

JERSEY / JUDGMENT

Michael Quinn -v- The Attorney General

COURT

Royal Court

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Hearing (Criminal) - assault - malicious damage - drunk and disorderly -
appeal against sentence.

[2018]JRC183

Royal Court

(Samedi)

3 October 2018

Before :

T. J. LeCocq, Esq., Deputy Bailiff, and
Jurats Crill and Christensen.

Michael Quinn

-v-

The Attorney General

Advocate M. J. Haines for the Appellant.

Ms R. C. L. Morley-Kirk., Crown Advocate for
the Attorney General.

JUDGMENT

THE DEPUTY BAILIFF: 1. On 8th June, 2018, Michael Quinn (“the Appellant”) was sentenced by the Magistrate following a Newton hearing for an assault that he committed on 24th March, 2018, on Miss X (“the Complainant”). The sentence imposed by the Court was a 12 month probation order, 140 hours of community service (the equivalent of 8 months in custody). There was a restraining order imposed. The Appellant was also sentenced with regard to two other charges, namely malicious damage and drunk and being disorderly but no appeal was lodged against the sentences on those two charges. Nor is there any appeal in connection with the restraining order. 2. There is no appeal against the imposition of a probation order and community service per se. What is appealed is the duration of those sentences. 3. Those sentences are underpinned by the findings by the Magistrate, as mentioned above, during the course of a Newton hearing when the Magistrate decided between rival versions of the facts surrounding the assault. 4. This Court dealt with the appeal on 9th August, 2018, and the appeal was dismissed. These are our

reasons.

The Law 5. The approach of this Court in connection with an appeal from the Magistrate's Court was set out in *Graham -v- Attorney General* [2013] (1) JLR 91 in which the Royal Court said this: "The Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 provides as follows at art. 20(3): "On any appeal under Article 17, the Royal Court may by order confirm, reverse or vary the decision of the Magistrate's Court, or may remit the matter with its opinion thereon to the Magistrate's Court, or may make such other order in the matter as it thinks just, and may by such order exercise any power which the Magistrate's Court might have exercised, and any order so made shall have the like effect and may be enforced in like manner as if it had been made by the Magistrate's Court." Article 17 does not itself give any indication as to the basis upon which an appeal from the decision of the Magistrate should be approached by the Royal Court. Nonetheless, it is clear that, if there has been some procedural defect before the Magistrate which is of sufficient significance, the Royal Court will interfere with the decision below; and it is also quite clear that the court occasionally directs that witnesses are heard before the Royal Court in relation to the appeal, as indeed we have done. Similarly, where there is an issue of law where the Royal Court is of the view that the Magistrate went wrong in a material way, the court will invariably interfere with the decision below. Where there is simply a complaint about the evidence that was given, the court's approach has been said on many occasions to be that set out in *Rushton -v- Att. Gen* (7), where the court said: "The court of course has on many occasions said that its duty in looking at an appeal on conviction from the Magistrate below is to examine the transcripts to see if there is evidence on which the Magistrate concerned could properly have come to the decision he did. If there was that evidence, then even though the court might not necessarily have come to the same decision, the court does not lightly interfere with it. The court has to be satisfied that there was insufficient evidence of the Magistrate to have come to the decision he did, or that he drew the wrong conclusions and inferences from the evidence before him." We mention this background because an appeal to the Royal Court is not in the same terms as an appeal under art. 26 of the Court of Appeal (Jersey) Law 1061 where the appeal is taken from the Royal Court to the Court of Appeal. The language of the statute in that case is as follows: "(1) Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." It is clear, therefore, that the Royal Court's approach to appeals from a decision of the Magistrate has historically been that it will not lightly interfere with a decision on the facts where the transcripts reveal that there was evidence on which the Magistrate could properly have come to the conclusion which he or she did. That approach is taken to give appropriate recognition to the principle that the Magistrate is in a better position than the Royal Court because he or she has

