

In the Supreme Court of St. Helena

Citation: SHSC 27/2021

Criminal

Judgment on appeal against conviction

Brandon Luke Caswell

-v-

Attorney General of St Helena

Ruling dated 17th February 2022

The Chief Justice, Rupert Jones

1. This is my judgment on the appeal of Brandon Caswell ('the Appellant') of his petition of appeal against conviction by St Helena Magistrates' Court ('the Court'). It follows an oral hearing which took place before me remotely by video on 11 February 2022.
2. I begin by repeating my thanks to the legal representatives of the parties, Mr Brown of Counsel for the Attorney General and Ms Barber, the Public Solicitor, for the Appellant. I am grateful for their preparation and presentation of the appeal both orally and in writing.
3. As I emphasised during the hearing, I have read and considered: the witness statement of Ms Baradi; transcripts of the 999 call and Body Camera footage from the police; the six transcripts of the prosecution evidence heard by the Court; the Chief Magistrate's reasoned ruling on the application to admit bad character evidence; his ruling after trial; the petition on behalf of the Appellant prepared by the Public Solicitor; and the prosecutor's response prepared by Mr Brown of counsel.

The nature of the conviction

4. On 19 November 2021 the Appellant was convicted by the Chief Magistrate and two Lay Magistrates following a four-day trial before the St Helena Magistrates' Court.
5. The Appellant had initially faced 8 charges but at the close of the prosecution case a submission of no case to answer was advanced by the defence. Following this submission, the Court determined that there was no case to answer on counts 2, 4 and 8. Count 1 was reduced to a charge under section 2 of the Protection of Harassment Act 1997, as the Court found that there was no evidence of fear of violence.

6. At the conclusion of the trial, the Appellant was convicted of four criminal offences: one charge of harassment contrary to section 2 of the Protection from Harassment Act 1997; and three charges of breaching his Sexual Offences Prevention Order (SOPO) contrary to section 113 of the Sexual Offences Act 2003. He was acquitted of a further charge of breaching his SOPO.
7. The allegations in the case are set out in more detail in the Court's ruling after trial at paragraphs 2 – 8 and are not repeated. However, the Court's findings can be summarised by reference to paragraph 48 of the Chief Magistrate's ruling:
 48. We make the following findings of fact to the criminal standard:
 - a. That the defendant was subject to a sexual offences prevention order at the time of the allegations.
 - b. That at some time between his release from prison on 4th September 2021 and the 15th October he visited Miss Baradi's house and used words of a sexual nature.
 - c. That during the same period he used words of a sexual nature to Miss Baradi as she passed his house.
 - d. That in the early hours of the 16th October 2021 the defendant attended Miss Baradi's house and used words of a sexual nature.
 - e. That by attending the complainants house on more than one occasion and demanding sex he pursued a course of conduct which amounted to harassment of Miss Baradi by causing her distress.
8. The prosecution witnesses who gave oral evidence at the trial were Linda Baradi ('Ms Baradi'), PC Brittney Coleman and DI Liam Fuller. The Appellant and two further witnesses on his behalf (his mother Wendy Bone, and his mother's partner Brian Williams) gave oral evidence and were cross examined.

The nature of the appellate jurisdiction

9. Section 242(2) of the Criminal Procedure Ordinance 1975 permits an appeal against conviction to the Supreme Court from the Magistrates' Court on a matter of fact as well as on a matter of law. The Appellant's appeal consists of both.
10. Section 245 provides for an appellant to bring a written petition of appeal. Section 248 provides for a summary dismissal of an appeal without hearing from the parties (which was not appropriate in this case). Section 250 provides for my jurisdiction and powers following the hearing of this substantive appeal against conviction:

Criminal Procedure Ordinance 1975

Summary dismissal of appeal

248 On receiving a petition made under section 245, the Chief Justice must peruse the same and after perusing the record of the Magistrates' Court—

(a) ...

(b) in any other case – if the Chief Justice considers that no question of law is raised proper for consideration by the court, or that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or

lead the court to consider that the sentence ought to be reduced, the Chief Justice may dismiss the appeal summarily without hearing the appellant or the appellant's advocate.

