REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

MAGISTERIAL APPEAL NO. 11 OF 2012
CASE NO. 4498B/10

IN THE MATTER OF

NIGEL HOSEIN **Appellant**

AND

CHARMAINE SINGH
ON BEHALF OF TRICIA RAMIAH **Respondent**

CORAM:
Paula-Mae Weekes, J.A.
Alice Yorke-Soo Hon, J.A.

APPEARANCES:
Mr. Wayne Sturge for the appellant.
Mr. Gerard Gray for the respondent.

DATE DELIVERED: 25TH July 2013.

Delivered by: A. Yorke-Soo Hon, J.A.

BACKGROUND

1. This appeal arises out of a private complaint brought by the respondent, Charmaine Singh, on behalf of her minor daughter, Tricia Ramiah, against the appellant, Nigel Hosein. The appellant was found guilty of using annoying language towards Ramiah with intent to provoke her to commit a breach of the peace, contrary to Section 49 of the Summary Offences Act Ch 11:02. He was sentenced to twenty (20) days hard labour.

2. He now appeals both conviction and sentence and has filed two grounds.

CASE FOR THE PROSECUTION

3. On 15th July 2010, at around 6:30pm, Ramiah was in her yard when the appellant passed by in a car. He, was seated on the passenger side of the car, and leaned out of the window and said to her "Sexy, what you doing later? Maybe we could go somewhere and lime. Ah would give you money or anything you want 'cause you don't need a personal man in your life and I want to fuck you and suck down there. Suck your cunt." He told her that he is a Muslim and that he "could have more than one wife and no one have to know anything". She "steupsed" and went home to speak to her mother.

4. Ramiah testified that sometime later she gave a statement to the police in which she indicated that she was annoyed by what the appellant had told her. This statement was not tendered into evidence. She further indicated that she felt afraid after the incident and went to stay at an aunt's.

5. Frank Gay gave evidence stating that he had witnessed a confrontation between the appellant and the respondent on the same day, shortly after the alleged incident, where the appellant said "I is ah Muslim I could have more than one wife, you can't tell me what to do."

CASE FOR THE DEFENCE

6. The appellant denied the allegations. He raised the issue of alibi stating that he was not in the vicinity of Ramiah's home at the material time. He also called a witness, Tyrone Chang, who testified that he had dropped the appellant at his home between 7:45 pm and 8:15 pm after they had been in Chaguaramas together.

GROUND ONE (A)

The learned Magistrate erred in law by relying upon hearsay evidence that did not fall within the exception to the rule of narrative.

7. Counsel for the appellant, Mr. Sturge, contended that the statement given to the police by Tricia Ramiah in which she had indicated that she was annoyed was hearsay evidence and that the Magistrate erred by relying on it in order to make out an element of the offence. He argued that the statement did not fall within the exceptions for admissibility as set out in **R v Ali (Hawar Hussein) 2004 1 Cr App 39** where Potter LJ referred to the exceptions referred to in **R v Beattie (1989) 89 Cr App R 502** and listed them as follows:

(i) Recent complaints in sexual cases;

(ii) Statements forming parts of the res gestae;

(iii) Statements rebutting an allegation of recent fabrication;

(iv) Statements made by an accused upon arrest;

(v) Statements made by an accused by way of explanation when found in possession of recently stolen goods or upon recovery of other incriminating articles; and

(vi) The statements of witnesses made by way of identification of an accused outside court.

At the trial, the only possible gateway for admission was under the rubric "res gestae".

8. Counsel contended that this particular charge required evidence that the complainant was in fact annoyed. The Magistrate, was therefore wrong to rely on hearsay evidence to so conclude. It is noted that counsel conceded that it was open to the Magistrate to infer from the circumstances that the virtual complainant was annoyed.

9. Mr. Gray, for the respondent, contended that the statement was admissible hearsay evidence as it fell within the *res gestae* exception. He submitted that it explained the mental condition of the virtual complainant, although he was unable to assist the court as to whether it was made contemporaneously.

