In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 10

KETHYIO WHITEHURST

Appellant

-v-

FIONA MILLER

Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction in Magistrates' Court-violently resisting arrest -sufficiency of findings and reasons for decision-Criminal Jurisdiction and Procedure Act 2015, section 83(5)

Date of hearing: April 25, 2017
Date of Judgment: May 1, 2017

Mr. Arion Mapp, Christopher's, for the Appellants
Ms. Larissa Burgess, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant was convicted on January 10, 2017 by the Magistrates' Court (Wor. Tyrone Chin) of one count of violently resisting arrest contrary to section 2(f) of the

[1] The present judgment was circulated to the parties without a hearing.

Summary Offences Act 1926. This followed a trial at which he was acquitted of two other charges of doing grievous bodily harm and assault occasioning actual bodily harm respectively.

2. The initial sole ground of appeal was that the Learned Magistrate erred in ruling that there was a case to answer. This ground was clearly hopeless. On the morning of the hearing the Appellant's counsel filed an amended Notice of Appeal with the following new ground of appeal:

> "*The Learned Trial Judge failed to comply with the requirements set out within section 83 of the Criminal Jurisdiction and Procedure Act 2015.*"

The Decision of the Magistrates' Court

3. The Prosecution case relied primarily on the evidence of two Police Officers who testified that they approached the Appellant to question him at Dockyard about an assault after a female member of the public (who never gave a statement or gave evidence) identified the Appellant as the assailant. Because of the crowds of people and presence of supporters of the Appellant, they invited him to accompany them to the Police Station and only arrested him after he declined to attend voluntarily. He violently resisted this arrest.

4. Mr Mapp made a submission of no case to answer the essence of which was recorded in the Learned Magistrate's notes. The points raised were that (1) the Appellant had been unlawfully detained before he was arrested and (2) the officers did not have genuine grounds for suspecting the Appellant had committed an offence, and therefore he was entitled to resist what was subsequently an unlawful arrest. Ms Burgess' response was also recorded. She submitted that the cases relied upon on pre-arrest detention were distinguishable having regard to the facts in the present case where the Appellant was not actually deprived of his liberty. Further, there were good grounds for the officers to have delayed the arrest, which they genuinely believed was appropriate at an earlier point. The Ruling was as follows:

> "*The Court having heard the arguments rules that there is a case to answer.*"

5. The Appellant gave evidence in his own defence which potentially (but not very clearly) supported his case that he was effectively detained before he was formally arrested. When asked in his examination-in-chief "*why did you refuse to cooperate with the Police*" he answered: "*First I had nothing to do with the matter. And when they first approached me they didn't tell me I was under arrest.*" Under cross-

examination he maintained the position that he should have been arrested from the outset but it appeared that the Officers were unsure and also asserted that he was grabbed first and then told he was being arrested afterwards. He also admitted that he resisted the arrest. He called a friend to support his case on the main charges who did not materially assist on the violently resisting arrest offence.

6. In his closing submissions, Mr Mapp invited the Court to consider in light of the Appellant's own evidence whether the Appellant had been unlawfully detained prior to his arrest based on the evidence of one of the Officers to the effect that before he was arrested and while he was being questioned, he did not consider the Appellant was free to go. The Court was referred to *Spicer-v-Holt* [1976] RTR 389, section 5 of the Constitution, *Fraser Wood-v- DPP* [2008] EWHC 1056 and *R-v-Iqbal* [2011] EWCA Crim 273, cases cited at the no case submission stage. He also queried the credibility of Officer Ward on the question of why he did not effect the arrest earlier if he had reasonable grounds to suspect the Appellant from the outset. The Crown's preceding closing submission was recorded as relying on the consistency and credibility of the Crown witnesses as proving the Prosecution case so that the Court could be satisfied of the Appellant's guilt.

7. The final Judgment on the charge which forms the subject of the present appeal read in its totality as follows:

> "*The Court heard further evidence from PC Ward and PC Evelyn as to the Defendant when arrested that the Defendant violently resisted PC Evelyn while he was in the execution of his duty….The Court does find the Defendant guilty beyond reasonable doubt on Count 3 that when arrested the Defendant violently resisted while Pc Evelyn was acting in the execution of his duty.*"

The duty to record findings and/or reasons for decisions

8. Section 83(5) provides as follows:

> "*(5) The record of proceedings must include the magistrates' court's final judgment in writing, which will include—*
>
> *(a)the point or points for determination;*
>
> *(b)the decision made on such points; and*
>
> *(c)the reasons for the decisions.*

9. Section 83(5) was not complied with in the present case because the final judgment did not include:

    (a) the points for determination. These were:

        (i) whether the Appellant was unlawfully detained prior to his formal arrest;

        (ii) whether the arresting Officer(s) did not have reasonable grounds for suspecting him of the offences for which he was arrested;

        (iii) if there was a reasonable doubt about either issues (i) or (ii), whether it was also possible that the Appellant used only reasonable force to resist an unlawful arrest;

    (b) the decision made on such points was not recorded as the points themselves were not identified;

    (c) there were (and could be) no reasons given for the non-decision.

