

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL NO. 11 OF 2019

IND#028/2018

SC#0947/2018

BETWEEN:

COREY ROBERT DODGE

Appellant

-v-

HER MAJESTY THE QUEEN

Respondent



BEFORE:

The Rt. Hon Sir John Goldring, President  
The Hon Sir Richard Field, JA  
The Hon Dennis Morrison JA

Appearances: Mr. Keith Myers and Mr. James Stenning of Stenning & Associates for the Appellant  
Mr. Greg Walcolm, Office of the DPP for the Respondent

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**JUDGMENT**

Revised from transcript of oral judgment dated 4 September 2020 and Approved

Released 11 September 2020

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**Sir Richard Field, JA**

*Introduction*

1. Following a trial before Justice Marlene Carter (“the judge”) and a jury on an indictment containing two counts of indecent assault contrary to section 132 of the *Penal Code (2017 Revision)*, the Appellant was convicted on count 1 which charged that he indecently touched the complainant’s breasts and was sentenced to three years, three months’ imprisonment.
2. He was acquitted on count 2 that alleged that he indecently touched the complainant’s vagina.

3. On 13 May 2019 the Appellant filed a Notice of Appeal against his conviction on count 1 and against the sentence of three years, three months. His first ground of appeal against conviction was that the judge misdirected the jury, and in particular as to the ingredients of the offence
4. It was not in dispute that in the early hours of 18 June 2017 the Appellant touched the complainant's breasts as she lay on a bed in the apartment of a former boyfriend to whom we shall refer as "AB". Earlier the previous night the complainant had visited a bar known as Calico Jacks where she met and spoke to AB. After the bar closed AB offered to give the complainant and two female friends of hers a lift home but they ended up at AB's apartment where they went on to the beach to watch a thunderstorm. The group continued to drink and socialise and were joined by the Appellant who lived in the neighbouring apartment. The Appellant and the complainant knew of each other but had not previously met. They chatted and the Appellant made a flattering observation about the complainant's appearance.
5. Shortly before about 2.30 am the complainant went to lie down alone on the double bed in AB's bedroom. Later, the Appellant went silently into that bedroom and started touching the complainant which led to his touching her breasts. The complainant then reacted and started shouting, at which point the Appellant left the room and returned to his apartment.
6. The complainant was interviewed by the police on 21 June 2017 and the resulting ABE was admitted into evidence at the trial. It contained the following exchange between the complainant and the interviewing officer:

Complainant: *"And when I finally did come through, and I'm sure I moved around a bit before then, kind of thinking like, oh, [AB], and like that, being weirded out, and then, like still kinda, and then all of a sudden hitting that, like"*.

Officer: *"So you're saying you may have momentarily entertained him, just momentarily? Oh yeah ... sorry just momentarily"*.

Complainant: *"Oh yeah, I think"*

Officer: *"Thinking that he was,"*

Complainant: *"he was somebody else"*

Officer: *"Okay"*

7. The complainant's evidence at trial was that she had spoken to the Appellant that night during the gathering at AB's home when no one else was around and he had said something about her physical appearance which she described as some "*slimy guy stuff*". She tried to ignore him and

walked away. As the night progressed she told AB that she was going to lay down and proceeded to lay down in AB's bedroom on her own and fell asleep with all her clothes on. The next thing she recalled was that she started to wake up and could feel someone touching her breasts which she described as "*general groping*". She turned around and recognised that it was the Appellant who was laying in the bed to the side of her. She panicked and the Appellant then ran from the room. It happened really fast. She realised that her shorts were off and immediately put them back on. In this state of panic she ran outside to check if the doors were closed and realised that no one was there.

8. The Appellant's evidence was that he spoke to the complainant at the gathering at AB's apartment several times when she was with others but only once when they were alone for about 5 minutes during which he told her that she was pretty and made a comment about her appearance. Although he did not recall her specific response, it was not negative or that his comment was inappropriate.
9. The Appellant stated that he left AB's residence and went to his apartment and was aware that the other persons involved in that night's gathering left the residence at around 3:00 am – 3:30 am.
10. Thereafter he returned to AB's apartment because he wished to speak with the complainant to see if she wanted to go out on the beach to talk. He had the impression that she would want to talk because everyone was friendly at the gathering and also because of his earlier interaction with her. He entered AB's bedroom and saw the complainant asleep on the bed laying on her back. The bedroom lights were not on but he could see her in the room as the lights in the nearby kitchen were on. He sat on the edge of the left side of bed and called the complainant's name and asked if she was ok and then touched her on the shoulder and she woke up and she responded 'yes'. The complainant then put her arm behind his head and pulled his face to hers and kissed him and he responded by kissing her back. He stated that while kissing her he felt pleased and thought that she was interested in him. He stated that the kissing lasted for a couple of minutes and while they kissed he touched her on her face, her back and her breasts. He said that while kissing her the complainant then stopped and shouted and used one of her hands to push him away. This action scared him. He panicked and returned to his apartment. After calming down he returned to the AB's residence about 10-15 minutes later because he wanted to speak to the complainant about what had just occurred. He knocked on the door several times but no one responded. He denied removing the complainant's shorts, underwear, or touching anywhere below her navel.