Powers of Supreme Court on appeal against conviction

250. (1) On an appeal against conviction, the Supreme Court, subject to subsection (1A), must allow the appeal if it is of the opinion that—

- (a) the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence;
- (b) the judgment should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice; or
- (c) on any other ground there has been a miscarriage of justice,

and in any other case must dismiss the appeal.

(1A) The court must, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.

(2) Subject to subsection (1), the Supreme Court on any appeal may—

- (a) reverse the finding and sentence, and acquit or discharge the appellant, or order a new trial;
- (b) alter the finding and find the appellant guilty of another offence, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence; or
- (c) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence or make any order which the Magistrates' Court could have made.

The petition and grounds of appeal

11. The Appellant appeals against the conviction of the Magistrates' Court on the following three grounds which are set out in a document prepared by the Public Solicitor dated 29 November 2021:

- i. The Magistrates "cherry picked" from inconsistent evidence of Linda Baradi to construct a narrative of guilt (Ground 1);
- ii. The Magistrates erred in admitting previous convictions of the Appellant relating to making obscene telephone calls (Ground 2); and
- iii. The evidence of Linda Baradi was so inconsistent and unreliable that no reasonable court properly directing itself could convict the Appellant upon it (Ground 3).

Grounds 1 & 3

12. Ms Barber accepted during oral argument that the first and third grounds of appeal could be considered together as they amount effectively to the same challenge to the reliability of Ms Baradi's evidence.

13. In relation to Grounds 1 and 3, the Public Solicitor relied heavily on the fact that Ms Baradi was the only direct or eye-witness on behalf of the prosecution in relation to each charge and allegation pursued by the Attorney General (the prosecution). She submitted that Ms Baradi's evidence was so peppered with inconsistencies as to be inherently unreliable. Therefore, she submitted that the Magistrates could not safely have convicted the Appellant based upon Ms Baradi's evidence.

14. In the petition, Ms Barber gave numerous examples of Ms Baradi's inconsistent evidence on oath - both inconsistencies within her oral evidence and inconsistencies between her oral evidence and witness statement. She suggested there were important inconsistencies on the following topics:

When the Appellant first came to Ms Baradi's house;

How often the Appellant came to her house;

In relation to the alleged visit by the Appellant to her property on the evening of the 16th October 2021;

In relation to the alleged visit by the Appellant to her property on the morning of the 16th October 2021;

In relation to whether she had actually seen the Appellant at the property; and

The nature of the sexual comments made.

15. In her oral submissions Ms Barber pointed to examples from the transcript of evidence from the trial where Ms Baradi had not even been consistent in her oral evidence supporting the four charges and central allegations upon which the Appellant was convicted:

Despite the prosecution's submission that Ms Baradi's evidence was consistent regarding the Appellant visiting her house on more than one occasion, Ms Baradi accepted during cross examination that the Appellant visited the house on only one occasion (see transcript 4, at page 6);

Despite the prosecution's submission that Ms Baradi's evidence was consistent regarding one of the Appellant's visits taking place (at night) in the early hours of 16 October 2021 (the day of his arrest), Ms Baradi in cross examination appeared to be saying the visit took place on the night 16/17th night (Saturday night to Sunday morning - see transcript 4, pages 3-4);

Despite the prosecution's submission that Ms Baradi's evidence was consistent regarding the Appellant making sexual suggestions when he came to her house, during cross examination Ms Baradi said that the Appellant never said anything when he came to the house (see transcript 4, page 5-6); and

Despite the prosecution's submission that Ms Baradi's evidence was consistent regarding the Appellant making sexual comments to her when she passed his house,

during cross examination Ms Baradi said that the Appellant never made any sexual comment to her at this time (see transcript 2, page 5).

