TURKS AND CAICOS ISLANDS

COURT OF APPEAL

CRIMINAL **CR-AP 21/2016**

SHERRINGTON DION MCINTOSH **Appellant**

vs

THE QUEEN **Respondent**

CORUM:
The Honourable Mr. Justice Mottley, President
The Honourable Mr. Justice Adderley J.A.
The Honourable Mr. Justice Hamel-Smith J.A.(Ag)

Appearances:
Ms. Lara Maroof for the Appellant
Mr. Leonard Franklyn for the Queen

Hearing: 12 April, 31 August 2018

Reasons

Hamel-Smith J.A. (Ag.)

1 The appellant had been charged with three offences viz., (i) Burglary; (ii) Common Assault; and (iii) False Imprisonment. He was convicted of all three and sentenced to varying terms of imprisonment, all to run concurrently. His appeal was against the conviction for false imprisonment and against sentence on the other charges.

2 On April 12, 2018 we allowed the appeal against the charge for false imprisonment and quashed the conviction. The convictions for Common Assault and Burglary were affirmed and the appeal against sentence in respect of the offence of Burglary was varied from that of five years imprisonment to one of four years imprisonment. The time spent in custody from December 3, 2015 would be taken into account in determining the length of the sentence as varied. We dismissed the appeal against sentence on the charge of Common Assault. The sentences were to run concurrently. We now give the reasons for our decision.

3 The facts briefly are that from the year 2008 until the beginning of December 2015 the appellant and the complainant lived together as man and wife. The couple had one child. While the relationship was cordial, by December 2015 the complainant said that there some misunderstandings and arguments between them, as a result of which she brought the relationship to an end.

4 The complainant found accommodation elsewhere and made arrangements for their child to be kept at a nursery while she was at work during the day. She assured the appellant that he could visit their child at the

nursery, which he did. The appellant was fond of the child and, as the complainant acknowledged, his relationship with the child was good.

5 Three days later, on the night of December 3, 2015 at about 2 o'clock in the morning, the appellant went to the home of the complainant. He knocked on her door and asked her to allow him in as he wanted to talk about their relationship or, as the complainant said, '*to try and fix things up between us*". She refused to open the door and immediately called the police.

6 The appellant in the meantime opened the door. She agreed that the door was not broken by him but was unable to say how it was opened. As he entered she tried to stop him but he put his hand on her face and pushed her (the Common Assault offence).

7 She related that the police arrived shortly thereafter and he closed the door to prevent them entering the house. The police called on him to open the door but the appellant told her "*how am I going to open the door because of how the police treated me before"*. He was obviously afraid that the police would mistreat him again. She agreed that he was nervous while the police were there. In fact, the police were calling on him to open the door and, according to the police, he was issuing all sorts of threats, even to blow up the house if they came in.

8 In the examination in chief she was asked whether she saw him drinking in the house. She said that she had a bottle of wine on the table that had cost her thirty dollars and he took a drink from it (the Burglary offence). When asked by the prosecutor why she did not leave the house straight away, her response was "*because the door was closed and he was at the door talking to the police and that was the only exit there was".* In cross-examination however, she

said that while the appellant was in the bedroom she had gone to the kitchen near the entrance door. She admitted that while there she could have left the house if she wanted to but did not want to leave the baby.

9 The circumstances of the case are unusual. It is obvious from the evidence of the complainant that the sole purpose of the appellant's presence at her home was to talk about reviving their relationship. The unusual characteristic is that the complainant lived in the house with her child and there was nothing to indicate that she had any intention of leaving her house that night. If anything, it was the appellant she wanted removed and had called the police for that purpose.

10 The appellant on the other hand, more likely than not, did not go to the house with any intention of restraining the complainant. He had left the door open when he entered the house and closed it only when he heard the police coming. His real fear for doing so, a fear the complainant acknowledged, was that the police might mistreat him as they had done in the past. It seemed more likely a case of him confining himself in the house for fear of the police beating him rather than having any intention to falsely imprison the complainant in the house.

11 Attorney for the appellant at the trial (not attorney in this appeal) filed two grounds of appeal against the conviction. The first was that the judge should have allowed the no-case submission made at the close of the prosecution's case. The second was in two parts. The first part, while the drafting was somewhat unpolished, was to the effect that the judge had misdirected the jury on the evidence in relation to the appellant's defence on the false imprisonment charge in that he did not deal with the fact that the

complainant had admitted that she could have voluntarily left the house at one stage. The second part was that the judge, in directing the jury that on the false imprisonment charge they could take into account *the size of the response force and the views of the police that they believed that she was confined inside her house and that the evidence might reveal that she was holed up inside the home,* he misled the jury into thinking that the views of the police were relevant to the guilt of the appellant.