10. The exception to the hearsay rule by virtue of the principle of res gesta was examined by the Court of Appeal in **Walter Borneo v The State Cr. App. No. 7 of 2011**. The Court referred extensively to principles laid down in the case of **R v Andrews (1987) 84 Cr. App. R. 382** where it was held that:

> "where the victim of an attack informed a witness of what had occurred in such circumstances as to satisfy the trial judge that the event was **so unusual or startling or dramatic as to dominate the thoughts of the victim** so as to exclude the possibility of concoction or distortion and **the statement was made in conditions of approximate but not exact contemporaneity**, evidence of what the victim said was admissible as to the truth of the facts recited as an exception to the hearsay rule."

11. **Andrews** suggests that statements which constitute part of the res gestae are ascribed a certain degree of reliability because they are contemporaneous, and are admissible by virtue of the nature and strength of their connection with a particular event.

12. Ramiah testified that sometime later she gave a statement to the police in which she indicated that she was annoyed by what the appellant had told her. That statement was not in evidence. The evidence of the respondent was that the statement was not given on the same day of the incident but was given "long after". While exact contemporaneity is not required, there is no definitive indication of how much time passed between the incident and giving of the statement. Therefore the statement cannot be said to have met the requirement of proximity.

13. However, it is permissible to infer annoyance in order to ground the offence as exhibited in the case of **Nangoo v Charles and Attorney General of Trinidad and Tobago HC No. 1065 of 1979**. In that case, the plaintiff was charged under Section 49 (then Section 54) for 'the use of obscene language to the annoyance of any resident or passenger in any street".

14. The Court found that all the ingredients for establishing the charge of using obscene language to the annoyance of any resident or passenger in any street were present. The judge opined that the language used by the plaintiff was capable of annoying any resident or passenger present on the street at the front of the plaintiff's home and added:

> "…it is reasonable to **infer** that the defendant, being one of these passengers, was annoyed, since his attempt to arrest the plaintiff.
>
> I do not think it is necessary for the defendant, in order to establish such an offence, to prove that a particular resident or passenger was actually annoyed by the obscene language used." (emphasis mine)

15. Similarly, in **Nicholson v Glasspool (1959) 123 JP 229**, a by-law provided: "No person shall, to the annoyance or interruption of any person passing along or being in any street or public place make use of any . . . indecent or obscene language." The appellant was charged with using obscene language in a street and evidence was given that at the time many people were passing the place where he was standing. No evidence was given that any person was annoyed. Lord Parker CJ held that on a charge of using obscene language in a street to the annoyance of a person therein, the Court is entitled to infer that the words were calculated to cause annoyance. It is unnecessary to show that any particular person was in fact annoyed.

16. **Nicholson** applied **Richard v Cook [1958] 1 WLR 1098**. That case also concerned a public order offence, namely the selling of noisy instruments to the annoyance of the inhabitants of a neighbourhood. The by-law provided that "No person shall for the purpose of selling any article, shout or use any bell, gong, or other noisy instrument in any street or public place so as to cause annoyance to the inhabitants of the neighbourhood." Two informations were preferred charging the defendant with using a noisy instrument for the purpose of selling and one inhabitant made a complaint in respect of both charges. Lord Parker CJ held that an offence was committed against the by-law if the noisy instrument was calculated to cause annoyance. It might not be necessary to call any evidence that any particular persons were annoyed to prove the offence.

17. In **Lennox O'Brien v Wilfred Edwards Mag. App. 1962**, the question for determination was whether proof of factual annoyance was a necessary ingredient of the offence of using obscene language to the annoyance of passengers. The Court reasoned as follows:

> "…it is not necessary for any such proof to be given. It is sufficient if there is evidence that there were people on the street who could have heard the filthy language used. In that event, inasmuch as the language was calculated to annoy any such person, the proper inference to be drawn from the very use of the language in their presence and hearing is that they were in fact annoyed. I think this ought to be borne in mind so that we don't have before us this sort of evidence about the police becoming annoyed. The sort of evidence that is requires is evidence (a) that the words were spoken, (b) that they were spoken audibly, and (c) that there were passers-by in the street or other public place, who could and would, have heard when the words were spoken. Once these three ingredients are proved the case is complete."

