IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

JP Appeal: 8/2017

IN THE MATTER	Section 131 of the Criminal Procedure Act 1980-81 & Section 76 of the Judicature Act 1980-81
BETWEEN	**RATU VILITATI KOMAINALOVO** of Rarotonga Appellant
AND	**COOK ISLANDS POLICE** Respondent

Hearing date: 1 December 2017 (CIT)

Decision: 28 December 2017 (NZT)

Appearance: Mr Rasmussen for Appellant
Ms Mills for Respondent

DECISION OF GRICE J
(Appeal against Conviction and Sentencing by Justice of the Peace Carmen Temata)

A. Appeal against conviction is dismissed.

B. Appeal against sentence is withdrawn by leave.

Introduction

1. This appeal arises from the conviction of the appellant on a charge of assault by a male on a female.[1] Mr. Komainalovo unsuccessfully defended the charge before Justice of the Peace Carmen Temata. The conviction was entered on 29 September 2017. A sentence of 12 months' probation service with special conditions was imposed on 12 October 2012.
2. Section 2 of the Crimes Act 1969 provides the following definition of "assault":

> "Assault" means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and
>
> "to assault" has a corresponding meaning"

3. Mr. Komainalovo is the father of a little girl who was three years old at the time of the incident. The child's mother, who is the primary caregiver, and Mr. Komainalovo do not live together. The victim, Tania John is the child's godmother.
4. At the request of the child's mother, Ms. John was to look after the child on the 17th of June 2017. She went to pick up the child from the mother's home where Mr. Komainalovo had been baby-sitting. When Ms. John arrived, she says the child came running to her while Mr. Komainalovo slept. An argument broke out between the two of them. She said he had been drinking. In cross-examination she listed her reasons for this belief.[2] While his level of intoxication is not directly relevant to the appeal, that he had been drinking became a bone of contention between the two and may have contributed to the escalation of the argument that ensued.
5. During the argument, the child was picked up from the floor and was the subject of a tug-of-war between the appellant and the victim. There is some confusion over what exactly happened. Ms. John says she was holding the child and Mr. Komainalovo was trying to take the child from her. Mr. Komainalovo says he was holding the child and he was trying to keep Ms.

[1] Section 214(b) Crimes Act 1969.
[2] Mr Komainalovo gave evidence that he had been drinking. Whether he was intoxicated was the subject of disagreement.

John away from the child. It may well be that in the course of the incident the child went from one to the other. The details do not matter for the purpose of this appeal.

6. Ms. John said that at various times in the course of the altercation she was pushed and shoved by the appellant and that at one stage her arm was grabbed and twisted. She said she later sought medical attention for sprain-like injuries to her arm and wrist caused by Mr. Komainalovo.
7. The main thrust of the appeal is that the prosecution focused on the assault being the arm twisting by the appellant. The victim did not see a doctor until some four weeks later after the incident. The doctor who attended to the sprain injury gave evidence. He could not say the injury was caused by the incident. The Justice of the Peace was not satisfied in the circumstances that there was a sufficient evidential link between arm-twisting by Mr Komainalovo and the sprain injuries.
8. Nevertheless the Justice of the Peace found that the appellant had “shoved” the victim. She was satisfied that shoving or pushing had occurred and that it amounted to an assault on the female victim and on that basis she convicted Mr Komainalovo.

The Grounds of Appeal

9. The grounds of appeal are set out in the Application for Appeal to a High Court Judge Against Conviction and Sentencing dated 2 November 2017. These are:

“…

c) Her Worship had incorrectly decided to find the defendant guilty on her own interpretation of the meaning of the word "shove" and without evidence heard in the Court towards the word "shove" being regarded as assault.

d) It is not sufficient for Her Worship to rely solely on the Defendants statement when he said he "was just shoving her off.

e) Insufficient argument and evidence in the trial had been raised and directed towards proving that the defendant did "shove" the victim.

f) The word "shove" was not an aspect of the Prosecution’s case and Prosecution did not introduce it in its examinations in chief of the victim and witnesses and also in cross examination of the defendant.

g) The Defense was not invited by the Prosecution's case to counter the meaning of the word "shove" or "shoving" as part of the components of assault that the Prosecution was aiming to prove.