had the advantage of seeing the witnesses give their evidence. Nonetheless, it is to be recalled that the terms of the statute give the Royal Court a wide discretion on appeal. In our judgment, there will occasionally be cases where the court is simply uncomfortable with what has taken place below. In England, the changes which were introduced by the Criminal Appeal Act 1968 removed the similar language as in the Court of Appeal (Jersey) Law 1961 and instead permitted the Court of Appeal to allow an appeal against conviction if the court considered the decision below was under all the circumstances of the case unsafe or unsatisfactory, as well as setting aside the decision on a ground of law or where there was a material irregularity in the trial. When this was considered in *R -v- Cooper* (4), the court said this ([1969] 1 Q.B. at 271): “[The shift to unsafe and unsatisfactory] means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.” There has from time to time been both judicial and academic criticism of the expression “lurking doubt”, but the Court of Appeal in England has continued to refer to this test from time to time (see *R. -v- Litchfield* (5) and *R. -v- Benton* (3)). It was said that the “lurking doubt” test and an alternative formulation advanced in *R. -v- Wellington* (6) – “whether we feel a reasoned and substantial unease about the finding of guilt” – are both acceptable and come to the same thing: “Was the conviction unsafe?” (2000 WL 491414, at paras. 28-29). We consider that the tests as set out in *Rushton -v- Att. Gen* (7) will, absent any other considerations, be sufficient in most cases to lead to an appeal being refused where there was evidence upon which the Magistrate could reasonably reach the conclusion he or she did. However, the qualification in the *Rushton* case, that the court would not lightly intervene where those were the facts, is an important qualification because it chimes with the lurking doubt/sense of unease approach which has been advanced from time to time in the English courts on an admittedly different statutory test.” 6. We are dealing with the Magistrate’s findings following a Newton hearing. In the case of *R -v- David Gandy* [1989] 11 Cr. App. R(S) 564 the English Court of Appeal said:- “The court would depart from findings of fact made by a judge in a Newton hearing only in the most exceptional case, as the judge had the advantage of hearing and seeing the witnesses, the Court was not satisfied with the findings which were made in the present case.” 7. In terms of the appeal against sentence, the Court, in *Louis -v- Attorney General* [2013] JRC257A set out the test at paragraph 2 et seq in the following terms:- “2. In *Harrison -v- AG* [2004] JLR 111 the Court of Appeal adopted the resume in Archbold: Criminal Pleading Evidence and Practice 2003 Edition at paragraphs 7 – 136 at 966:- “In broad terms, it is submitted that the Court will interfere (a) where the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive.”

3. The appellate Courts of this Island will not interfere with sentences that are not manifestly excessive and are within the powers of the sentencing Court. The authority for that is Morgan and Schlandt -v- AG [2001] JLR 225; “It is not the function of this Court to tinker with sentences which were well within the range open to the sentencing court simply because we might ourselves have fixed a lower term of imprisonment.”” 8. There was a preliminary matter raised with us. The decision of the Magistrate was first communicated at the end of the hearing and is contained in the transcript of the proceedings. Subsequently, however, the Magistrate prepared a judgment which has been placed before us. We had already read the judgment before the Court sat but Advocate Haines, for the Appellant, made the submission that there was no legal basis for the preparation of a judgment by the Magistrate once the decision had been handed down and an appeal lodged. Advocate Haines thought that this was unfair and was tantamount to requiring his client to overcome two cases, the decision made by the Magistrate set out in the transcript and the more elaborate statement of reasons contained within the subsequently issued

judgment.

9. Advocate Haines did not, however, wish to apply for an adjournment to have more time to prepare on the basis of the new document.
10. In our view there is no difficulty with the Magistrate filing a judgment giving more details of her decision. It might perhaps be more usual to reserve the right to add to any ex tempore remarks or a decision made in Court, but it cannot be wrong for the Magistrate to give a fuller explanation of the reason why she reached the conclusions that she did. On our reading of the judgment issued by the Magistrate it simply elaborated upon her reasons but were not inconsistent with them.
11. We do not, of course, consider the position were a subsequently issued judgment to be inconsistent in some significant respect with the remarks made by the Magistrate in Court. That is not the case here and we allow this appeal to proceed in the light both of what the Magistrate said in Court and in the subsequently issued judgment. The assault
12. The assault was divided, so it was alleged, into two parts separated by a short interval of time but forming the same offence. The Appellant admitted the essential facts of the first part of the assault. This related to an altercation that took place between the Appellant and the Complainant at or near the Complainant’s apartment in the early evening of 24th March, 2018, during the course of which the Appellant became angry, shouted at the Complainant, threw a coat that she had bought from her accommodation to return to him on the floor, took her phone from her and then grabbed the Complainant by the neck with one hand and pushed the Complainant to the floor. He also on the same occasion caused malicious damage. As far as the Appellant is concerned, the assault ended at that point.

