Onedera v R

Court of Appeal
Morling, Ryan and Quilliam, JJ
Appeal No.11/1991

31 May, 1991

Criminal law - causing grievous harm - mens rea-state of knowledge and state of mind
Criminal law - inferences - proper basis for drawing
Criminal law - standard of proof - how to direct jury
Evidence - unfairness - lack of objection

The appellant was found guilty, by a jury, on a charge of wilfully and without lawful justification causing grievous harm to a child. She appealed

HELD:
Allowing the appeal and setting aside conviction:-

1. That although the trial judge in his summing up did not mention the words "beyond reasonable doubt" his charge to the jury made it clear that they had a duty to acquit unless they were sure of guilt. That ground of appeal was rejected.
2. As was a complaint of lack of fairness in terms of admission of certain "prejudicial" photographs and questions in cross-examinations of the accused. No objection was taken at the time and no application to discharge the jury made.
3. The evidence did not establish, however, that the appellant wilfully caused the injuries. Proof that she negligently permitted the harm to occur would not be sufficient; and there was insufficient evidence from which the jury could infer, properly, that the appellant knew, or had any reason to suspect, that the person who allegedly did the actual harm to the child was beating and harming or would beat and harm the child inside a house whilst she was outside.

Statute considered : Criminal Offences Act s.106(1)

Counsel for appellant : Mr Edwards
Counsel for respondent : Mrs Taumoepeau

Judgment

The Appellant was indicted before Martin CJ and a jury on two charges. The first charge was that on 8 April, 1989 the appellant unlawfully imprisoned Keneti 'Otuafi ("the complainant") in her house. The Appellant was acquitted of this charge. The second charge, was that on or about 8 April. 1989, she wilfully caused the complainant, a child, to be assaulted in a manner likely to cause him unnecessary suffering or injury. This charge was brought pursuant to s.106(1) of the Criminal Offences Act which reads as follows:-

> "Every person who wilfully and without lawful justification causes grievous harm to any person in any manner or by any means whatsoever shall be liable to imprisonment for any period not exceeding 10 years."

The facts which gave rise to the charges were singularly unpleasant, indeed deplorable. In substance the Crown's case was a as follows:-

The appellant accused the complainant of stealing of gold watch. The complainant denied the accusation. The appellant thereupon took the complainant to a family friend or relative who was a member of the police force. She left him in the custody of the policeman in his house. The policeman beat the complainant on the buttocks with a cane knife causing him very painful injuries. Whilst the beating was taking place the appellant was outside the policeman's house. After the policeman had finished beating the boy, she left the house with the policeman and the complainant and they drove together to her home. It must have been known to the appellant that the beating had taken place, either because of something that the boy said or did eg crying or because it must have been otherwise apparent to the appellant that the complainant had been beaten. At the time, the complainant was only 12 years of age.

After the appellant, the complainant and the policeman returned to the appellant's home she again left the complainant in the policeman's custody while she went shopping. While she was away shopping the policeman further grossly ill treated the complainant, causing him much more serious injuries.

The jury must have accepted the Crown's version of the facts. It convicted the appellant of the second charge and she was sentenced to nine months imprisonment.

On the hearing of this appeal, a number of grounds were argued. It was submitted that the Chief Justice failed to properly direct the jury as to the onus of proof borne by the Crown. The relevant directions given by the Chief Justice appear on page 104 of the Appeal Book, and were as follows:-

> "This is a Criminal Case and in every criminal case we start from the presumption that the accused in innocent. The Defence does not have to prove anything at all. The prosecution has to prove that she is guilty of these charges and they have to prove every element of each charge to the extent that you can be sure that she is guilty. In respect of each of these charges, if you think that she might be guilty that is not enough and you should acquit her. And even if you think she is probably guilty, that is not

enough and you must acquit her. You only convict her if you are sure that she is guilty."

It was submitted by Mr Edwards, Counsel for the appellant, that these directions were defective in that there was no reference to the requirement that the Crown was obliged to prove its case beyond reasonable doubt. It was further submitted that there was no reference in the directions to the duty of the jury to acquit if it was not sure of her guilt.