12 The offence of false imprisonment consists of the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place. It is unlawful detention restraining the victim from moving away as she would wish to move. (Archbold 17th Ed, 2200). Every confinement is an imprisonment, even in a private home but there must be evidence of total restraint.

13 It is sufficient to deal with the second ground of appeal alone. In a nutshell, the appellant's argument is that his defence was not put to the jury. There was evidence from the complainant that showed that she was free to leave the house and this was critical to the issue of total restraint. The trial judge however, never left this issue to be determined by the jury. Further, the judge erred in directing the jury to take into account the views of the police as to the level of its response and as to whether the complainant was falsely imprisoned.

14 The appellant did not give evidence at the trial. The complainant was the only witness to what actually occurred inside the house. As indicated above, in the course of her testimony she referred to two occasions when she was asked about leaving the house. It is obvious that she was referring to two separate

occasions but what is significant is that in her answer to the prosecutor she never asserted that she could not leave because of the child. Implicit in what she did say however, was that had the appellant not been by the door talking to the police, it would have been possible for her to leave. On the other hand, from her evidence in cross-examination it became obvious that there was an occasion when she was alone in the kitchen and could have left the house. This evidence was critical to the appellant's case; it was capable of refuting the charge of false imprisonment because it demonstrated that at some time during the incident the complainant had the freedom to leave the house.

15 While the appellant's presence in the house may have been unlawful, the issues of intention and restraint were alive and critical to the outcome of the charge. When dealing with these issues it was incumbent on the judge to fairly represent the evidence to the jury in a balanced way so that they could determine whether (i) there was intention on the part of the appellant to falsely imprison and (ii) there was total restraint on the complainant's freedom in light of what she had said in cross-examination.

16 In his directions to the jury, the judge said that in finding intent "*you must be sure*" that when the defendant did the act complained of he *intended unlawfully to restrain the victim intentionally* (sic.). He put the essential element of the offence to the jury, saying that it was the *total restraint* of the victim's freedom of movement without her consent. In directing the jury however, he never mentioned the opportunity to leave while in the kitchen.

17 Having described the elements of the crime of false imprisonment to the jury, the trial judge proceeded to direct them that *if they found as a fact that the defendant …pushed the injured party to her face….in other words he unlawfully*

assaulted her…and that push was not an accident and if you also find as a fact that the defendant had kept the injured party inside her own premises and she could not voluntarily leave her premises …..because of legitimate fears for the safety and well-being of her ten month old child then the defendant was guilty of unlawfully restraining her, *provided you also find that his act was intentional or reckless*.

18 It seems that, rather than treating each charge separately, the judge combined his directions on common assault and false imprisonment into one. It may have left the jury with the impression that the common assault charge was, in some unexplained way, part and parcel of the false imprisonment charge. In other words, if they found that the push was not accidental and they also found as a fact that she could not voluntarily leave the premises, he could be found guilty of false imprisonment.

19 Nonetheless, the judge reminded himself that he was only required to touch on what he saw as the poignant and important features of the evidence. One important feature, at least to the appellant, was the complainant's admission that she could have left the house while in the kitchen. It was evidence of the complainant herself that was favourable to the appellant and should have been put to the jury. The jury had to determine questions of fact and both her admission and the reason for not leaving should have been left to the jury to determine whether there was total restraint of the complainant.

20 In **Canny** (1945) 30 Cr.App. R. 143 @ 146, Humphrey J stated that '*it does not matter how absurd the defence is, or how unlikely it is that any sensible person would pay the least attention to it. A prisoner is entitled to make his defence to the jury, and it is for the jury and not for the judge to decide on its weight. …a*

prisoner is entitled to take his chance in finding a stupid jury and is entitled to put his defence before the jury with a view to persuading them to acquit him. Likewise, in **Marr** (1990) 90 Cr. App. R 154 the Court allowed an appeal and quashed the conviction because a defence, unattractive as it may have been, had not been put to the jury with the balanced treatment and consideration which the Court held to be the right of every criminal defendant.

21 The defence of the appellant went to the issue of total restraint. On both occasions when the question of leaving the house arose, the complainant never suggested that she was afraid of leaving the child there. While that was a plausible reason for not leaving it and possibly an answer to the false imprisonment charge, it was a matter for the jury to decide.