18. It is clear that the Magistrate relied on the statement to find that the virtual complainant was annoyed, she stated:

> "The words used caused Tricia to be annoyed as she admitted saying in her statement."

19. The Magistrate was therefore wrong to rely on the statement, as it constituted hearsay evidence not covered by the res gestae exception. Nonetheless, even without such statement, it was open to the Magistrate to infer from the circumstances that the words used had caused the virtual complainant to be annoyed. There was no need for direct evidence of annoyance and accordingly this ground fails.

GROUND ONE (B)

The learned Magistrate erred in law by failing to consider the alibi on its own weight.

20. Counsel for the appellant submitted that the Magistrate failed to give sufficient reason for disbelieving the alibi. He argued that it was insufficient for the Magistrate to mention that an alibi was raised and that an alibi witness was called without more. Counsel contended, in sum, that there was nothing in the Magistrate's reasons which suggested that she gave the issue due and adequate consideration.

21. Counsel for the respondent submitted that the Magistrate considered the alibi on its own weight and was correct in finding it disproved on the facts. He indicated that the Magistrate gave due consideration to the issue of alibi when she referred to the appellant's alibi and went through the evidence of his witness. Further, counsel contended that the disbelief of the appellant's alibi is a finding of fact which was not so "plainly wrong" as to warrant being disturbed by the Court of Appeal.

22. The Magistrate addressed the issue of alibi in the following manner:

> "The appellant raised an alibi and called an alibi witness Tyrone Chang who testifies that he dropped the appellant home around 7:45 to 8:15pm from a trip to Chaguaramas. The court was satisfied to the extent that it felt sure that the alibi was disproved by the evidence led by the respondent that at around 6:30pm he was at La Paille Village in Caroni and pulled up alongside Tricia at a time when she was by herself, and told her what was testified to."

23. The Court of Appeal will not lightly interfere in findings of fact made by the Magistrate.

24. In the **Peters v Peters (1969) 14 WIR 457** it was held that where a Magistrate, whose function it is to make findings of fact, has done so and there is evidence which clearly shows that his findings may be justified, it is not the function of the Court of Appeal to interfere by substitution its own view of the facts. Fraser J.A. stated that the Court of Appeal ought to ask itself the following questions when examining the findings of fact by a Magistrate:

(i) Does it appear from the judgment of the Magistrate that he made full judicial use of the opportunity given him by hearing the *viva voce* evidence?

(ii) Was there evidence before the Magistrate affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?

(iii) Is there any glaring improbability about the story accepted by the Magistrate sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression", or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure" that has had the same effect?

He concluded by noting that the Court of Appeal does not have "the jurisdiction at large to do whatever it wishes in relation to appeals from magistrates' courts notwithstanding a clear and justifiable finding of fact."

25. We are of the view that the evidence before the Magistrate clearly justified her finding that the appellant was indeed at La Paille Village at the material time. From her judgment, it appeared that the Magistrate made full judicial use of the opportunity given to her to hear the viva voce evidence of the appellant and his witness, and, that there is no glaring improbability about the various facts applied by the Magistrate so at to create a wrong impression and which constituted any specific misunderstanding or disregard of a material fact.

26. Therefore we cannot agree with Counsel's contentions and we find no reason to interfere with the findings of fact made by the Magistrate on this issue. We therefore find no merit in this ground.

GROUND ONE (C)

The learned Magistrate erred in law by directing herself to the incorrect test to determine intention.

