JERSEY / JUDGMENT

Christian O'Byrne v The Attorney General

COURT

Magistrate's Court Appeal - appeal against conviction - grave and

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Magistrate's Court Appeal - appeal against conviction - grave and criminal assault.
[2019]JRC108
Royal Court
(Samedi)
11 June 2019

Before : J. A. Clyde-Smith, Esq., Commissioner, sitting alone.
Christian O'Byrne
-v-
The Attorney General
Advocate C. L. G. Carvalho for the Attorney General.
Advocate O. A. Blakeley for the appellant.

JUDGMENT

THE commissioner: 1. The appellant appeals against his conviction for grave and criminal assault before the Magistrate's Court on 21st March, 2019. A number of preliminary issues have arisen in relation to the appeal. Notice of appeal 2. The appellant was sentenced to community service and probation on 17th April, 2019, and the notice of appeal against conviction was filed on 24th April 2019, within eight days after the date of sentencing, but not within eight days after the date of conviction. On the face of Article 18 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 ("the 1949 Law"), the notice has been filed out of time. Article 18(1) is in the following terms:- "18 Notice of appeal An appeal under Article 17 shall be commenced by the appellant's giving notice of appeal to the Judicial Greffier within 8 days after the day on which the decision of the Magistrate's Court was given." The decision being appealed against is the conviction. 3. However, Advocate Blakeley argues that the decision for the purposes of Article 18(1) must be the decision taken on the date when the sentence was imposed. He rightly points out that the right of appeal is given under Article 17 of the 1949 Law, the relevant provisions being as follows:- "17

Right of appeal

(1) A person convicted by the Magistrate's Court may appeal to the Royal Court –

(a) if the person pleaded guilty or admitted the facts, against the sentence;

(b) if the person did not –

(i) and was sentenced by the Magistrate, against the conviction or sentence, (ii) and was committed by the Magistrate for sentence under Article 4, against conviction. (2).....

(3) In this Article, 'sentence' includes any order made on conviction by the Magistrate's Court, not being –

(a) a probation order;

(b) a community service order;

(c) an order for the payment of costs;

(d) an order made in pursuance of any enactment under which the Court has no discretion as to the making of the order or its terms;

(e) a committal in default of payment of any sum of money, or for want of sufficient distress to satisfy any sum of money, or for failure to do or abstain from doing anything required to be done or left undone." 4. The appellant pleaded not guilty, and therefore Article 17(1)(b) applies. He argued that pursuant to the provisions of Article 17(1)(b)(i), a defendant has to wait until actually sentenced before his right of appeal against conviction arises. Accordingly, the eight days has to run from the date of his sentencing, in this case 17th April, 2019, and the notice was filed within eight days after that date. 5. I do not accept that argument. In my view, Article 17(1)(b) is concerned with the decision of the Magistrate whether to retain the case for sentencing or to remit the case to the Royal Court for sentencing under the provisions of Article 4, which is in the following terms:- "4 Committal for sentence If the accused has pleaded not guilty and the Magistrate, having heard the case, finds the accused guilty and if –

(a) thereafter, having examined the accused record of previous convictions; or

(b) having regard to any other fact then brought to the Magistrate's knowledge, the Magistrate is of the opinion that there should be imposed a penalty or penalties in excess of those which the Magistrate is empowered by Article 3 to impose, or that a confiscation order is likely to be made, the Magistrate shall commit the accused in custody or on bail to the Inferior Number of the Royal Court to receive sentence." 6. It follows that if on convicting a defendant the Magistrate decides to retain the case for sentencing, the defendant has a right of appeal against conviction or any sentence that might subsequently be imposed by the Magistrate, other than one of the sentences set out in Article 17(3). In this case, the appellant was sentenced to community service and a probation order, and therefore would have no appeal against that sentence. If, however, the Magistrate decides to remit the case up to the

Royal Court for sentencing, then the defendant has a right of appeal against conviction only. The decision whether to retain the case for sentencing or to remit to the Royal Court for sentencing will be taken by the Magistrate immediately after the conviction. 7. Accordingly, I find that the notice of appeal in this case was not filed within the required eight days after the date of the appellant's conviction. However, having considered the circumstances of this case, I give leave to the appellant to appeal out of time, pursuant to the provisions of Article 18(3) of the 1949 Law. No transcripts 8. There is no recording of the trial, and therefore no transcript for the Court to consider in this appeal. The Judicial Greffier, Advocate Adam Clarke, has been provided with this explanation:- "Each time the Court sits, there are two units that need to be turned on. The first is the audio system which allows the sound to be captured. The second is the Greffier's computer and software which controls the commencement and cessation of the recordings. Ordinarily, both are turned on by the ushers in the morning, and once the hearing starts, the Greffier hits the record button, and listens for a short time through the headphones, to ensure that the recording is indeed being captured and recorded. On this occasion, the audio system was not turned on. I am told that on the Greffier's screen this would not show up. The Greffier hit the record button, but failed to check with the headphones whether the sound was being captured. The net result was that the Greffier believed that the sound was being recorded, when it was not. It is my understanding that there was no recording capable of being recovered." The Judicial Greffier has not sought a formal report from the Magistrate's Court Greffier, but there seems no reason to doubt that this is unfortunately what occurred, and that there is no recording. 9. The appeal concerns the events at the trial and whether the verdict could be supported with the evidence heard before the Magistrate. It is the case that the Court in such appeals routinely has a transcript available.

