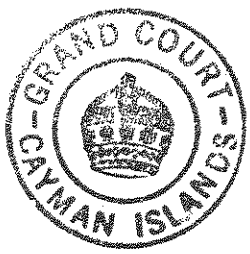
IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

SCA NO: 16/2013

'J'

v.

THE QUEEN



Appearances: **Mr. Delroy Murray of Murray & Westerborg for the Appellant**

Mr. Patrick Moran of the DPP for the Respondent

Before: **Justice Michael Mettyear (Actg.)**

Heard: **15TH May 2015**

JUDGMENT

Preamble

1. Section 12 of the Youth Justice Law (2005 Revision) states:

> "12. *(1)* *In relation to any proceedings in any court, such court may direct [and this court so directs] that-*
>
> *(a)* *no published report of or comment on the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any young person concerned in the proceedings, either as being the person by, against or in respect of whom the proceedings are taken, or as being a witness in the proceedings; and*
>
> *(b)* *no picture shall be published as being or including a picture of any young person so concerned in the proceedings.*

> *(2) Whoever publishes any matter in contravention of subsection (1) is guilty of an offence and liable on summary conviction, in respect of each such offence, to a fine of five thousand dollars or to imprisonment for six months.*

Therefore, for the avoidance of any doubt, in any report of this matter, no words or descriptions shall be used which could identify the victim by name, age, address, educational institution(s) or otherwise.

INTRODUCTION

2. This is an appeal against a conviction recorded on the 13th November 2013 and a sentence imposed on the 20th November 2013. No application has been made to re-hear evidence.

3. The conviction followed a protracted trial before Magistrate Kirsty-Ann Gunn when the Appellant was found guilty of Cruelty to a Child contrary to s.225(A) of the Penal Code (2010 Revision). The charge specified as the "Particulars of Offence" the following:

> "'J', on the 1st day of May 2011, at an address in Grand Cayman, having the responsibility of a girl under twelve years old, wilfully assaulted her."[1]

4. A further charge of Common Assault against the Defendant/Appellant, in which it was alleged that the Defendant/Appellant threw a "stroller" at her daughter, 'P', was dismissed at an earlier stage – the Crown accepting that a conviction was not possible on the evidence adduced.

[1] This wording is edited to remove the Defendant's/Appellant's name, the residential address identified and the name of the child.

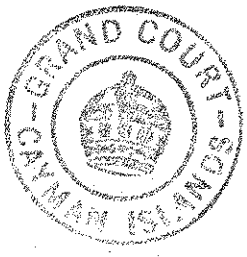
5. The sentence imposed was a 30-day prison sentence suspended for 18 months and a Probation Order with conditions that the Defendant:

i. Submit to the supervision of a probation officer and comply with the officer's directions;

ii. Complete the anger management programme; and

iii. Undertake such other individual counselling as directed by probation in consultation with the assigned social worker.

6. 'P' is the natural daughter of the Appellant and her husband. 'P' was born in 1999.



HISTORY OF THE PROCEEDINGS

7. The history of the proceedings makes sad reading. Although the alleged offence took place on the 1st May 2011 and the matter came to the attention of the police on the 9th May 2011, the first hearing in the Summary Court was not until the 1st November 2011. The case then remained in the Summary Court until the sentence was imposed just over 2 years later. There was then a hearing in the Grand Court where a rather curious order was made, which I will have to return to later. Further delay then occurred until the case came before me for hearing on the 15th May of this year [2015]. Only today will the case finally be over.

8. I am not seeking to blame any particular person or persons for the delays. Even if I wanted to do so I could not as I have only very limited information as to why some of the delays occurred. I merely wish to record my disappointment that a relatively straightforward case concerning a child complainant should take more than 4 years to resolve.

THE FACTS

9. A very brief outline of the build-up is that P was left at home on the 1st May 2011, having been "grounded" whilst the rest of the family went to the beach. She sought permission to leave home and visit friends, but this request was refused. In response 'P', by text, called her mother a "bitch". The response from her parents was to tell her they loved her. Despite what she had been told 'P' went out to her friends' house and was therefore not at home when her mother returned. Understandably, there was a good deal of upset. The Appellant told her husband to pick up 'P'. In due course mother, father, 'P' and the rest of the family were at home. It is the Appellant's conduct thereafter that forms the basis of the allegation against her.