We do not think there is any substance in these submissions. We think the Chief Justice's directions made it plain enough to the jury that they did have a duty to acquit the appellant unless they were sure that she was guilty. The totality of what the Chief Justice said could not have left the jury in any doubt tha they had a duty to acquit the appellant if the evidence left them in any reasonable doubt. We do not agree that the mere failure to specifically refer to the words "beyond reasonable doubt" caused the trial to miscarry. We are therefore not disposed to allow the appeal on this ground.

It was also submitted that there were some aspects of the trial which unfairly prejudiced the appellant and that accordingly the conviction should not be allowed stand. In particular, it was submitted that a number of questions put to the appellant in cross-examination by counsel for the Crown were prejudicial and ought not to have been asked. As to this submission, we make two observations. First, no objection was taken to most of the questions. Secondly, no application was made to discharge the jury. It is plain that Counsel who appeared for the appellant was content that the matter should proceed to verdict notwithstanding the questions which are alleged to have been unfair. The other matter of unfairness was said to be the tender of some photographs. We agree with Mr Edwards that the photograph must have concerned the jury. However that is not to say that they ought to have been rejected. Accordingly, we do not think this submission has substance.

By far the most important submission for the appellant was that the evidence did not establish the offence of which the appellant was convicted. The obligation on the Crown was to prove that the appellant wilfully caused the injuries suffered by the complainant. It was not sufficient for the Crown to prove that the appellant negligently permitted that to occur.

It is necessary to refer in some detail to the evidence from which the jury may have been able to infer that the appellant knew that the complainant was being beaten in the policeman's house or knew that he had been beaten by the time she left him in the policeman's custody and went shopping.

The evidence of the complainant on this matter was as follows: Having said that he was taken by the appellant to the policeman's house, he said that the policeman took him to the kitchen at the back of the house. He said the appellant remained outside. After relating how the policeman assaulted him with the cane knife he was asked these questions:- Question : Did you cry? Answer: Yes. Question : Cry out loudly? Answer : No. Question : Where was the appellant at the time? Answer : She still remained outside. His evidence also included the following. Question : Can you indicate to us, how far is the kitchen from were you are beating up and where Tilema (the appellant) was standing? Answer : From here to the Archives. It was common ground on the hearing of the appeal that the distance referred to by the complainant was about 20 metres. The complainant also said he could see the appellant from the kitchen, but it is not clear from his evidence that she could see him whilst he was being beaten.

That was the extent of the complainant's evidence which could have been used by the jury to draw the inference that the appellant saw the first assault taking place or must have been aware that it had taken place.

There was evidence from the son of the appellant that he did not hear or see anything untoward while he was in the car outside the policeman's house. He also said that the complainant walked normally out of the house. Even if the complainant's evidence was entirely accepted by the jury it did not justify the drawing of an inference that the appellant saw the assault take place in the policeman's house. On any view on the evidence she was 20 metres away when the assault took place. She was then out in the street. The kitchen where the assault occured was separated from side of the house by a living room dining room and corridor. We do not think that it was open to the jury to infer that the appellant saw or heard what happened inthe house.

We have came to the conclusion that the evidence was not strong enough to justify the drawing of an inference that the appellant knew that the complainant had been assaulted in the policeman's house, even if she did not see him being assaulted.

Mrs Taumopeau has referred to the extent of the injuries to the complainant's buttocks disclosed by the photographs. The injuries are certainly serious but it is fair to say that the photographs were taken a few days after the beating. For all that as appears from the evidence, the injuries may have become inflamed because of the lack of proper treatment.

The evidence of the complainant did not justify the drawing of an inference by the jury that, between the time he left the policeman's house and the time he was left with him in the appellant's house, he gave any indication to the appellant that he had been assaulted. He did not say that he told the appellant that he had been beaten. Nor did he give any evidence to suggest that the way he walked or the way he behaved in the car would have demonstrated to the appellant that he had been beaten.

For these reasons we have come to the conclusion that it was not open to the jury to infer that when the complainant was taken back to the appellant's home, the appellant knew that the policeman had already assaulted him. This being so, we do not see how the jury could have concluded that the appellant had any reason to suspect that, by leaving the complainant with the policeman while she went shopping, she would expose him to the risk that the policeman would assault him. It was not shown that she had any reason to suspect that the policeman would obtain an iron, heat it, and burn the complainant.

It necessarily follows there was no basis for the jury inferring that the appellant caused grievous harm to the complainant. Accordingly the appeal must be allowed and the conviction set aside.