13. On the Complainant's version of events, however, the assault continued in that she went from her home towards David Place and, when she reached the shop Black Label the Appellant had come up from behind, continuing to shout and hurl abuse at her. She alleged that he grabbed her around the neck and placed one of his hands in her mouth and started to push her around. She had tried to push him away, she struggled with him, until a member of the public approached and he, the Appellant, then left. She describes running off. The Appellant denies that any of this second element of the assault took place.
14. The Magistrate, determining that the second part of the assault, if as alleged, would affect the sentence she was likely to pass decided that the matter should be resolved by a Newton hearing. The findings of the Magistrate
15. Evidence was given by the Appellant and Complainant and a witness who saw the events from his bedroom window.
16. The Magistrate made certain findings in connection with the evidence. We note the following findings made by the Magistrate from the transcript of the hearing on 8th June, 2018. They are:- (i) Now, the Complainant gave evidence and I found her to be a strong and compelling witness." (ii) The Complainant had always been very clear that she had always claimed to have reached the corner of David Place and Vauxhall Street but not rounded it when the second part of the assault occurred. The Magistrate said "she was very clear that she had always said "reached" and I accept that she was right about that." (iii) The Magistrate said "I was satisfied her evidence in court was consistent with her statement." (iv) The Magistrate said ... "but the Complainant again was adamant that she told the Force Medical Examiner about that second part of the incident and she made a very strong point, which I found compelling. She said "well why did the Force Medical Examiner inspect the inside of my mouth if I had only reported the earlier incident, where I was grabbed round the neck and fell onto my bottom?" What on earth would be the basis of looking in her mouth? The Force Medical Examiner clearly did look in the mouth and recorded that there is tenderness, which is subjective. The Force Medical Examiner didn't see anything in the mouth, but subjective tenderness in the mouth clearly indicates to me that that was mentioned. Again, I didn't find that she was undermined in that."
- (v) The Magistrate said, of the Appellant, "I heard your evidence. I regret I didn't find you to be a compelling witness. The evidence about putting your hand over her mouth you then said was at the very beginning of the incident and that contradicts your version of events, which have been served by your advocate." (vi) "I believe your account in evidence was inconsistent with the interview with the police, when they mention the Vauxhall Street/ David Place second part of the incident and, moments later, you say yes you did put your hand over her mouth to stop her screaming. I think that is much more consistent with her account than with what you were telling the court." (vii) And, again, of the Complainant: "I found her to be an honest and largely consistent witness. The only inconsistency, as I said earlier, really was when she says you were kicking the door as she went up the street. This is a matter of the order of events, not the events themselves. I accept her evidence at the

second part happened. It was deeply distressing and humiliating for her. She clearly remembered it. She was given a consistent account which has not been undermined by defence evidence or cross-examination.” (viii) As to the evidence of the Witness, the Magistrate said: “Now, as far as the Witness is concerned, he clearly didn’t see everything. He didn’t see her fall over, didn’t hear the door being kicked, didn’t see her return for the second coat, and I conclude that the defence evidence was weak and inconsistent. So I find that, after the initial incident, further down Vauxhall Street, she walked away towards the junction with Vauxhall Street and David Place, you caught up with her, you grabbed her to the front ... to the collar area, she was screaming and you put your fingers into her mouth to stop her screaming...”