11. The Appellant's evidence was the same as the account he gave when interviewed by the police.

*The legal context to the appeal*

12. The deliberate touching of another person without their consent is an assault and the assault will be an indecent assault if it is capable of being considered indecent by right-minded persons. It follows that when bringing a charge of indecent assault founded on touching the prosecution has to prove that the accused intended to and did touch the complainant indecently without the complainant's consent. This means that the prosecution must prove that the defendant did not believe that the complainant was consenting to the touching; see Archbold 2020 edition, para 20-364 (e); *R v Court* [1989] AC 28 and *R v Kimber* [1983] 1 WLR 1118.

13. As has been noted, it was common ground that the Appellant touched the complainant's breasts and that, if this was not consented to, the touching was indecent. It follows that, in light of the evidence of the complainant and the Appellant and the complainant's ABE interview referred to above, the issues for the jury at the trial were:

- (1) Were they sure that the complainant had not consented to the Appellant touching her breasts? If they were not sure, they must acquit.
- (2) If the answer to (1) was yes, were they sure that the Appellant did not honestly believe that the complainant had consented to his touching her breasts. If they were sure of this, their verdict should be guilty.

14. Given the Appellant's defence that he honestly believed the complainant to be consenting to his touching, if the prosecution proved that he did not have this belief the only conclusion open to the jury would be that the prosecution had proved that he knew he did not have the complainant's consent or that he had taken the risk that she was not consenting. It was therefore not necessary to complicate this straightforward case by raising as an issue whether the Appellant was reckless as to whether the complainant was consenting. To do so, as did the judge, raised an unnecessary complication confusing to the jury.

15. In her summing up, the trial judge outlined the ingredients of the offences charged as seen at page 17, line 8 to page 21 line 12 of the transcript. She directed the jury that the prosecution had to prove that the Appellant intentionally assaulted the complainant, intended indecently to assault her and intended that the assault would be such as would be considered indecent by right-minded people. At that stage, save for stating that the prosecution's case was that the

complainant did not consent to the touching of her breast, the judge did not deal further with the issue of consent.

16. Later, the judge reminded the jury of that part of the complainant's ABE interview in which she mentioned she might have momentarily entertained the touching and she reminded the jury that in the complainant's evidence she did not accept that she had momentarily consented to the touching. The judge then went on:

*"Now, if you look and consider this case, the defendant has said it was consensual. If you say it was consensual, I believe the defendant and I don't believe the complainant, well, that's an end of matter. As I said, you go back to the prosecution case. The prosecution makes you sure -- I'm sorry, I'm sorry. I think I shifted to things there I'm sorry. Let's start again.*

*The prosecution's case was that there was no consent. Yes? The defendant says she consented. Now, the complainant has, in that previous interview, said that what was said there about "momentarily," and it's been suggested that that was momentarily she consented. Yes? When the complainant gave evidence she did not accept that. However, it is there for you to consider, because it has been suggested to her.*

*As I say, you can believe some of her evidence and not another part. If you believe that she did momentarily consent, yes, you then must go on to consider whether or not when the defendant said that there was that momentary -- that there was consent, whether it was that momentary consent, and whether or not the defendant could honestly have felt that there was consent at that point, whether he honestly felt that there was consent at that point.*

*Now, again, you must consider all the circumstances in order to come to that conclusion. The prosecution are saying when you look at those circumstances, the defendant having entered the room while it was dark, while the complainant was asleep, not trying to find out whether or not she was awake, whether she knew it was him, whether she knew it was Corey [the Appellant] and not [AB], you then have to determine whether you believe he honestly believed that she was consenting there momentarily, or whether or not he was reckless as to whether she consented or not, meaning he did not bother to satisfy himself that she was in fact consenting. So you look at all the circumstances to see whether or not, in those circumstances, you find that he was reckless as to whether or not she was consenting. Yes? Whether it was honest that he actually did think that at that point, or whether he was reckless when he considered whether or not there was consent at that point."*

17. We are bound to observe that this part of the summing up was profoundly unsatisfactory in that it was extremely confusing and gave the distinct impression that it was for the Appellant to prove that he honestly believed his touching was consented to when, on the authority of *Kimber*,

it was plainly for the prosecution to prove that he did not believe that the complainant was consenting to the touching.

18. The Crown has rightly conceded that this part of the summing up was a serious misdirection and that in consequence this appeal must be allowed on the ground that the Appellant's conviction is unsafe. There is no application for a re-trial. We accordingly allow this appeal and set aside the Appellant's conviction on count 1.
  
19. Before concluding this judgment, there is another matter we feel it important to mention. It relates to what happened in the aftermath of the jury's verdict that the Appellant was not guilty on count 2, following which the jury were going to have to retire to consider their verdict on count 1. At this point a member of the jury (juror 5) was allowed to raise orally with the judge in open court a submission made by counsel for the Appellant that if the complainant had thought that the Appellant was someone else when she was being touched, that amounted to the giving of consent. Astonishingly, the judge then responded to this juror in terms similar to those she used when giving the seriously deficient direction that the Crown concedes renders the Appellant's conviction unsafe. And that was not all. The judge went on to attempt to deal with a further point raised by a different juror (juror 7) whether recklessness should be considered from the point the Appellant entered the bedroom or from the moment the Appellant believed he got consent.
  
20. We are in no doubt that the judge was in serious error to proceed in this manner engaging as she did in a debate in open court with members of the jury. What she should have done was to request the juror to formulate a question in writing which she would then consider with counsel for the prosecution and for the defence before dealing with it in open court if she thought it appropriate to do so.

