The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 14 of 2018

B E T W E E N:

CALVIN HUNT

Applicant/Appellant

- v -

THE QUEEN

Respondent

Before: **Clarke, President**
Smellie, JA
Gloster, JA

Appearances: Bruce Swan and Stephanie Burrows-Trott, D.V. Bermuda Ltd, for the Applicant/Appellant;
Loxley Ricketts, Office of the Director for Public Prosecutions, for the Respondent

Date of Judgment: **12th March 2019**

EX TEMPORE JUDGMENT

Accessing child pornography – extension of time to appeal – leave to appeal against fact alone – criteria for bringing an appeal twice – counsel's failure to adduce amended grounds of appeal.

CLARKE P:

Introduction

1. We have to determine whether we should grant an extension of time to appeal, and leave to appeal in this case.

2. I would grant an extension of time for filing the Notice of Appeal.

3. As to the question of granting leave to appeal; this case has a lamentably long history. Mr. Hunt entered a plea of not guilty on 12 August 2015. There was a hearing before the learned Magistrate in June 2016, followed by a further day's hearing in February 2017, with the judgment of the learned Magistrate being given on 25 July 2017.

Procedural History

4. Counsel before the Magistrate was Mr. Rick Woolridge. He drafted the Notice of Appeal to the Supreme Court. A hearing date was set for the 17th July 2018. At Mr. Woolridge's request there was an adjournment from that date, and a new hearing date was fixed for 14th August 2018, which was later moved to the 22nd August 2018. The Applicant then decided that he would seek new counsel, and on the 14th August 2018, Mr. Paul Wilson filed a Notice of Change of Counsel. There was then an application for a change of date for the hearing before the learned Judge. With reluctance, the Crown did not oppose that application, and with similar reluctance, the Court granted it, and a new hearing date was fixed for the 14th October 2018.

5. Since then, there has been a second change of counsel, and we now have before us 7 grounds of appeal to this Court, all of which it is common ground, raise issues of fact. Grounds 2, 3, 6 and 7 do not feature in the Notice of Appeal to the Supreme Court. I would not give leave to appeal on any of those. They could have been raised before the Supreme Court. Mr. Wilson had ample time in which to file an amended Notice of Appeal, but he did not do so, presumably thinking that the existing grounds were sufficient.

The Grounds of Appeal

6. Item 7 of the grounds of appeal sought to be argued before us is that the Applicant's appeal counsel was not allowed to file his own grounds of appeal. In fact, he did not attempt to file new grounds of appeal, and the Judge, unsurprisingly, decided not to entertain grounds of appeal that were not in the Notice of Appeal to the Supreme Court.

7. What has happened is that, having failed before the learned Magistrate and the learned Judge, the Applicant, through his new counsel, has sought to introduce these new points. It is in my view wholly inappropriate to give leave, and, in effect, to allow the Applicant a third bite at the cherry.

8. The principal new ground of appeal is a complaint about the performance of the Applicant's first counsel. Since if leave had been given, it would probably have been necessary to hear oral evidence, the Court required the attendance of counsel. We are not going to allow this ground to proceed, and have made no decision as to its merits, or the lack of them, and I regret that it is been necessary for Mr Woolridge to attend, conformably to our requirement.

9. In relation to grounds 1,4 and 5, the ground of appeal is in essence, that the learned Magistrate was in error in his factual finding. The cases in which the Court of Appeal will allow a second appeal on the facts are rare, and, in my view, this is not one of them. On the evidence before him, the learned Magistrate, who, of course, saw and heard the Applicant, was entitled to conclude that on the second occasion, when someone accessed the two videos in relation to which the Applicant was convicted, namely on 31st December 2014, it was the Applicant who did so. It was his phone and the obvious inference that it was he who accessed it was not rebutted. The learned Magistrate was entitled to hold that that inference was not displaced by the Applicant saying, at the end of his evidence, that there was no lock on his phone and that his children played with it.

Conclusion

10. The learned Judge was entitled to leave the findings of the learned Magistrate undisturbed. I am wholly unpersuaded that there was some significant failure of analysis by the Judge which could justify the bringing of a second appeal. I would therefore dismiss the application for leave to appeal under all of the seven grounds. The matter is accordingly remitted to the Magistrates Court for sentence for the 15th March 2019.

SMELLIE JA:

11. For the reasons given by my Lord President, I agree that the appeal should be dismissed and the application is refused.

GLOSTER JA:

12. I agree.

Clarke P

Smellie JA

Gloster JA