17. The Magistrate emphasised but did not depart from her conclusions in her written judgment. In paragraph 46 of her judgment she said:- “Despite her distress, the Complainant was a powerful and compelling witness. The Crown’s case had been put that in part B the Defendant grabbed the Complainant around the neck and put his hand over her mouth. However, the Complainant demonstrated the Defendant grabbing her clothing in front of her throat and said that he put his hand (showing three fingers) in her mouth. She was not cross-examined on the basis that this part of her account was inconsistent with her statement.”
18. At paragraph 51, the Magistrate said:- “The Complainant was equally robust in dealing with cross-examination regarding her conversations with the FME. The suggestion was that if part B had really happened, the Complainant would have told the FME about it. The cross-examination was somewhat unorthodox as the FME’s evidence had been agreed in redacted form and she was not present to give evidence. ...”
19. And, at paragraph 53:- “It was unfortunate that the FME was not present but the defence sought to cross-examine on the point as the Complainant had given evidence that she had told the FME about part B and the FME statement did not record that specific allegation. No application was made to call the FME. If the FME had been called, she could only have told the court whether she had been told about part B, not whether the Complainant’s account of part B was true.”
20. And, lastly, at paragraph 54:- “As the Complainant pointed out very forcefully, the FME recorded tenderness inside the mouth. Logically, for the FME to record tenderness there, the Complainant must have mentioned something which could have led to injury to the inside of her mouth. No allegation in part A relates to the inside of the mouth. Although I do not know exactly what was said, I am satisfied that the Complainant told the FME about part B or at least some part of it. In my view the cross-examination on the FME statement did not undermine the Complainant’s credibility.”
21. The Magistrate also made the following reference to the Witness’s evidence. She observed that whereas the Witness was able to see a number of elements of the assault, he gave evidence that he saw the Appellant leave the scene of part 1 of the assault first and took

three or four steps and turned right into Nelson Street. He then also noted that the Complainant, had gone to the top of Vauxhall Street and had turned either right or left. He had not seen certain elements of the first part of the assault which were not disputed nor did he hear the door being kicked in which again was agreed. The Magistrate's assessment of his evidence was contained at paragraph 62 when she said:- "I found the Witness's evidence to be inconclusive and did not undermine the Complainant's evidence as the defence might have hoped."

22. We do not need to repeat any more of the Magistrate's judgment. As we have said, it was not inconsistent with the judgment that she gave on the matter as appears in the transcript.
23. There was uncontroverted evidence that the Appellant's coat had been found in Vauxhall Street and this, it was argued by the Appellant, was consistent with the Witness's view that the Appellant had turned right down Vauxhall Street and had left, so it was suggested, in advance of the Complainant and therefore could not have followed her and perpetuated the assault. It seems to us however, to have been possible that the Witness's evidence was correct that the Appellant turned right down Vauxhall Street but then discarded his coat, where it was later found, and returned by which time the Complainant had reached the junction between Vauxhall Street and David Place and the second element of the assault took place. The Appellant's contentions
24. The Appellant based his appeal on nine elements. They were: (i) The evidence of the Witness; (ii) The failure by the prosecution to ask the Witness questions and his consequential closing submission to the Court; (iii) The Appellant's discarded coat; (iv) The evidence of the FME;
- (v) The medical evidence does not support Part 2; (vi) The changed evidence of the Complainant; (vii) The absence of any witnesses who saw Part 2 and contacted the police; (viii) The consistent evidence of the Appellant; (ix) The Complainant's version is contrary to common sense and the evidence.
25. The strongest element, so it was characterised by the Appellant's lawyer, was the evidence of the Witness. He was the only direct independent witness and he confirmed that he could see a great deal from the beginning of Vauxhall Street right up to the houses on David Place. The Appellant concentrated on the clarity of the Witness's evidence and asserts that the Magistrate was simply wrong when she concluded that he had not seen everything.
26. The complaint is made that the prosecution did not re-examine the Witness on the allegations relating to Part 2 of the incident merely stating in closing submission that he, the Witness, could not have seen everything.
27. It may well have been preferable had the Witness's evidence been further explored but in our view that failure did not undermine the conviction. It was open to the Magistrate to conclude that from the second floor, where he was, the Witness could not have seen everything and that the Complainant's version of events was essentially to be believed.

