Flemming v Manu

Court of Appeal
Morling, Burchett & Tompkins JJ
App 5/96

17 June 1997

Evidence - affect of criminal conviction - civil action

This was an appeal against adverse verdicts from a jury in the Supreme Court on claims for damages for alleged rapes and assault. The jury answered one issue of assault negatively even although the respondent had been convicted of that very assault in the Magistrates' Court, on a private prosecution brought by the appellant.

Held:

1. S.99 of the Evidence Act made that conviction conclusive proof of the assault.
2. The trial judge should have directed the jury to answer that particular issue, therefore, in the affirmative, that they must so find.
3. The jury's verdict on that issue, was obviously against the evidence and would be set aside.

Statutes considered : Evidence Act s.99

Counsel for appellant : Mr Appleby
Counsel for respondent : Mr L. Foliaki

Judgment

When this appeal was listed for hearing today, the Court was informed by counsel for the appellant that the appeal was not to seek a new trial at which damages would be sought by the appellant from the respondent. Rather its purpose was to have vacated an onerous order for costs which had been made in favour of the respondent at the trial, and to obtain a ruling as to the meaning and effect of s.99 of the Evidence Act.

Cousel for both parties have joined in asking us to express our view as tothe mearing and affect of s.99 in its application to the facts of this case. We have been informed by counsel that upon expression of our view they will join in asking the Court to make consent orders which will dispose of the appeal.

The appellant sued in the Supreme Court for damages for assault and rape. She alleged 2 separate assaults, one of which was alleged to have occurred on the which was alleged to have occurred on the night of 8/9 April 1994. We need not refer to the other alleged assault or to the two alleged rapes and we shall refer hereafter to t he 8/9 April

alleged assault as "the assault".

Before the trial, the appellant brought a private prosecution against the respondent in the Magistrates' Court in respect of the assault.

The respondent was convicted and fined by the Magistrate. The present action came before Mr Justice Lewis and a jury. Conflicting evidence was given as to whether the assault had in fact occurred. As part of her case, the appellant tendered evidence of the conviction of the respondent.

At the conclusion of the evidence, His Honour left four questions for the jury to decide. The fourth of those questions related to the assault and was in these terms: "Did the defendant on the night of 8th and 9th April 1994 enter the plaintiff's home and assault her?"

In his summing-up to the jury, His Honour referred to the evidence of the respondent's conviction. He told the jury it was "proper for you to take into account that (the respondent's) behaviour on the night of 8th and 9th April 1994, led to his being privately prosecuted by the appellant, and being brought before the Magistrate and convicted."

He further instructed the jury, that they could not conclude that just because the respondent had been convicted of the assault, he assaulted the appellant on other occasions. He also told the jury that the conviction may persuade them that the respondent unlawfully assaulted the appellant on the relevant occasion.

Later in his summing-up His Honour said, - "if you find that the respondent was properly convicted, and no attempt has been made by the defence to suggest that he was not found guilty according to law, than I would imagine, you will not have any difficulty in finding that he assaulted the plaintiff, in the manner complained of".

He also referred in the following terms to the evidence given by the respondent as to why he did not appeal against the Magistrate's decision. "He says, - "at this time I thought I have paid the fine and finished it, and continued on with my life, because it will affect my wife and children".

His Honour's charge to the jury continued: "Does that sound reasonable? Does his answer sound probable? It is for you to say, that his failure to appeal in time means, that while he is entitled to claim innocence, he may certainly not deny the fact that he was convicted of the offence and challenge the decision of Magistrate Palu before you, members of the jury".

Section 99 of the Evidence Act provides:

> "Every judgment is conclusive proof in all subsequent proceedings between the same parties and their privies of facts directly in issue in the case, actually decided by the Court, but not of facts which were only collaterally or incidentally in issue even though the decision of such facts was necessary in order to enable the Court to decide the case".

The jury answered question four in the negative, the other three questions (to which is unnecessary to refer) were also answered favourably to the defendant. His Honour accordingly gave judgment for the defendant with costs.

The appellant has appealed to this Court. Two grounds of appeal are relied on:

1. It is claimed that the verdict of the jury was against the weight of the evidence; and
2. It is claimed that the conviction in the Magistrates' Court was conclusive

proof of the alleged assault on 8/9 April 1994.

It is not claimed in the Notice of Appeal that His Honour's directions to the jury were erroneous. We do not think this is of much, if any, significance because if the conviction was conclusive proof of that part of the appellant's case that was raised by question four, the jury's verdict was obviously against the weight of the evidence.

In our opinion, s.99 clearly applied to the facts of this case. The prosecution in the Magistrates' Court was brought by the plaintiff. The position would have been different if it had been brought by the Crown or a police officer.

110 We do not think that it is possible to read s.99 as conveying other than that the conviction was conclusive proof of the assault in the action between the prosecutrix, ie. the plaintiff, and the defendant.

We refer again to the relevant words of section:

> "Every judgment is conclusive proof in all subsequent proceedings between the same parties ... of facts directly in issue in the case actually decided by the Court."

The very fact which was directly in issue in the Magistrates' Court was whether the defendant assaulted the prosecutrix ie. the plaintiff on 8/9 April 1994.

120 That being so, we think with respect to the learned trial judge, that he should have directed the jury that they must answer question 4 in the affirmative. Whilst His Honour did make statements to the jury from which they may well have formed the view, that they should find for the plaintiff on that issue, he did not tell them that they must so find. The consequence was that they answered question 4 erroneously.

The orders which by consent, we make are as follows:

1. Appeal allowed. Jury's answer to the question 4 set aside. Note that it is agreed that the question should have been answered in the affirmative.
2. Order for costs below set aside. In lieu thereof, each party to pay his or her costs of the trial.

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3. All further proceedings in the action permanently stayed.
4. Each party to pay his or her own costs of the appeal.
5. Appeal otherwise dismissed.