16. Ms Barber submitted that Ms Baradi's witness statement was put to her by the prosecution and she simply agreed the contents during her oral evidence. It was not clear that she understood when answering questions about the statement that she was being asked whether she agreed with the content of her statement. In the statement she made very specific allegations about words used by the Appellant which were inconsistent with her evidence on oath.
17. Further, the Appellant, his mother Wendy Bone, and his mother's partner Brian Williams gave evidence as to the Appellant's whereabouts on the evening on the 16th October 2021. All three stated that the Appellant was at home and did not leave at any point between the 1800 hrs and his arrest at about 2200. On this basis of this evidence, he was acquitted of count 5.
18. Having determined that Ms Baradi's evidence was unreliable in relation to the allegation of a visit by the Appellant to her home address on the evening on the 16th October 2021, just prior to her phone call to the police, Ms Barber submitted on behalf of the Appellant that the court should have been even more cautious as to the reliability of Ms Baradi's evidence of in relation to the other charges.

Ground 2

19. In relation to Ground 2, Ms Barber submitted that the Appellant has a lengthy history of sexual offences. An application was made by the prosecution to admit his previous convictions for these offences which was resisted by the defence. The defence conceded that two offences previously committed on women in the same street as these offences were of a striking similarity, and no application was made to resist the admission of these offences.
20. It was however submitted that previous offences relating to obscene phone calls were offences of a different nature and ought not to have been admitted.
21. The court admitted the obscene phone calls on the basis that the language used in the calls was similar to the comments attributed to the Appellant by Ms Baradi in her statement. Ms Barber submitted that it was improper to admit the evidence of the calls on this basis as her evidence as to what, if anything, was said by the Appellant was wholly unreliable, and the effect of admitting the phone calls was to provide disproportionate support for already unreliable evidence.
22. She further submitted that there is nothing particularly unusual or striking about the words used in the phone calls or the alleged comments used that would allow the words used in the phone calls to safely support that the alleged sexual comments made were made by the Appellant.

Discussion and Analysis

Grounds 1 and 3 of the Appellant's appeal – the reliability of the evidence of Linda Baradi and the “cherry picking” of evidence

23. As Mr Brown conceded, Linda Baradi was the prosecutions' key witness and only direct or eye witness. She is a 71-year-old lady who at the time of these offences lived alone and was suffering with depression. She gave oral evidence over the course of two days. At times during her evidence it is apparent from the transcripts that she became confused with dates, times and the frequency of the Appellant's visits to her property. Nonetheless, I accept the prosecution's submission that it is important to remember that these visits occurred over a period of about six weeks, and over a month before she gave her evidence at trial.
24. I also accept the prosecution's submission that despite her confusion and forgetfulness during oral evidence insofar as dates, times and the frequency of visits, Ms Baradi did give consistent, reliable and credible evidence in respect of a number of fundamental points. Ms Baradi was largely consistent in her more contemporaneous 999 call, statements to police captured by Body Camera footage and witness statement together with her oral evidence in chief and re-examination about the four central allegations that the Appellant was convicted upon:
- a) the Appellant had visited her property on more than one occasion following his release from prison;
 - b) these visits took place late at night and one took place in the early hours of 16 October 2021, the day of the Appellant's arrest;
 - c) the Appellant had knocked on her bedroom window and asked to come in because he wanted to have sex with her;
 - d) the Appellant had made sexual comments to her as she walked past his address to go to the shop.
25. Ms Baradi's evidence was largely consistent in respect of each of these four points. It is true that there were moments in the cross examination when she deviated from them, but these were relatively isolated moments. Even during cross examination she was largely consistent about them. As set out above, these are all points about which Ms Baradi remained consistent since her initial disclosure to the 999 call handler; to the attending officer (who recorded them on her Body Camera); and in her initial witness statement to the police.
26. By the very nature of charges 1 and 2, the Crown was not required to prove the specific dates and times of the Appellant's offending, only that it occurred between 5 September 2021 and 16 October 2021 in respect of count 1; between 5 September 2021 and 15 October 2021 in respect of count 2, and at approximately 2am on 16 October 2021 in relation to counts 3 and 4. The Appellant gave consistent and credible evidence of the Appellant's offending and the Magistrates found that they were sure the Appellant did commit the

offences during these times. The Magistrates were not sure that the Appellant offended at 7pm on 16 October 2021, and accordingly acquitted him of that charge.