22 Not wanting to leave the child, without more, could have been interpreted as simply that, not wanting to leave the child there. Accordingly, it was a matter for the jury to decide as a question of fact whether she did not want to leave the child there simpliciter, or did not want to leave it because of (as the judge suggested) *legitimate fears for the safety of her ten month old child.*

23 The defence, as unreasonable as it may appear to some, had to be put to the jury for its assessment and decision. In **R v Bentley & anor** (2001) 1 Cr. App. R 21 (1998) the appellant had been charged with murder as a result of having participated in a joint criminal enterprise to break into a warehouse. The prosecution alleged that when the appellant was held and under arrest he shouted to his partner who was armed "**Let them have it, Chris**". This was critical evidence to the appellant on the issue of whether it was sufficient to justify a plea of abandonment of the joint enterprise.

24 The Court of Appeal (on a review of the convictions some years later) found that the words "*let them have it, Chris*" were capable of bearing two meanings. They could mean '*go ahead and shoot them, Chris'* or equally have meant *'hand over the gun, Chris'.* The trial judge had overlooked this possibility and never put the latter version to the jury for its consideration and finding of fact.

25 As farfetched as it may have seemed to some, particularly in the charged atmosphere in which the trial had been conducted at the time (there had been great public reaction to the killing of the police officer), the Court of Appeal found that the very brief and dismissive account of the defence '*did not in our judgment do justice to the points which, good or bad, had been made on behalf of the appellant and which the jury should have been invited to consider*. *Whether the jury would have been impressed by the points if they had been dispassionately identified and laid before them we can never know…The effect was to deprive him of the protection which a jury trial should have afforded him'.*

26 The judge in the instant appeal should have reminded the jury that the complainant had admitted that she could have left the house while in the kitchen and that this evidence went to the issue of total restraint. He also should have reminded them of the reason she offered for not wanting to leave and let them determine whether in those circumstances there was total restraint or not.

27 Without inviting the jury to consider this issue of total restraint, the judge simply moved from his directions on common assault to the charge of false imprisonment and directed the jury that if they found as a fact that the complainant could not voluntarily leave because of *legitimate fears for the*

safety and well-being of the baby, they could find him guilty of the charge. Firstly, there was no context in which he gave that direction and, secondly, it was not factually correct. The complainant never mentioned any fear for the safety and well-being of her child, either on the occasion when the appellant was speaking to the police near the door or when she had the opportunity to leave.

28 That may have been the judge's interpretation of what she had said but it was not necessarily the jury's interpretation and it was a question of fact that should have been left to them. Not having invited them to consider the defence, the direction of the judge must or may have driven the jury to conclude that they had little choice but to convict.

29 While a judge may be free to express his view on the evidence, he should remind the jury that it is his view and they are free to accept or reject it. The judge did give a general direction on this at the beginning of the summation, but when dealing with what the complainant had actually said about leaving the house, in expressing a view on the issue of total restraint, he should have reminded them that he was expressing his view, a view they were free to accept or reject. Further, he should have expressed it in the context in which the evidence was given so that the jury could determine that issue of fact.

30 The judge's interpretation of what the complainant meant led to one conclusion only i.e. that the appellant was in some way holding the baby hostage and would harm it should the complainant leave the house. By injecting the notion that she feared for the safety of the child, it had the effect of depriving the appellant of having the jury fairly determine an issue of fact.

31 Turning to the second part of this ground, by directing the jury that on the false imprisonment charge they could take into account the *size of the*

response force and the *views* of the police that they *believed* that she was *confined inside her house* and that the evidence might *reveal* that she was *holed up inside the home* was plainly wrong. It added nothing to the issue of intention or total restraint.

32 There is always a risk of injustice if the jury is invited to approach evidence on the assumption that police officers, probably because they are police officers, are likely to be reliable witnesses and their views on certain issues must be considered. The *size* of the response was irrelevant and what they *believed* added nothing to the guilt or innocence of the appellant. If anything, the directions may have influenced the jury to find the appellant guilty of the charge. We shall never know. The comments were best avoided.

33 Apart from what was otherwise a commendable summation, these errors, when taken together, may have deprived the appellant of having the real issue, viz., total restraint, fairly considered by the jury. It was in these circumstances that we considered the verdict to be unsafe and had to be set aside.

34 For these reasons the conviction was quashed. As to the sentence on the charge of Burglary, we found that in the circumstances of this case the appropriate starting point was three years and the upward adjustment to five years was not justified. We therefore quashed the sentence of five years and substituted one of four years instead.

Dated this 31st day of AUGUST 2018.

Mottley, P.

Adderley, J.A.

Hamel-Smith J.A. (ag)