h) The Prosecution's entire focus was to prove there was assault by the defendant on the victim on the allegation that the defendant twisted the victim's arm and wrist and the effect of that caused long lasting discomfort to the victim.

i) The Prosecution called witnesses including a doctor for evidence of the arm twisting assault allegation but called no witness to the shoving incident.

j) Her Worship Carmen Temata had indicated in her decision that the Prosecution did not prove the assault of the arm twisting due to the lack of photographic evidence and to the unclear medical evidence but despite that, she latched onto the statement by the Defendant that he "was just shoving" the victim, terming it to satisfy the elements of assault.

k) The decision by Her Worship was unfair and impulsive and defeats the purpose of a fair trial.

l) That there was reasonable doubt created in the case by the Defense."

The evidence before the Justice of the Peace

10. It is common ground that there was an argument between Mr. Komainalovo and the Ms. John over the child. Mr. Komainalovo admitted he was angry and had been drinking. Mr. Komainalovo said he was holding the child and trying to keep Ms. John away from her. However, he denied grabbing her and twisting her arm and he was consistent in that denial. In his statement given to the Police on the day of the incident he said he had "shoved" Ms. John to keep her away from the child, but denied grabbing her and twisting her arm. He said in his evidence at the hearing that he was trying to keep her away.

11. There were no other witnesses to the incident.

12. Ms. John said in her evidence:

> "A.…When I got there the father was asleep on the floor, baby was sitting in the side room and as soon as she saw me she started crying and ran to me. I just picked her up and I waited and I woke him up. I asked him if he was going to start work at 12 because it was after 1 at this time. He said no he was starting at 2. I said okay I can take baby now so that you can get ready and that's when he stood up and told me to F off. At that time I was holding baby, she was on the bed, I was changing her t-shirt. I also

asked-, we had a long conversation before everything happened and I remember asking baby if she had eaten - she said no, her father said yes. So I think he just lost it, he got up, he told me to F off out of the house, I told him to leave, he wasn't going to stay to look after her. He grabbed me, he pushed me against the wall, I grabbed baby and went out of the house and stood in the rain for a little bit. So I locked up the house-, oh, before this I was asking him wait, because he said I was going to take baby so I said okay so where are you taking baby? He told me that he was going to take baby to school. So I told him today's Saturday, that's why I'm here, you can't take baby to school, that's why June told me to come and look after baby. He said no, he didn't have to start work at 2, he was on a day-off and that he was going to take baby to the mother. Now, with all this conversation going on he was a bit [10:51:39 confused?] so he wasn't in a state to look after baby if he didn't even know what day it was so I refused to hand the baby over and that's when he grabbed me, pushed me away, grabbed baby and ran outside."

13. Mr. Komainalovo said he "shoved" Ms. John in his written statement to the Police made on the same day as the incident. This was consistent with his evidence that he was angry and using his hand to keep her away from the child. He said in his statement:[3]

"…

A:I didn't twist her arm I was just shoving her away from me. Because she trying to grab baby off me.

Q:Which hand did you use to shove her away?

A:Left hand open palm.

Q:How many times did you shove her away?

A:I can't remember, because she kept coming for baby.

Q:When you say she was coming for baby, what do you mean?

A:I was carrying baby in my arms, when she came to take baby away from me.

Q:How long were you guys doing that?

A:A couple of minutes, she was shouting on top of her voice, I told her you are scaring baby, so I took baby outside.

[3] The statement of Mr Komainalovo dated 17 June 2017 was made on the day of the incident. It was produced by Constable Junior Tapoki in evidence.

Q:What did you do when she grabbed baby?

A:I was trying to stop her with my shoulder. I never gave baby to her.

Q:Which shoulder?

Q:Left shoulder.

…"

Decision of the Justice of the Peace

14. The Justice of the Peace correctly set out the Crimes Act definition of assault. She then went through the evidence and submissions.
15. She concluded:[4]

"[100] This is a case of the victim's word against the defendant's because no one actually witnessed the assault. Without a doubt something happened between the defendant and the victim at Ms Round's home in Kavera on the day of the alleged incident.

[101] I do not accept statements made as to the character of the defendant not being a good father and incapable of looking after his child because it is irrelevant to the charge before the Court.

[102] I do accept that there is no photographic evidence presented to the Court showing the injuries inflicted on the victim's arm on the day of the alleged incident.

