IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 2/2020
IND 16/2019
SC#02355/2018

BETWEEN:

LEANDRO SOLOMON

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon John Martin, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Date of Hearing**:** 13th November 2020

Appearances: Mr. Rupert Wheeler for Appellant
Ms. Kerri-Ann Gillies, Office of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 13th November 2020 and Approved for Release 18 February 2021

MOSES, J.A.:

1. This is an application for permission to appeal in respect of a sentence imposed upon the applicant, Leandro Solomon, on 20 December 2019. On that day he was sentenced to four months' imprisonment by Justice Richards for an offence of indecent assault, contrary to section 132 of the *Penal Code (2019 Revision).* He had pleaded not guilty but had been convicted.

2. The appeal, however, focuses not on that sentence, but upon a Sexual Harm Prevention Order (SHPO) which was imposed at the same time.

3. It is submitted that it was unnecessary to impose such an order, and, in any event the terms in which it was imposed are too wide, and unjustifiable.

4. It is, however, necessary for the purposes of assessing the strength of those submissions to refer to some of the facts of the case. The judge described those offences in her sentencing remarks: this applicant accosted a woman whom he did not know, in frightening circumstances in the early hours of the morning in October 2018 as she walked along a road in George Town. He engaged her in conversation, made frightening remarks of a sexual nature saying "*what if I show you my*" referring to "*his private person*" as the judge puts it. And as she tried to escape, he pursued her, grabbed her from behind, grabbing her bottom and lower back and then as she sought help from nearby premises, started to masturbate in front of her.

5. His response, when he was being interviewed, to a video that he was shown of his behaviour, was described rightly by the judge as being "*chilling*". He plainly had no understanding of the gravity of what he had done or of the impact that it had had upon the victim. This was particularly of concern, bearing in mind that this applicant was 29 at the time of this offence, and it was a first sexual offence. Normally, that might be powerful mitigation but not, in our judgment, in this case. He had been in trouble with the police in the past for minor offences, although the author of the social inquiry report dated 11 October 2019 rightly noted there had been "*some escalation*". But what was sinister about this was not merely the gravity of the offence itself and his reaction, but the fact that it demonstrated an escalation of criminal behaviour into the particularly sensitive and dangerous elements of an offence of a sexual nature.

6. The first submission advanced by Mr. Wheeler is that no order restricting his liberty as an order such as this does, was necessary. It is plain that no judge should pass such an order unless it is necessary and proportionate.

7. In this case, Mr. Wheeler challenges the propriety of such an order by pointing out that although the conclusion in the report was that he was at a high risk of committing a sexual offence again, there was no proper reasoning to support that conclusion.

8. There is a reference in the report to the very serious features of his behaviour, pointing to a very high risk, both in relation to his companions and alcohol and drug problem and his pro-criminal attitude and orientation. None of those, submits Mr. Wheeler, justifies deploying the risk matrix 2000 to reach the conclusion that he was a high-risk offender. Still less, when one looks at the proportion of high-risk offenders who have reconvicted within two years; namely, only

three percent. In those circumstances, submits Mr. Wheeler, there was no justification for any order of this nature at all.

9. We do not agree. Having regard to the gravity of this offence itself, the escalation of the offences committed by this applicant and particularly of his reaction and attitude to it and his total lack of understanding of how serious it was, we think such an order was justified. The explanation for it was that at the time, unfortunately, he was suffering from mental difficulties, particularly a type of schizophrenia for which he had to take medication and he had not taken that medication. But that, in our judgment, merely underlines the risk and does not mitigate it. In those circumstances, we think some order was appropriate. However, it is necessary to look at the terms of the order to see whether it was justified, because if the terms are either vague or unenforceable or cannot easily be understood, then they are worthless.

10. Paragraph 3 of the order directs the applicant as follows:

> *"You shall not loiter at, or enter any residential property or premises, including hotels, resorts, strata, apartment buildings, dwelling houses or any premises where female persons reside, either permanently or temporarily during the hours of 22:00 hours - 10:00 p.m. - to 6:00 hours - 6:00 a.m. - the following morning without the express invitation from a resident of the property or dwelling house or unless you have lawful reasons for attending the property*".

11. Mr. Wheeler rightly observes that if one chooses to loiter at or enter any residential property there is no means of knowing whether a female person is there or not and the expression "*either permanently or temporarily*" is inherently vague since it is not clear as to whether it is referring to the trespasser or whether it is referring to the female persons.

12. In those circumstances, so far as the drafting is concerned, we would delete the words beginning "*where female persons*" down to the adverb "*temporarily*", so that the order will read "*dwelling houses or any premises during the hours of 22:00 hours*" and so on.

13. Mr. Wheeler submits that that clause is unnecessary because it merely replicates the provisions of 277 (1) of the Penal Code which provides:

> "*A person who, without having lawful business thereon, enters upon the premises of any private residence or upon land belonging to any proprietor or occupier which is enclosed, or in any manner cultivated, commits the offence of criminal trespass and is liable to a fine of $1,000 and to imprisonment for one year".*

14. Mr. Wheeler submits that bearing in mind there is serious penalty for that criminal trespass as

defined, it is unnecessary to replicate it in the order. But, in our judgment, the order does not replicate that provision because it makes the important prohibition against "*loitering at*" and, in those circumstances, is not merely repeating the provisions of the criminal law but adds to it, enjoining the applicant not to loiter at the premises.

15. In those circumstances, we reject the submission that it is unnecessary because it repeats the criminal law, although we do think that "*loitering at*" would be better worded as "*loitering in the vicinity of*" and we would change the order to meet the attack on the word "*at*".

16. The next submission relates to clause 5 of the Sexual Harm Prevention Order:

> "*You shall notify the Royal Cayman Islands Police Commissioner in writing at least seven days in advance of any departure from the Cayman Islands to travel overseas by air or sea. Such notification shall include the travel itinerary and the location in which you will be staying*".

17. Then there is an addition which I need not read out.

18. It was not clear from Ms. Gillies' submissions on behalf of the respondent quite what the purpose of this was, bearing in mind clause 4 of the order requires this applicant to notify the Commissioner of any change in his residence. There is no history of offending once he left the islands or indeed any particular intention to leave the islands.

19. It is important that these orders not only are clear, but are focused upon the particular defendant against whom they are addressed, and do not contain in any form standard wording that might be appropriate in a different circumstance. In those circumstances, we shall delete the whole of clause 5. We do not think that it was justified in this case.

20. Given our strictures in relation to the order, we shall therefore grant leave to appeal and, to that limited extent by altering the wording as we have described, allow the appeal.