bitch", contrary to Section 200A of the Criminal Code, here I am faced with a "he said/she said" situation. Doubtless emotions were running high but I cannot be satisfied so that I am sure that this offence occurred. It is with some reluctance that I quash the conviction of the Count.
9. Finally turning to the charge of offensive words in a public place, specifically St Andrews Church car park, is this a "public place"? In evidence is a photograph warning people not to trespass and not to park their cars there without permission. This is clearly in my view private property.

"Public Place" is defined in Section One of the Act as:

Any highway, wharf, street, bridge and thoroughfare, and includes-

- (a) every place (including any foreshore or any beach or open space belonging to the Government) to which the public under ordinary circumstances have the right of legal access, whether with or without payment of any entrance fee or gate money; and
- (b) any steamer, boat or vehicle plying for hire in Bermuda; and
- (c) all land and land covered with water contiguous to a public place from which any act constituting an offence against this Act would ordinarily be viewable or audible to or by persons in such public place.

In my opinion a church car park is not a public place. Further and in any event, no evidence was led that the public have access to this area as of right nor was any led that these offensive words could be heard in contiguous public places. Accordingly I quash the conviction on this Count as well.

10. I will hear the parties on any consequential orders for directions.

Dated this 6th day of December 2023



MARK DIEL
ASSISTANT JUDGE