10. In an appeal which does not involve the hearing of evidence the appellate court is very reliant on the findings of fact of the lower court. In the present case the learned Magistrate carefully set out her findings beginning on page 35 line 15 of her judgment:

> *"I am therefore satisfied so that I am sure that the defendant did wilfully assault [P] in that-*
>
> *(i) The defendant threw shoes at [P] when [P] entered the family home;*
>
> *(ii) The defendant threw many toys at the door and used her fists to pound the door;*
>
> *(iii) That the force used to pound the door was such that it created a hole;*
>
> *(iv) The hole was large enough for the defendant to put her head through;*
>
> *(v) That the defendant laughed at [P] in a mocking manner, including the phrase "peekaboo";*
>
> *(vi) At the same time the defendant repeatedly stated that she was going to kill [P];*
>
> *(vii) That the defendant repeatedly called and spoke to [P] after [P] ran away from home;*
>
> *(viii) That during one of these phone calls, the defendant told [P] that she had killed her father; and*
>
> (ix) *In another phone call the defendant said she would kill [P]."*

11. She went on to state that she was sure:

> *"...the defendant's behaviour would have caused a reasonable adult to fear that immediate violence would be used against them, but that 12 year old 'P' did in fact fear this"*

12. It is in light of that background and these findings that I turn to the Grounds of Appeal. They read as follows:

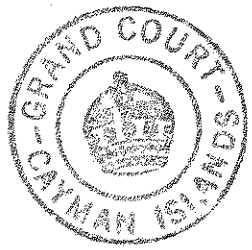
i. The Learned Magistrate erred in law in rejecting the No Case Submission made on behalf of the Appellant at the end of the Crown's case.

ii. That the Learned Magistrate failed to take into account that the Appellant's action on the day in question, at its highest, did not amount to cruelty but to lawful chastisement of her child, the Complainant, in the case.

iii. That the Learned Magistrate failed to appreciate the importance and impact of the evidence that the Appellant and her husband differed in the manner in which they disciplined children of the marriage;

iv. That the Learned Magistrate failed to appreciate and examine the evidence of [the husband], as being someone with an interest to serve.

13. I will deal with grounds in reverse order.

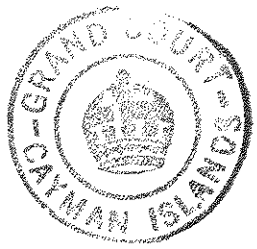


THAT THE LEARNED MAGISTRATE FAILED TO APPRECIATE AND EXAMINE THE EVIDENCE OF [THE HUSBAND], AS BEING SOMEONE WITH AN INTEREST TO SERVE

14. The assertions simply do not stand up to scrutiny. It is clear throughout the judgment that the Learned Magistrate was acutely aware of the tensions and difficulties existing between husband and wife. As a result she was appropriately cautious when considering the weight to be attached to his evidence. Specifically, she said the following at page 23 line 9 to 20:

> *"[The husband] was, at times, defensive as well as argumentative which is not unusual, given he was not agreeing with many of Mr. Murray's suggestions. In particular, during questions as to the Grand Court proceedings [the husband] became very agitated, defensive and frustrated. It was clear that he felt very wronged by the actions of the defendant in the way she obtained the initial order. I must also consider the real possibility that [the husband] may believe that a conviction in these criminal proceedings would improve his case in the family proceedings and thereby provide another motive to be dishonest. In light of all of these factors, it is therefore necessary for me to be cautious when assessing his evidence and that of ['P'] as she now resided with him for 2 years and will equally be affected by the outcome of these proceedings and the Grand Court proceedings."*

15. It was a model direction and completely refutes Ground 4.



THAT THE LEARNED MAGISTRATE FAILED TO APPRECIATE THE IMPORTANCE AND IMPACT OF THE EVIDENCE THAT THE APPELLANT AND HER HUSBAND DIFFERED IN THE MANNER IN WHICH THEY DISCIPLINED THE CHILDREN OF THE MARRIAGE

16. This ground appears to misunderstand the nature of the proceedings and the role of the Magistrate. This was not a case of the Appellant against her husband, but a case the Crown brought against the Appellant. The Court was not deciding between the merits of the views of one parent as against the views of the other. It was deciding whether the Appellant's conduct, as proven, constituted the charge laid. If it did, she was guilty, irrespective of the views of her husband.