10. In the circumstances, Advocate Blakeley submits that the Court should hear all the witnesses again. The witnesses would comprise the victim of the grave and criminal assault, the appellant and an independent witness to the assault. The Court has the power to order that witnesses be heard before it pursuant to Article 20(1), which is in the following terms:- "Procedure on appeals

(1) The Royal Court may direct that witnesses shall be heard before it at the hearing of any appeal under Article 17 in relation to any matter or thing relevant to the appeal and may require the production of the Magistrate's notes of the trial."

11. Advocate Carvalho has a number of objections to the Court hearing all of the evidence again:- (i) This is an appeal against the decision of the Magistrate to convict, and whether that decision could have been arrived at properly on the evidence before her. If the Court hears all the evidence again, it will not be addressing that issue, but making its own decision on the evidence before it in what would in effect be a re-trial. (ii) The victim will have to go through the ordeal of giving evidence and being cross-examined again. (iii) It is not known whether the victim, or the independent witness, are available to give evidence again, or are indeed willing to do so, although Advocate Carvalho said no inquiries had been made of

them.

12. Article 20(1) makes reference to the Magistrate's notes of the trial, which have already been provided. The Magistrate's handwriting is thankfully very legible, and she has helpfully provided a page by page key of the abbreviations she uses. In my view, these notes appear to be very comprehensive. Counsel who appeared at the trial have also made their own notes available, although I have not seen these. In addition, the Magistrate has offered to provide a written judgment, an offer not yet taken up, but which, in my view, should be accepted.

13. I did give consideration to whether the Court might refer the matter back to the Magistrate's Court for a re-trial. That would be subject to the same issues in relation to the witnesses, but in my view that would not be fair to the appellant, in terms of perception, the lower Court having already convicted him.

14. I conclude that armed with the Magistrate's notes, the notes of trial counsel and the judgment of the Magistrate, the Court will be in a position to ascertain the evidence before the Magistrate and therefore to do justice to the appeal. Meeting with the probation officer

15. One of the grounds of appeal is as follows:- "2. That the Defendant's defence at trial was of self-defence which was an absolute defence yet the Magistrate, at sentencing stated 'even on your [the Defendant's] version of events I would have convicted you' which was indicative of bias on the part of the Magistrate."

16. In this respect, Advocate Blakeley noted the following entry in the Social Enquiry Report under the heading of "Sources":- "Review of the Police report and a review of the trial with Magistrate Shaw due to the trial hearing recording being unsuccessful."

17. We do, fortunately, have transcripts of the sentencing hearing, which was recorded, and I note that the notice of appeal does not set out in full what the Magistrate actually is recorded as saying, which is as follows:- "You really do need to reflect on what you did that night. Even on your admission, even if I had accepted your version of events, I would still have convicted you, because your reaction to what she did or didn't do was over the top, even on your version." The amount of force used in defence must be reasonable.

18. Advocate Blakeley said it was improper for the probation officer to have met with the Magistrate, saying that the criminal process should be transparent. However, the probation officer always provides an analysis of the offence as the Social Enquiry Report does in this case, at paragraphs 19-24, and I can see no objection to the probation officer attending upon the Magistrate, in the absence of transcripts. The fact that she had done so was made clear in her report. It was not suggested that the probation officer may have said anything to influence the sentence imposed by the Magistrate. Rather, Advocate Blakeley suggests that something might have been said by the Magistrate that would indicate bias against the appellant, and support the allegation that she was biased against him at the trial. He therefore submits that I should order the Magistrate and the probation officer to provide their notes of their meeting, if such exist.

19. In my view, no evidential foundation has been put forward on behalf of the appellant to justify the Court requiring the Magistrate and the probation officer to produce notes of their meeting, if they exist, and I decline to do so.

Conclusion

20. In conclusion, (i) I grant the appellant leave to appeal out of time. (ii) I decline to order that the witnesses be heard again. (iii) I request the Magistrate to produce a written

judgment.

(iv) I request trial counsel to produce their notes of the trial, with a key to any abbreviations that they may have used.

(v) I direct that the appeal be listed to be heard. Authorities Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949.

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