[103] In my opinion this is crucial evidence that police failed to present because there was no witness to the alleged incident in Ms Round's home in Kavera except what the victim and the defendant told the Court in their evidence. Both their versions vary considerably.

[104] I also accept Dr Voi's expert opinion that he is unable to confirm that the victim's injury resulted from the alleged assault that happened some four weeks earlier.

[105] In the absence of any other evidence linking the defendant to the assault on the victim, I come to the defendant's suspect statement dated 17 June 2017, recorded by the police when they interviewed him where he stated that he shoved the victim away from him as she tried to take baby from him. He admitted that he "shoved" her away with an open palm of his left hand but could not remember how many times he did it.

[106] The victim in her oral evidence said that defendant grabbed her and pushed her onto the wall.

[4] Police v Komainalovo CR No 336/17. 29 September 2017. Carmen Temata JP at [100]-[109].

[107] The word “shoved” means pushed therefore in this case it constitutes an assault.

[108] In my opinion and I rule that the defendant did assault the victim by the act of shoving her while she was trying to take the child from him.

[109] Based on the above, I accept that the prosecution has proven, beyond reasonable doubt, that the defendant is guilty of the charge of assault on a female.”

16. In essence, the Justice of the Peace says she accepted the evidence of Ms. John that she was shoved or pushed by Mr. Komainalovo. At the same time, she was not satisfied on the evidence of the doctor that the sprain injuries were caused by Mr. Komainalovo in the incident.

17. It was open to the Justice of the Peace to find that the assault was constituted by the pushing or shoving occurred but also find that it was not proved that the sprain injuries were caused in the incident. She had sufficient evidence before her to make those findings on credibility and that the charge of assault was made out.

Findings of Fact – Role of Appellate Court

18. This appeal is by way of rehearing, based on the transcript and evidence adduced before the Justice of the Peace.[5]

19. The powers on appeal are set out in the Judicature Act as follows:

“Power of the Court on Appeal

Section 80 of the Judicature Act sets out the power of the Court on appeal:

Powers of Judge on appeal from Justices — (1) On any appeal from a determination of a Justice or Justices, a Judge may affirm, reverse, or vary the judgment appealed from, or may order a new trial, or may make such order with respect to the appeal as he thinks fit, and may award such costs as he thinks fit to or against any party to the appeal.

(2) Without limiting the general powers conferred by subsection (1) of this section, the Judge

[5] Section 78, Judicature Act 1980-1981.

> (a) On any appeal against conviction, may quash the conviction for any offence and substitute a conviction for any other offence which he thinks is justified upon his finding of the facts, and may pass such sentence in respect of the substituted offence as he thinks fit:"

20. It is the province of the judicial officer at first instance to make findings of credibility. The Cook Islands Court of Appeal in *Loomes v Police*[6] put it succinctly:

> "20. With exceptions which are not material here it is the exclusive province of the trial Judge to assess the credibility of witnesses. It is not for this Court to interfere in a matter of that kind in the absence of compelling reasons for doing so…."

21. Similarly in *Boyle* the Cook Islands Court of Appeal said:[7]

> "[18] Those comments apply equally here. Counsel agreed that the role of the Court of Appeal in relation to findings of fact was set out in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*[8] as follows:
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> > "While not purporting to set out an exhaustive test, there are two conventional circumstances in which an appellate Court may differ from the trial Judge on a matter of fact. They are: (a) if the conclusion reached was not open on the evidence, ie where there was no evidence to support it; and (b) if the appellate Court is satisfied the trial judge was plainly wrong in the conclusion reached."[9]
>
> [19] More recently the Court of Appeal has confirmed this approach:
>
> > "[43] Second, it is well established that the appeal court will not lightly revisit credibility findings of this kind made by a judge who had the significant advantage of having seen and heard the witnesses…"[10]

22. In this case the Justice of the Peace traversed the evidence and submissions in some detail. She identified the elements of assault and applied the correct test requiring proof beyond reasonable doubt on each of the elements. There was ample evidence for her to rely on in reaching her conclusion. She pointed to the evidence she relied on.[11] The Justice of the Peace gave reasons for her decision based on her findings as to credibility and the evidence (including Mr. Komainalovo's written statement) before

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6 *Loomes v Police* CKCA CA No 4/2006, 1 December 2006.