17. It is clear that the Learned Magistrate understood this. She said at page 28 of her judgment:

> *"It is undeniable that a parent will feel agitated, frustrated and even angry with a child that in their view continually misbehaves, particularly when the child is a bit older and strong willed. Also, I am mindful that the way a parent reacts and deals with a disobedient child will differ from parent to parent. What is considered to be disobedient behavior justifying more or less severe reprimanding will differ from parent to parent. Some parents struggle with discipline issues more than others and some children are more disobedient or disrespectful than others. These are all matters I take into account. However, there is a line which the law states you cannot cross, when the actions are no longer reasonable or justifiable. That is the nature of the offence of assault generally, and cruelty to a child in particular. I must not consider how I, or any other parent, would have felt or dealt with the situation, but whether the facts as I find them to be, cross the threshold of criminal behaviour."*

18. There is no merit in this ground of appeal.

THAT THE LEARNED MAGISTRATE FAILED TO TAKE INTO ACCOUNT THAT THE APPELLANT'S ACTIONS ON THE DAY IN QUESTION AT ITS HIGHEST DID NOT AMOUNT TO CRUELTY BUT TO LAWFUL CHASTISEMENT OF HER CHILD, THE COMPLAINANT IN THE CASE

19. In his skeleton argument for the Crown, Mr. Moran claims that this was "specifically disavowed by counsel for the Appellant at the trial". In support he refers to P4 of the judgment of the Learned Magistrate, where she says:

> *"Mr. Murray has not suggested that this is a case where the defendant asserts "reasonable chastisement", primarily because the defendant's case is that there was no assault at all".*

20. I do not read that as Counsel disavowing "reasonable chastisement" and I do not believe that the Learned Magistrate took it that way. She recognised that he could not easily put it forward positively, because it was at odds with his primary submission that there was no assault at all.

21. It would have been open to the Learned Magistrate, if appropriate, to find an assault and yet say it was "reasonable chastisement" despite Mr. Murray not putting it forward.

22. However, in view of the findings of fact already referred to, "reasonable chastisement" was a complete non-starter. What happened, as found by the Learned Magistrate, is completely incompatible with such a concept.

23. This ground of appeal fails.

THE LEARNED MAGISTRATE ERRED IN LAW IN REJECTING THE NO CASE SUBMISSION MADE ON BEHALF OF THE APPELLANT AT THE END OF THE CROWN'S CASE

24. These days it would be very unusual to allow an appeal where there had been defence evidence on the ground that the case should have been stopped at the end of the Crown's case. That is because the appellate court is looking to see whether, on all the evidence, the conviction is safe. I therefore approach this ground as if it included a more general complaint that the conviction was unsafe.

25. In fact, whichever way one looks at the ground of appeal, it is clear from the defence "skeleton" and, more particularly, Counsel's oral submissions, that the basis of the defence case on this ground depends on the complaint about the way the Learned Magistrate treated discrepancies in the evidence. Discrepancies between what a witness said at one time and another and discrepancies between what one witness said compared with what another witness said. As Mr. Murray said in opening the appeal "the case turned largely on credibility."

26. A number of discrepancies are relied on by the defence and, in a nutshell, the submission by the defence is that they demonstrated that the witnesses were lying or were so unreliable that their evidence should not have been relied on. It is claimed that the Learned Magistrate gave insufficient weight to these discrepancies.

27. Of course discrepancies are the life blood of criminal litigation. Not many cases are completed without one side or the other or both alleging that the case for the other side has inconsistencies in the evidence. Indeed it is such a frequent occurrence that in cases where there are no inconsistencies one is met by the submission that the witnesses have conspired to get their stories to be the same as other witnesses - that they are "all singing from the same hymn sheet" as it is sometimes put.

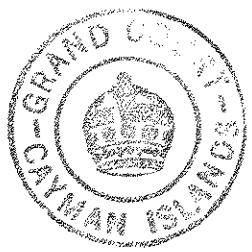
28. In truth, discrepancies can arise for all sorts of reasons. People see things differently and people have different powers of comprehension and memory. The lapse of time can damage or make false a memory, which can also be affected by drink or drugs. Of course a judge or jury must always be alert to the possibility that a witness may be deliberately seeking to mislead.

29. These and other factors are what judges and juries wrestle with on a weekly basis.

30. In seeking to persuade me that the Learned Magistrate was wrong Mr. Murray has the difficulty that she saw the witnesses and I have not. Realistically his only chance of success is to show that her approach to the problem was wrong.

31. Her general approach to evidence was set out at page 3 of her judgment when she said:

> "*In considering the evidence of any witness I may accept or reject any part of such evidence or reject such evidence in its entirety. I should look at the other evidence to see if such evidence corroborates or undermines the witness' evidence*".