28. The Appellant also states that the location of his coat, where it was found, in Nelson Street, was consistent with the evidence given by the Witness and by himself. It is true it seems to us that the evidence that his coat was found in Nelson Street was indeed consistent with the assertion that the Appellant had walked down Nelson Street at some point but not that he had not either discarded his coat and returned (which would account for why the Witness saw him leave first but the Complainant said that he came up behind her) or on some other occasion.
29. The Appellant argues that the absence in the Force Medical Examiners report of any reference specifically to part 2 must indicate that the Complainant did not tell the Force Medical Examiner about it. We have already noted the Magistrate's finding in that regard based upon the Complainant's clear evidence and the fact that there was tenderness to the inside of the mouth noted. The Force Medical Examiner did not give evidence and was not called.
30. Although the evidence of the Witness was of some assistance, in our view the Magistrate was entitled to make the finding that he simply did not see the second element if it had taken place and that his evidence was not pivotal. It was open to prosecution counsel to take his evidence no further forward.
31. It is also asserted that the medical evidence simply did not support the happening of the second element in the assault. Had what the Complainant alleged, so the Appellant argues, taken place, then there would have been specific injuries.
32. The complaint related to the grabbing of the front of the throat and placing the hand in the mouth. It does not seem to us to be inevitable that injuries would have occurred as a result. The Appellant points to inconsistencies between the written statement that the Complainant made and the evidence that she gave in Court. It is a common experience of courts that sometimes witnesses do not come up to proof in every single particular of their statement and that there are often inconsistencies between live evidence and the written statement. A number of things can account for that. It may be indeed because the witness is lying or because memory has changed in some way or because of earlier written record now, on reflection, appears to a witness to be somewhat inaccurate and they wish to correct it. There are other possible reasons.
33. The Magistrate had before her, however, the evidence of the Complainant in chief and cross-examination on the alleged inconsistencies. The inconsistencies put before us were that the Complainant had said that part 2 of the attack occurred as she reached the corner of Vauxhall Street and David Place and refers to being "grabbed outside Black Label". The Complainant said in Court, however, that the attack took place before she got to the corner and was closer to Nelson Street.

34. Furthermore, the statement in which she alleges that the Complainant “grabbed me around the neck” was, in evidence, changed to “he grabbed me on my, on my top half of my chest” and the allegation that the Appellant had put his hand in the Complainant’s mouth had become, in evidence, “his three middle fingers went into my mouth”.
35. We do not consider that these inconsistencies, if such they be, necessarily undermine the evidence of the Complainant. It was open to the Magistrate to find that the Complainant was largely consistent in her evidence and that such inconsistencies as there were, were not material inconsistencies and might be properly explained by the stress of giving evidence and the underlying stress of the circumstances in which the assault took place.
36. The Appellant also complains that the Magistrate found that he was not a compelling witness. She was entitled to do so.
37. We refresh our memories as to what was said in *Rushton -v- Attorney General* cited in *Graham* above. We ask ourselves if there is evidence on which the Magistrate could properly have come to the decision she did? If there was that evidence that even though we might have come to a different decision we will not lightly interfere with it. We keep in mind also the “sense of unease approach” also referred to in *Graham*. We also remind ourselves of the rather more stringent statement in *Gandy* mentioned at paragraph 6 above.
38. The Magistrate heard the witnesses in the case and had before her not only what they said but was able to assess how they said it and how they withstood examination and cross-examination. She was entitled, in our view, to find that the Witness may not have seen everything, that notwithstanding what the Appellant characterised as inconsistencies, the evidence of the Complainant was credible and persuasive and unmoved by cross-examination, and the evidence relating to the Force Medical Examiner’s report was in fact supportive of the Complainant’s version and that the Appellant was not a credible witness. In the circumstances, we find that there was sufficient evidence before the Magistrate for her to make the findings that she did and we do not feel a sense of unease in the findings of the Magistrate on the *Newton* hearing.
39. That being the case, it was unnecessary for us to consider the appeal against sentence and accordingly the appeal was dismissed. Authorities *Graham -v- Attorney General* [2013] (1) JLR 91. *R -v- David Gandy* [1989] 11 Cr. App. R(S) 564. *Louis -v- Attorney General* [2013] JRC257A.

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