10. Since no reasons for rejecting the submission of no case to answer were given, the final judgment required clear explanation, especially since the Appellant gave evidence in his own defence and merely needed to raise a reasonable doubt to be entitled to an acquittal. There was a comprehensive failure to comply with section 83(5) in case where compliance could perhaps have been achieved quite concisely if the issues raised by the Defence were viewed wholly unmeritorious.

11. While there was clearly sufficient evidence adduced by the Prosecution to support a conviction and rebut the defence which was advanced, this Court is left in the dark in terms of understanding precisely why the defence was rejected. The Defence case was a highly legalistic one which it was properly open to the Learned Magistrate to accept, depending upon what view he took of evidence which to some extent agreed. Proving the Prosecution case entailed more than simply preferring the evidence of the Crown to that of the Defence: it required the Court to be satisfied that the Defence's interpretation of that evidence (on the pre-arrest detention issue) was not a plausible one.

12. Mr Mapp aptly referred this Court to a case in which he also appeared as guidance to the approach to decision-making required under section 83(5) of the Criminal Jurisdiction and Procedure Act 2015: *Keishun Trott-v-The Queen* [2016] SC (Bda) 100 App (23 November 2016). It is disappointing that the *Trott* decision, published roughly six weeks before the trial Judgment in the present case, was effectively studiously ignored. In that case I held (at paragraph 18(b)):

"*…because the points for determination were not expressly identified, it is impossible to safely infer that in finding that each charge was proved the Learned Magistrate consciously addressed these key issues. The charges and issues were not so straightforward that this Court can confidently rely on implicit findings based on a clear rejection of the Defence case and acceptance of the Prosecution case*

The consequences of a failure to comply with section 83(5)

13. Mr Mapp referred this Court to the same case as regards the consequence of failing to adopt the correct approach required by section 83(5):

> "*22…A failure to record findings and reasons does not without more vitiate a conviction. In all the circumstances of the present case, however, it is impossible for this Court to conclude that despite this series of unfortunate legal lapses, none of which individually would have made the conviction unsafe, no serious miscarriage of justice has occurred. However, these irregularities in the trial Judgment were not contributed to by the Prosecution to any or any material extent. In the present case… despite the absence of adequate findings or reasons it is possible to fairly conclude that the Crown case was far from a weak one. So while the convictions must be quashed and set aside and the appeal allowed, I consider (as foreshadowed at the hearing of the present appeal) that this matter should be remitted to the Magistrates' Court to be retried before a different Magistrate.*"

14. Where there is so complete failure to comply with section 83(5) of the Criminal Jurisdiction and Procedure Act, as occurred in the present case, so the appellate Court has no documented basis for finding that the issues which arose for determination were consciously considered and determined against the accused, the relevant conviction cannot be properly viewed as a safe one. The offence charged is, it is true, only a summary one. One aspect of the Defence case (that no genuine suspicion of guilt existed) seems (based on the Record) almost absurd. But the nature of the defence involved the liberty of the subject and invoked (albeit indirectly) constitutional rights.

15. The importance of adequate findings and reasons in trial courts has been explained in '*A Guide for the Magistrate in the Commonwealth: Fundamental Principles and Recommended Practices*'[2] in the following way:

> "*The giving of reasons for decision is consistent with the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done.*
>
> *The giving of reasons promotes transparency and accountability through the provision of "accessible reasoning [which is] necessary in the interests of victims, the parties, appeal courts and the public".*
>
> *The giving of reasons for decision furthers judicial accountability in the broader democratic sense:*
>
> > *…those who are entrusted with the power to make decisions affecting the lives and property of their fellow citizens should be required to give in public an account of the reasoning by which they came to those decisions.*
>
> *As pointed out by Justice Murray Gleeson:*
>
> > *Providing reasons promotes good decision-making because decision-makers who know that their decisions are open to scrutiny and who are obliged to explain them are more likely to make reasonable decisions.*"

16. In the present case, however, the Prosecution case was clearly, based on the Record, a strong one and was presented by Ms Burgess at trial in an effective and proper manner. Justice requires that the conviction should be set aside but that is primarily on the basis that justice was not seen to be done. On the other hand, a complete acquittal based solely on a failure to comply with section 83(5) would equally be unjust from a broader public interest perspective.

17. Crown Counsel unsurprisingly invited me to order a retrial if it was found that the non-compliance with section 83(5) complained of rendered the conviction unsafe so that the conviction had to be set aside. The Appellant's counsel sensibly did not seek to oppose such an outcome.

[2] Commonwealth Magistrates and Judges Association, January 2017, page 95. This Guide was only received in Bermuda and circulated to Magistrates on January 12, 2017.

Disposition

18. The appeal is accordingly allowed, the Appellant's conviction is set aside and the matter remitted to the Magistrates' Court to be retried before another Magistrate.

Dated this 1st day of May 2017 _____

IAN RC KAWALEY CJ