27. Mr. Sturge embarked on an examination of the concept of intention as it has developed over time. He submitted that the test for intention can be found in the authority of **R v Woolin [1999] AC 82**, which states that foresight of virtual certainty was required for intention to be inferred. Counsel suggested that the Magistrate therefore ought to have considered whether the appellant would have been virtually certain that his action would provoke Ramiah to cause a breach of the peace.

28. Counsel further submitted that Section 49 could not be construed as creating a strict liability offence because, given the wording of the section, it must be proved that by using such words the appellant intended to have the virtual complainant commit a breach of the peace.

29. Mr. Gray submitted that the Magistrate was under no obligation to determine intention on the part of the appellant. He argued that the Section 49 offence ought to be construed as one of strict liability. Counsel acknowledged that on the wording of the statute there is a specific requirement for intention, but relied on the phrase "or which might tend to provoke any other person to commit a breach of the peace" to argue that a finding of intention is not absolutely necessary.

30. Section 49 of the Summary Offences Act Ch 11:02 provides:

> "Any person making use of any insulting, annoying or violent language **with intent to, or which might tend to, provoke any other person to commit a breach of the peace**, and any person who uses any obscene, indecent or profane language to the annoyance of any resident or person in any street or of any person in a place to which the public is admitted or has access, or who fights or otherwise disturbs the peace, is liable to a fine of two hundred dollars or to imprisonment for thirty days." (emphasis mine)

31. In **Vanessa Maraj v WPC Lauren Hutchinson Mag. App. No. 25 of 2012**, this Court considered the second offence created by Section 49 that is, the use of obscene, indecent or profane language. The section is silent as to the state of mind which attaches to that offence and it is such silence, inter alia, that led the Court to conclude that the offence of using obscene, indecent or profane language was one of strict liability.

32. In contrast, the first offence created by Section 49 clearly expresses an intention in two distinct ways. Firstly, it addresses a person who makes use of insulting, annoying or violent language with intent to provoke another person to commit a breach of the peace. Secondly, it address a person who makes use of insulting, annoying or violent language which might tend to provoke any other person to commit a breach of the peace. The first limb is plain as to its meaning and provides for a specific intention, that is, one must intend to provoke another to commit a breach of the peace. The second limb provides a lower threshold. It requires the person to be reckless as to the consequence of his language, that is, without specifically intending such, the language used could provoke another to commit a breach of the peace.

33. In this case, the appellant was charged with using annoying language towards Ramiah with intent to provoke her to commit a breach of the peace. The Magistrate stated:

> "It is assumed that a person intends the natural consequences of his actions, when an adult man uses language such as he did in this case the natural consequence must at the least be to annoy the person he spoke to and to invoke a response which would amount to a breach of the peace."

34. We are of the view that the Magistrate was correct in her approach to the law. The Magistrate considered the intention of the appellant when she examined the "natural consequence" of his actions. She found that the appellant must have known that the virtual complainant would have been provoked by his actions, and as such, he must have intended to so provoke. We find no fault with her conclusion.

35. This ground fails.

GROUND ONE (D)

The learned Magistrate erred in law by inferring "the expected response" breach of the peace.

36. Counsel argued that the Magistrate was wrong to examine the "expected response" to determine whether there was or was likely to be a breach of the peace. He submitted that the correct test was stated in **Alexis Gabriel v Rameshwa Baldeosingh Mag. App. No. 118 of 2005**. He further contended that there was nothing on the evidence which shows that the virtual complainant was provoked so as to commit a breach of the peace, nor was there any evidence from which such could be inferred.

37. The respondent submitted that the Magistrate acted judicially when she inferred on the facts that there was a breach of the peace.

38. In **Alexis Gabriel**, the Court of Appeal noted that a Magistrate must ask himself "whether the use of such language in all the prevailing circumstances was of a kind which would have led or reasonable tended to lead the respondent to commit a breach of the peace." The Court also

indicated that in order for a matter to succeed "there must be evidence that shows a breach or the likelihood of a breach of the peace, whether that evidence is express or inferred." In **R v Howell [1982] QB 416, 427**, Watkins LJ stated as follows:

> "…there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance."