27. Assessing a witness's reliability (whether they are mistaken) and credibility (whether they are lying) is very much a matter for the first instance tribunal which had the opportunity to view and listen to the witness over the course of two days and assess this. Consistency within their own evidence is only one way in which a witness's evidence is assessed. For example, it may also be assessed by reference to inherent probability, contemporaneous documents or non-oral evidence and other disputed or undisputed evidence presented in a case.

28. Further, perfect consistency is not a pre-requisite of accepting a witness's reliability & credibility. A court is not required to conduct a mathematical exercise in counting the number of times that a witness is consistent or inconsistent - a fact finding tribunal has to come to an overall view of the evidence and (when not sitting with a jury) provide rational and reasonable reasons for accepting a witness's evidence. The Court did so in this case.

29. The Court was entitled to come to the view that it did and give the reasons it expressed for accepting Ms Baradi's evidence at paragraphs 40 and 41 of the ruling after trial:

40. Although at times confused we do not find that Miss Baradi was a dishonest witness, indeed the defence was not run in that way. There was a consistency in her evidence as to the order of events, i.e. the defendant attended her house sometime after his release and said he wanted to sleep with her, that when she later passed his address he made sexual comments and that he attended her address at 2am on the 16th October 2021.

41. We do not find that this inconsistency of itself renders the rest of Miss Baradi's evidence incapable of being relied upon, as we have said she is consistent as to the events and the timeline up to and including about 2am on the 16th October 2021.

30. The approach adopted by the Magistrates as set out above was lawful and proper. There is nothing irregular or unusual about it. As the prosecution submitted, when a witness is confused or forgetful in respect on some points, it cannot follow that their entire evidence must be disregarded and is incapable of being relied on. A trial court is entitled (and indeed duty bound) to assess the reliability and credibility of each witness, and to attach as much or as little weight to their evidence as it sees fit. It is a matter for the trial court as to what evidence is relied on, and what evidence is not. The Court's ruling sets out that process was correctly followed, and the ground of appeal that the Court, for whatever reason, set out to "construct a narrative of guilt" is without rational foundation.

31. I am satisfied that these grounds of appeal amount to a disagreement with the Court's assessment of the reliability of the witness. This is not sufficient to warrant an appeal on a matter of fact or law. The Appellant has not established that there is material in the circumstances of the case which could raise a reasonable doubt whether the conviction was safe. As the St Helena Supreme Court said in *Cruyff Buckley v AG* (21 February 2019) at para 6:

‘Mr Jackson rightly concedes that a tribunal of fact is entitled to believe a witness to be accurate and truthful on one point while disbelieving him on others. That is what the Chief Magistrate did, as his Findings make plain. It is not unreasonable for him to have done so, nor can it be said that his decision to convict cannot be supported having regard to the evidence.’

32. The same applies to credibility as to reliability – a witness can be reliable on some matters and not on others. The Court was careful to distinguish between the evidence on the four charges which were proved based upon Ms Baradi’s evidence and the one that was not.
33. Finally, I should observe the obvious when considering the safety of the conviction and whether there was an error of fact or law – that the Appellant was not convicted of these four offences solely based upon the evidence of Ms Baradi but based upon additional evidence such as the bad character evidence (addressed below) and the evidence of the Appellant himself. The Court gave sufficient reasons for finding the charges proved to the criminal standard at paras 42-47. Its reasons are cogent and I can find no flaw in them:
 42. We look at what Miss Baradi describes and the words she says the defendant used. We are struck with the similarity between the sexually aggressive words supposed to have been said to Miss Baradi and those said to the telephone operators when the defendant made his previous obscene phone calls. We are also impressed by the similarity in the nature of the victim between these allegations and the conviction of the 10th May 2012. In both instances the complaints were ladies in their 70’s living alone. This type of offending against women of this age is so unusual that the similarity cannot be ignored. However the previous convictions are just part of the factual matrix of this case and the defendant cannot be convicted wholly or mainly upon them, having said that we will not ignore them in helping us in deciding whether the evidence of Miss Baradi is reliable or not.
 43. We turn to Mr Caswell and accept that in the past he has always admitted his guilt and we have regard to that when assessing his credibility as a witness. His defence has been run on the basis that Miss Baradi is not a dishonest woman but a confused one who may have imagined these events. Although it is not for the defence to prove their case we say that we can reject this as a realistic approach to the evidence. We can see no scope for any finding that Miss Baradi might have imagined these events, especially having regard to the words she says were used and her very obvious distress and fear when the police arrived.
 44. The defence accept that there was no issue between the defendant and Miss Baradi and the Crown have referred to this as a matter to be taken into consideration. We will not attach weight to this as it has the effect of potentially placing upon the defence a burden for providing a reason why Miss Baradi would lie.
 45. We accept in full the evidence of Miss Bone and Mr Williams as this was not challenged by the AG.
 46. We are sure that Miss Baradi is an honest and truthful witness having regard to the unusual behaviour and language described by her which because of its similarity to the defendant’s past unusual conduct does not allow for doubt about fabrication or imagination.
 47. It follows on from that that we cannot accept the evidence of the defendant, which consists of flat denials, as being credible.