7 *Boyle v Police* CKCA CA No 5/2017, 15 December 2017

8 *Rae v International Insurance Brokers (Nelson Marlborough) Limited* (1998) 3NZLR 190 (CA).

9 *Rae v International Insurance Brokers (Nelson Marlborough) Limited* at p 197 per Tipping J.

10 *Attorney General for Ministry of Justice (Survey Department) v Kokaua* (2017) CKCA 3; CA 1/2017 (6 July 2017) citing with approval in a footnote the New Zealand Supreme Court case of *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2NZLR 141 at [5] and [13].

11 Supra Police v Komainalovo Carmen Temata JP at [100] to [109].

her.[12] There are no good reasons for revisiting the credibility findings she made in this case.

23. I now deal with the grounds of appeal in more detail.

Grounds of Appeal

Whether "shove" should be regarded as an assault[13]

24. The term "shove" is not a term of art. It is used in ordinary parlance to mean the action of pushing someone or something away. Mr Komainalovo was the first to use the term when being interviewed by the police. He did so in his statement and the word was not first suggested to him. That he shoved the victim is consistent with his evidence although he did not use the word "shove" in his evidence.
25. There was no indication that Mr Komainalovo did not understand English. A review of his statement and of the transcript of his evidence demonstrates that he is fluent in English. He may well have a Fijian accent but it's clear he understands it well. His responses to questions were appropriate. He used the word "shove" in a correct context and had ample opportunity to clarify his meaning if he had used the word other than as commonly understood.
26. The charge in this case is assault. The defence did not take issue with the definition of assault, which includes both the application of force directly or indirectly as well as the threatening by any act or gesture to apply such force, if the victim has cause to believe on reasonable grounds that the defendant has the present ability to affect this purpose. "Assault" has been given an expansive meaning.[14] Thus the appellant in pushing or shoving the victim falls well within that definition.
27. Therefore I find that "shoving" may constitute an assault and the Justice of the Peace was entitled to so find.

[12] There is no invariable rule that judges must give reasons for their decisions; *Police v Quarter* [2011] CKHC 8/4/2011 Hugh Williams J at [75]. It is however desirable (supra at [76]).
[13] Application for Appeal dated 2 November 2017. Ground (c) & (g). That the defence was not given the opportunity to counter the meaning of the word "shove".
[14] *Police v Raponi* (1989) 5 CRNZ 291. Wylie J at 296: "…a mere touching can amount to assault…the mere brushing of some part of a person's body can be an assault…".

Whether it is sufficient for the Justice of the Peace to rely on the appellant's statement that he was "just shoving her off"[15]***/ Whether the "shoving" was an aspect of the Prosecution's case and introduced in the examinations in chief of the victim and witnesses and in cross examination***[16]

28. These grounds relate to whether the prosecution's focus on the twisting of the arm was such that it was unfair to convict Mr Komainalovo of assault based on the "pushing" or "shoving".
29. The question is whether Mr Komainalovo was given the opportunity to deal with the allegation of shoving when the focus of the prosecution was on the allegation of arm-twisting.
30. Mr Rasmussen in his oral submissions said that the defence felt it was "short-changed" in that it had succeeded in persuading the Justice the Peace that the medical evidence was not sufficiently linked to the twisting of the victim's arm and therefore, the assault charge should be dismissed in its entirety.
31. Mr Rasmussen says that the "shove" was not put to the appellant in cross-examination nor was it introduced in examination in chief of the victim and witnesses.
32. There were no witnesses to the event other than the victim the appellant and the child. Therefore the fact that it was not put to the witnesses – who attested to other matters but were not present at the incident – is irrelevant. They were not in a position to comment on it.
33. The victim referred in her evidence-in-chief to being grabbed and pushed by the appellant. She refers to that in a number of places in her evidence. In cross-examination she specifically referred to being pushed. The cross-examination challenged her on a number of issues including the arm-twisting but she was not tested by the defence as to the truth of her evidence of being "pushed".
34. The written statement that Mr Komainalovo gave on the day of the incident, was put to him in evidence-in-chief. He read out excerpts of the statement where he denied twisting the victim's arm but said he tried to stop her by stretching out his left-hand as she was coming toward him. While he did not read out the specific pages where he referred to "shoving", he adopted his statement in general terms.
35. His evidence was not inconsistent with his statement. On a number of occasions, he agreed that he put his hand out to fend off Ms John but denied that he twisted her arm.