39. In the instant case, the Magistrate said:

> "The court was satisfied to the extent that it felt sure that Tricia was annoyed and the words were such that the expected response should be to invoke the hearer to commit a breach of the peace."

40. Looking at the evidence as a whole, it was open to the Court to infer that there was a likelihood of a breach of peace. Applying the test as stated in **Alexis Gabriel**, the question is whether the language of the appellant in all the prevailing circumstances was of a kind which would have led or reasonable tended to lead Ramiah to commit a breach of the peace. The evidence is that the appellant spoke to Ramiah, upon which she steupsed and walked off. She went back home to her mother instead of continuing on to her intended destination by her neighbour. The evidence is sufficient to infer that there was annoyance likely to invoke Ramiah to commit a breach of the peace.

41. We are therefore of the view that there was sufficient evidence that the use of the particular language complained of had the effect of provoking or tending to provoke Ramiah to commit a breach of the peace. Therefore, this ground fails.

GROUND TWO

The sentence imposed was unduly severe.

42. Counsel for the appellant noted that **Section 49** of the **Summary Offences Act Ch 11:02** provided a maximum sentence of thirty (30) days. He further indicated that at the time of sentencing the appellant was thirty-five (35) years old and of good character. He contended that when one took all those factors into account, the imposition a twenty-day sentence was unduly harsh.

43. Counsel further argued that the sentence ought to be quashed because the virtual complainant never indicated that the words uttered by the appellant did or were likely to provoke her to commit a breach of the peace.

44. Counsel for the respondent submitted that the Magistrate was judicious in her sentencing of the appellant and indicated that the Magistrate did take into account the appellant's antecedents when handing down her sentence. Counsel argued that both the conviction and the custodial sentence were just, judicious and appropriate in circumstances where the virtual complainant was a female minor and the commission of the offence was unprovoked.

45. In **Benjamin v R (1964) 7 WIR 459** it was held that there are five objectives of punishment: retribution; deterrence of potential offenders; deterrence of the particular offender; prevention; and rehabilitation. In **Farfan v The State Cr App No. 34 of 1980** the Court of Appeal emphasized that the objects of sentencing should not be overstrained, each case must depend on its own circumstances and various factors must be considered by the court in deciding which principle of sentencing should predominate.

46. It is clear that the Magistrate took the character and antecedents of the appellant into account. In her reasons, the learned Magistrate stated:

> "The court opined given the circumstance the appropriate sentence was for the appellant to serve 20 days with hard labour. The sentence was discounted because the appellant had no previous convictions." (emphasis mine)

It is also clear that the magistrate was interested in protecting young women against these types of crimes as well as deterring other would-be offenders. She stated:

> "However, the court felt the need to send a signal that young females will be protected from the commission of criminal offences against them."

47. The Magistrate applied the correct principles of law in passing sentence. We consider however that a custodial sentence may not have appropriate in the circumstances of this case. In **Vanessa Maraj v WPC Lauren Hutchinson Mag. App. No. 25 of 2012**, the appellant was found guilty of the offence of making use of obscene language contrary to Section 49 of the Summary Offences Act. She was fined $200.00 and in default of payment to serve a term of four months

simple imprisonment. Similarly, this is a public order offence and we find that justice would have been served in the circumstances of this case by imposing the maximum fine on the appellant.

48. The sentence is therefore varied to a fine of $200.00 and in default of payment to serve a term of 6 months simple imprisonment.

ORDER

49. The appeal against conviction is dismissed and the conviction is affirmed. The appeal against sentence is allowed and the sentence is varied to a fine of $200.00 and in default of payment, the appellant will serve a term of 6 months simple imprisonment.

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P. Weekes
Justice of Appeal

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A. Yorke-Soo Hon
Justice of Appeal