32. She clearly understood the importance of witness credibility in this case as she demonstrated when she said, at page 16 of her judgment:

> *"Much of this case rests on the credibility of the main parties. ['P'] gave evidence over two days while her father gave evidence over three days. The defendant gave evidence over the course of almost a day. This gave me considerable opportunities to observe their demeanour as well as the way in which they respond to very extensive probing by counsel. Miss Brophy and Mr. Watling provide evidence on two narrow but important issues, namely the telephone calls and ['P's] emotional state.*
>
> *When assessing the evidence of all of the witnesses the Court is mindful of the fact that all witnesses, including the defendant, are trying to recall events that occurred two years previously. This time lapse will have inevitably affected the quality of their evidence."*

33. She went on to say:

> *"In broad terms the sequence of events on 1st May as recounted by 'P' and by her father are very similar".*

34. She set out the similarities. Significantly, she also set out the inconsistencies. These appear at Page 16 of her judgment:

> *"There are some inconsistencies in their accounts as well, such as:*
>
> *i. Whether ['P'] ended up lying on the ground during the course of the defendant throwing shoes:*
> *ii. Whether ['P'] had gone into her room of her own accord or whether her father had instructed her to do so;*
> *iii. Whether ['P']had barricaded the door with a chair or a desk; and*
> iv. *Whether ['P'] had opened the door later or her father had done so."*

35. She dealt with these by saying:

> *"These inconsistencies are not so significant or of a nature that would individually or collectively cause the court to question the credibility or reliability of their evidence as a whole. These are not material issues".*

36. At page 21 of her judgment the Learned Magistrate said, of 'P':

> *"Overall, I was left with the impression that ['P'] was trying to be as accurate and forthright in her account as she could be and honest with regards to what she could and could not remember of events that occurred two years' previously. Throughout her evidence ['P's] demeanour appeared genuine. She was very respectful, even during lengthy and forceful cross-examination by Mr. Murray. She showed what appeared to me to be genuine emotions, including at times, considerable distress."*

A little later she said:

> *"Not only was [P] herself a credible witness but as already stated, in the large part her account was corroborated by the evidence of [her father]".*

37. As I have pointed out already, the Learned Magistrate directed herself on the need to be cautious about the evidence of the father, but his was not the only evidence called by the Crown. She considered that there was consistency between the evidence of 'P' and Miss Brophy and Mr. Watling. Nevertheless, she set out such inconsistencies as she did find and decided that:

> *"None of these issues are material and are the type of inconsistencies that are not unusual when witnesses are recounting events that occurred 2 years ago".*

38. I have no intention of going through all of the alleged discrepancies set out in the defence "skeleton". I chose one example. I select it because it is a genuine discrepancy, it had an important consequence and it demonstrates the approach of the Learned Magistrate. It concerns the "stroller".

39. In her account to the police 'P' alleged that her mother threw a baby stroller at her. In her evidence in court she said that it was pushed against her foot. She assumed that her mother had done this because of her position *vis-a-vis* the stroller. She made it clear that she did not actually see her mother either throw or push the stroller. She maintained this stance after having been referred to her police statement to refresh her memory. Mr. Murray submitted that this was "very crucial" – raising "serious issues about the credibility of the witness". There is, however, another way of looking at this evidence.

40. It was considered in some detail by the Learned Magistrate. Having reviewed the evidence she said:

> "*What is clear to me is that, rather than being deliberately untruthful in her statement to the police, ['P'] was saying that she had drawn an inference from the circumstances as she believed them to be, which provides a reasonable explanation for her statement to the police. What was even more striking was that when ['P']was given her statement to look at that part of it, had she intended to the dishonest and bolster the case against her mother, she could have said at this point that she did see her mother push the stroller, but, instead, she maintained that she had not seen her mother push the stroller.*"

It was this evidence from 'P' that caused the assault charge to be dismissed.

41. The way that the Learned Magistrate dealt with this specific issue and her general approach to the inconsistencies cannot be faulted. She weighed the evidence, considered the submissions and reached a conclusion. In each instance the decision she made was one she was entitled to make and one which could not possibly be said to be unreasonable.

It is for this reason that I do not need to go through each and every inconsistency alleged by Mr. Murray. My answer would be substantially the same in each instance. In truth Mr. Murray's complaint is that he disagrees with the conclusions reached. That is not a ground for overturning the conviction.