[15] Supra at Ground (d).
[16] Supra at Ground (f).

36. The appellant was afforded ample opportunity to put his version of events and he did so. There is no rule that requires the prosecution to put the specific allegation of "shoving" to the Appellant in cross-examination. The issue is one of fairness. The fact the specific word that he used in his statement was not put to him in cross-examination does not detract from the fact that the Crown case was fairly put to him and he was afforded the chance to respond.[17]
37. Therefore I find that the Justice of the Peace relied on the evidence of the victim as well as the statement and evidence of the appellant to reach the conclusion that the appellant by shoving the victim committed assault. The prosecution case was fairly put in evidence and to the appellant.

Whether there was sufficient evidence to support the finding that the appellant assaulted the victim by "shoving" her[18]

38. There was a suggestion by Mr Rasmussen that the only intention Mr Komainalovo had was to keep Ms John away from the baby. The intention required to provide the *mens rea* to establish an assault is the intention to apply the force or the threat. Mr Komainalovo's intention was to push Ms John away. He admitted this. The intention meets the requisite intention to constitute intent for an assault. The offence is complete when coupled with the action by the appellant of shoving or pushing the victim. The level of force applied is irrelevant. The Justice of the Peace was satisfied that Mr Komainalovo had shoved or pushed Ms John and that he intended to do so. She pointed to the evidence that supported these conclusions.
39. That Mr Komainalovo may have pushed or shoved the victim for the purpose of keeping her away from the baby does not affect his primary intention to apply force to Ms John.
40. There was also a suggestion that Mr Komainalovo was acting in self-defence. There was no evidence of that nor does it appear from the decision of the Justice of the Peace that this was argued before her. There is no evidence of self-defence.
41. As I have outlined above, I am of the view that the evidence supports the finding of the Justice of the Peace that the appellant did assault the victim by pushing or shoving her.

[17] *Gutierrez v R* 14 CRNZ 108, (112 at line 1 – 10).
[18] Supra at Ground (e)

Whether the prosecution's focus was on the twisting of the arm as assault; there was no witness giving evidence of the shoving incident; the injuries were not found to be caused by the twisting of the arm[19]/ What was the Evidence Available to Support the Decision?

42. The Justice of the Peace was entitled to make a finding based on credibility. She did so in that she preferred the evidence of the victim in relation to the pushing and shoving. No further corroborative witness was required. The fact that the appellant and the victim gave differing versions of the incident is not unusual. In this case the appellant himself in his statement said that he shoved the victim.
43. Mr Komainalovo's statement written statement was produced at the hearing and no objection was raised as to the manner in which it was obtained nor as to its admissibility. It was properly put in evidence and the Justice of the Peace was entitled to take it into account.
44. The fact that the Justice of the Peace found she was not satisfied that one part of the evidence relied upon as to an assault by the twisting of the victim's arm was proved beyond reasonable doubt, did not preclude her from finding the assault was made out based on the pushing or shoving.
45. While there was some focus by the prosecution on the twisting of the victim's arm, including the production of the medical certificate, it was not to the sole focus of the evidence or submissions as to what constituted the assault as charged. A careful reading of the evidence shows that the prosecution case referred to a number of alleged assaults in the course of the incident. They included the pushing or shoving at various stages as well as the alleged twisting of the victim's arm. The defence understandably may have been primarily focused on the arm-twisting because of the alleged resulting injury, the shoving or pushing was part of the police case throughout. It should not have taken the defence by surprise.
46. The information itself as laid was not specific as to the exact action that constituted the assault. It was not limited to the arm-twisting. This is not unusual. If the Justice of the Peace was satisfied that an assault of some description occurred in the course of the incident the charge was made out. She was so satisfied.

Conclusion

[19] Supra at Ground (h); (i) and (l).

47. No grounds of appeal have been made out and therefore the appeal must fail.

Appeal against sentence

48. In the course of the appeal hearing Mr Rasmussen withdrew the appeal against sentence. Leave to withdraw the appeal against sentence was granted.

Result

49. The appeal against conviction is dismissed.
50. The appeal against sentence is withdrawn by leave.
51. The conviction and sentence are confirmed.