34. For these reasons, I reject the first and third grounds of appeal.

Ground 2 - bad character evidence

35. The Appellant appeals on the basis that the Court erred by admitting his previous convictions relating to making obscene telephone calls. It is not in dispute that the Appellant has a considerable offending history, mostly for sexual offending. This includes offences against children, offences against lone women, offences against elderly women, offences involving making obscene phone calls, and offences involving masturbating in public.

36. The prosecution made an application to admit this substantial bad character evidence for the following reasons set out at paragraph 3 of its written application:

3) Reasons why the evidence is admissible. Explain why the evidence is admissible, by reference to the provision(s) of the Criminal Justice Act 2003 on which you rely.

The above previous convictions and police caution are admissible under section 101(1)(d) in that the defendant has a propensity to commit sexual offences and offences involving threats of harm towards women and that propensity makes it more likely that he is guilty of these offences.

The defendant faces 9 charges arising out of his conduct towards a lone 71 year old female over a period of a number of weeks. It is alleged that he targeted this lone female late at night, banged on her window and said "I HAVE A HARD ON, I WANT TO SLEEP WITH YOU". On a further occasion, the defendant is alleged to have made another comment about wanting to sleep with her. At 02:00 on a further occasion, it is alleged that the defendant again targeted this elderly lady by banging on her window and made comments about wanting to sleep with her. Later in the evening of the same day, he is alleged to have again attended the address, banged on her window and shouted "IF YOU DON'T OPEN THIS WINDOW, YOU KNOW WHAT I AM GOING TO DO TO YOU". The complainant feared she would be raped.

These charges bear striking similarities to the defendant's previous offending and demonstrate a tendency towards unusual behaviour, namely:

- 1) Unsolicited targeting of vulnerable women (previous convictions for targeting children and elderly women);
- 2) An implied threat of harm which the victim took to be one of rape (previous offending for threatening to rape females);
- 3) Targeting elderly women in their own home, indeed in Cow Path, Half Tree Hollow (previous conviction for assaulting a 75 year old woman in her own home in Cow Path and previous offending for masturbating outside the home of lone women in Cow Path);

The Crown refer to the principles set down in paras 7-9 of *R.v. Hanson*. The defendant's considerable similar previous offending demonstrates a tendency towards unusual

behaviour and their circumstances demonstrate probative force in relation to the offences charged.

The court has a duty to consider the strength of the evidence (*R v Darnley [2012] EWCA Crim 1148*). This case involves a 71 year old lady who is good friends with the defendant's mother. She has no motive to fabricate this allegations which bear a striking similarity to the defendant's modus operandi.