42. Besides the issue of credibility Mr. Murray raised the matter of the ingredients of the offence of "Cruelty to a child". Having dealt with those ingredients which were not in dispute, he stated, in his skeleton argument, at paragraphs 17 to 19, what he called the fourth and fifth ingredients that the Crown have to prove and his submission that the Crown had not proved these ingredients. The paragraphs read as follows:

> "*17. Fourthly, the Prosecution must prove that the assault in question must be something more than a mere common assault – R v. Hatton [1925] 2 K.B. 322.*
>
> *18. Fifthly, the evidence led by the Prosecution must show that the "assault" complained of must be willful. The Prosecution is therefore required to present to the Court evidence showing a state of mind of the Defendant of an intention to commit the assault on the Defendant R v. Sheppard [1981] A.C. 394.*"
>
> *19. In this case it is submitted that the Prosecution failed to lead cogent and reliable evidence before the Court to support the fourth and fifth ingredient of the charge.*"

43. For present purposes I accept that the Crown in a case of "Cruelty to a child" allegation, based on an assault, has to prove more than a "mere common assault". However it is quite clear that the findings of the Learned Magistrate amounted to much more than that. She found that the Appellant was involved in a lengthy and frightening incident which included throwing things at her daughter, trying to get at her by conduct that knocked a hole in a door, taunting her and threatening to kill her. Conduct which she found caused 'P' to fear that immediate violence would be used against her. That conduct cannot possibly be described as a "mere common assault".

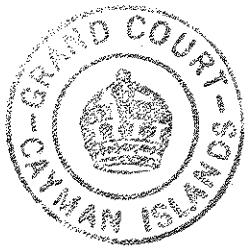
44. So far as the mental element of the offence is concerned, it is true in some examples of "Cruelty to a child" this can be a problematic issue. However, in a relatively simple case like this it is not necessary to look beyond the word "wilfully", meaning in this context "deliberately and knowingly" as opposed to accidentally. Obviously, the Appellant did what she did deliberately and knowingly.

45. There is one further matter that I wish to deal with specifically. It arises from a comment in paragraph 44 of Mr. Murray's skeleton argument. He set out an argument justifying part of the Appellant's behaviour and went on:

> "*To think otherwise shows a cultural bias and a lack of appreciation of how parents from former colonial territories have been taught and raised to handle such situations* …"

46. I have looked through the careful judgment of the Learned Magistrate for any evidence of deliberate or unintended bias. I have also looked for any evidence of a lack of appreciation of the type alleged. There is none. This is an allegation that is wholly without foundation. It should never have been made.

47. The appeal against conviction is dismissed.



APPEAL AGAINST SENTENCE

48. The ground of appeal reads "That in all the circumstances the suspended 30-day imprisonment was excessive."

49. It has not been argued that the sentence was wrong in principle. It couldn't be. The sentence fell within the type and length of sentence recommended by Magistrates' Guidelines. The Learned Magistrate was in the best position to assess the appropriate length of sentence and that which she chose cannot be said to be manifestly excessive.

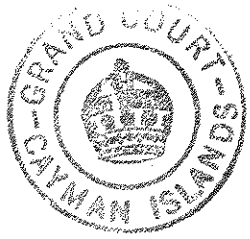
50. In normal circumstances the appeal against sentence would end there. However, in spite of the fact that the probation order is not mentioned in the ground of appeal it is, in my judgment, necessary to look at that.

51. Following sentence in the Summary Court the case came before the Grand Court on the 12th December 2013. At that hearing the Learned Judge ordered a stay on the Probation Order pending appeal. For myself I have never before heard of a stay being applied in such circumstances, although I can see the logic of making such an order. Neither Counsel has experience of such an order being made on any other occasion. I cannot say that there is no power to make such an order as I have not had the issue argued before me. Be that as it may, the fact is that no steps have been taken to implement the Probation Order since the stay was imposed and nearly 18 months have gone by since then.

52. I have no doubt that the order as well as each of the conditions were properly imposed by the Learned Magistrate for the reasons she gave. Whether the Order or the conditions are necessary or relevant now, I have no idea. I have no reason not to believe what I have been told, namely, that the father and 'P' are now living together in the U.S.A. whilst the Appellant remains in the Cayman Islands. I understand that the Appellant has periodic contact with 'P' when she comes from the U.S.A. to visit. I am told that there has been no further trouble.

53. One way to resolve the issue would be to call for further reports to get an updated picture and see what is recommended. However, adapting the words of William Gladstone, spoken in a different context, "this dance has gone on long enough". I revoke the Probation Order. To that very limited extent I allow the appeal against sentence.

Dated this the 5th day of June 2015



Honourable Justice Michael Mettyear (Actg.)
Acting Judge of the Grand Court