37. The Court did not admit all of the previous convictions relied upon but ruled as follows when admitting some of the bad character evidence:

6. We are left with 5 offences of making obscene phone calls which were sexually aggressive in their nature, masturbating in the street and sexually assaulting a 75 year old lady in her own home. These offences occurred between 2010 and 2015. Although 6 and a half years have elapsed since the last offence the defendant has been in prison since March 2018 and only recently released prior to these current allegations.
7. The offences we are considering revolve around a matter of harassment involving a course of conduct and a number of breaches of a sexual offences prevention order. All offences are inextricably linked as the breaches of the SOPO are also reflected in the harassment course of conduct.
8. We are quite satisfied that the offences that he has been convicted of show a tendency to offend in the way alleged in these proceedings. Approaching a lone 71 year old female in her home, asking for sex and saying he wanted to come in and sleep with her because he had a hard on bears sufficient similarity to the previous offending to establish a propensity. Additionally we do not think it would be unfair to rely upon this evidence when deciding if the Crown have proved their case.
9. This evidence is just part of the factual matrix and we cannot convict wholly or mainly upon it. The fact that Mr Caswell has offended in a certain way in the past does not mean it will be repeated. Only if we think it right will we use these convictions as some support for the prosecution case.
10. ...
11. We will bear in mind that Mr Caswell is particularly vulnerable to these types of allegations and that the witness knows of his past offending. We have also been alerted to evidence that may be put before the court by the defence relating to work that has been done by the defendant while in prison and will take that into account if presented.

38. The Court benefited from both written and oral submissions relating to the Appellant's bad character. For the reasons set out in section 3 of the Crown's written application, and those set out in the ruling of the Court, both set out above, I am satisfied that it did not err in law in its approach. It was lawful to admit the Appellant's previous convictions.

39. The previous convictions for obscene phone calls were further addressed in paragraph 42 of the Court's ruling after trial which I repeat:

"42. We look at what Miss Baradi describes and the words she says the defendant used. We are struck with the similarity between the sexually aggressive words supposed to have been said to Miss Baradi and those said to the telephone operators when the defendant made his previous obscene phone calls. We are also impressed by the similarity in the nature of the victim

between these allegations and the conviction of the 10th May 2012. In both instances the complaints were ladies in their 70's living alone. This type of offending against women of this age is so unusual that the similarity cannot be ignored. However the previous convictions are just part of the factual matrix of this case and the defendant cannot be convicted wholly or mainly upon them, having said that we will not ignore them in helping us in deciding whether the evidence of Miss Baradi is reliable or not."

40. The convictions related to the Appellant making unsolicited phone calls from a public payphone to female operators. Those calls involved the Appellant making comments including "I going to rape you", "I wanna fuck you" and "I wanna pull off over you". Those comments bear a striking similarity to the comments the Appellant was said to have made to Linda Baradi and demonstrates a tendency towards unusual behaviour (i.e. unsolicited sexual remarks to females telling them that he wants to have sexual intercourse with them).
41. The approach taken by the Court in determining whether or not to admit the Appellant's previous convictions for making obscene phone calls was lawful and correct.
42. Even if the Court erred in law or was wrong to admit the previous convictions relating to the obscene phonecalls, I am satisfied that it was not a material error leading to any miscarriage of justice. The obscene phonecalls did not play a substantial role in leading to the convictions as explained at paragraph 42, set out above, and paragraph 39 of the Court's ruling after trial:

"39. We reaffirm what was said in the bad character ruling regarding the weight to be attached to the character evidence"
43. In summary, the Court properly identified that bad character evidence formed only part of the overall case, and ultimately did not convict the Appellant wholly or mainly on it. The previous convictions for making obscene phone calls were only a small element of the prosecution's case, and it is apparent that the Appellant's conviction did not rest solely or mainly upon them.
44. For these reasons, I reject this ground of appeal.

Conclusion

45. In the circumstances the Petition of Appeal fails, because none of the grounds set out in s250(1)(a)-(c) of the *Criminal Procedure Ordinance* 1975 apply. I reject each of the three grounds of appeal for the reasons set out above. The judgment of the Court was not unreasonable and can be supported having regard to the evidence; there was no wrong decision on any question of law and even if there was, the decision has not caused a miscarriage of justice; and there has been no miscarriage of justice on any other ground.
46. The appeal against conviction is dismissed.

Rupert Jones, The Chief Justice

17 February 2022