ROYAL COURT
(Samedi Division)

21st October, 1997

Before: **F.C. Hamon, Esq., Deputy Bailiff, and Jurats Myles and de Veulle**

POLICE COURT APPEAL (The Magistrate)

T

- v -

The Attorney General

Appeal against conviction in the Magistrate's Court on 12th May, 1997, following a not guilty plea to:

1 count of indecent assault.

[On the May, 1997, the appellant was bound over for three years; there was no appeal against sentence].

Appeal allowed; conviction quashed.

Advocate M.J. Thompson for the Appellant.
N.M.C. Santos Costa Esq., Crown Advocate.

JUDGMENT

THE DEPUTY BAILIFF: The appellant, T, was charged on 21st October, 1996, with having committed an indecent assault on one W in April, 1996, at the Watch Room at the Airport Fire Service, Jersey Airport. The appellant's first appearance in the Magistrate's Court was on 12th November, 1996. This is because the incident was only reported some weeks after it occurred. The Magistrate found the charge proved on 12th May, 1997, one year and one month after the alleged indecent assault was committed. During that time, seventeen witnesses were called, the Court made a visit to the site of the incident, there was a lengthy submission of no case to answer (it covers forty eight pages of transcript) and the defence began its case on 27th March, 1997. On 12th May the appellant was sentenced to a binding over order of three years. It is perhaps not surprising that witnesses often made contradictory statements.

The facts are in general not disputed. On that Sunday the on duty Watch at the Airport were due to come off duty at 9.35 in the evening. We should say immediately that both the appellant and the complainant are grown men. W was 30, married with a young son; the appellant was 39 and also married with two children.

At around 7 o'clock on that evening W put out a spoof announcement over the tannoy system operating within the Airport Fire Service building. The Watch had planned a night out once their shift ended at 9.35. The spoof announcement was to the effect that there was an extension to flying hours. This, had it been true, would have meant the Watch remaining on duty until the Airport closed.

Three firefighters went to the watch room, firefighters G, V and M The precise whereabouts of M in the room is in dispute.

The appellant entered the room. He said to W *"If you are mucking around I am going to stick my finger up your arse."* At that stage, W and the other officers present regarded that statement as a joke and as retaliation for the spoof announcement by W. There was apparently what was described as a culture of horseplay in the Airport Fire Service at the time.

In the Magistrate's Court a swivel chair was fetched and the usher gave a demonstration to the extent of lying on the ground to show the position in which the complainant fell after he was tipped from the chair.

The appellant having tipped W from his chair on to the floor pulled his trousers down to his knees and at this stage the complainant's underpants also came down. The appellant placed his hand between W's thighs above the knee but below his penis and scrotum.

It is alleged at this point that the appellant pushed his finger into the anus of W. That would have complied with his threat but he denies that it happened and no one saw it happen. The appellant admits that when he pretended to carry out his threat the pitch of the complainant's laughter changed. The complainant says he screamed but only two other witnesses heard what they described as a soft grunt. After the alleged incident, the appellant placed his finger in the air and then into Ws mouth.

W alleges that the alleged insertion of the finger into his anus caused immediate bleeding and caused him to bleed intermittently for the next three or four months. It is clear from the learned Magistrate's remarks that he did not attach a great deal of importance to the bleeding. What he said was this:

> ADVOCATE THOMPSON: *"But, Sir, I submit what you have to decide is whether a finger was inserted so as to cause bleeding".*
>
> JUDGE SOWDEN: *"No, surely not. So as to hurt. I don't think the bleeding is of the consequence that you attach to it".*
>
> ADVOCATE THOMPSON*: "Otherwise, how do you explain the bleeding?"*
>
> JUDGE SOWDEN: *"Well, it was the hurt. I don't actually give a fig for the bleeding".*

The Watch went out as planned , The appellant left at about 11.45. The complainant continued partying until 2.00 a.m.

The appeal is based on seven grounds and we have been greatly assisted by Advocate Thompson's skeletal argument.

In the case of Vaughan heard in November, 1974, and reported in Whelan's "Aspects of Sentencing in the Superior Courts of Jersey" at pp. 84-85, Ereaut, DB, during his summing up defined grave and criminal assault thus:

> ***"Now in Jersey law an assault is a touching or laying hold by one person on another in an angry revengeful rude indecent or hostile manner and it includes an attempt to do so provided that the person who is threatened is led to anticipate an attack. In the United Kingdom an attempt to do these things is called "an assault" and the actual doing of these things is called "a battery" but here we make no such distinction. We use the same name for an attempt and for the actual doing of the thing; they are both equally called "assaults". In Jersey law assaults can be of two kinds. They can be either common assault which is the less serious type of assault or they can be grave and criminal assault which is as the name implies the more serious type of assault and the only difference between them is one of degree".***

To that element of assault we have to add the element of indecency. In R. -v- Court (1988) 2 All ER 221 Lord Ackner in the House of Lords judgment held that on a charge of indecent assault the prosecution must prove 1) that the accused intentionally assaulted the victim, 2) that the assault and the circumstances surrounding it are capable of being considered by right minded persons as indecent, and 3) that the accused intended to commit such an indecent assault.

The crucial words of the Magistrate are these: *"I am sure that at the material time you carried out your threat to penetrate W's anus with your finger and so intentionally. I find you guilty of the offence as charged. I do not find that the degree of penetration was as great as W had every reason to believe that it had been"*.

There, in the judgment, is as clear an exposition as can be found of what the Magistrate found beyond reasonable doubt to have been proved and to have constituted the indecent assault. Not apparently the taking down by force of the complainant's trousers and underpants, not the putting of the finger into the mouth but the pushing of the finger into the anus of W. The Magistrate need not have gone into such detail. The appellant was charged *"with having between 18.45 hours and 19.30 hours approximately on Sunday, 7th April, 1996, in the watch room of the Airport Fire Service, Jersey Airport, in the parish of St. Peter, committed an indecent assault upon W"*.

It would appear that the element of indecency that brought the matter outside the terms of horseplay was the insertion of the finger.

The general grounds of appeal in the notice of appeal filed on 19th May were sevenfold:

1. The conviction was contrary to the weight of the evidence;

2. That the Magistrate erred in law in considering the test to be applied on intention.
3. That the Magistrate erred in failing to take into account the medical evidence and inconsistencies in the prosecution evidence.
4. That the learned Magistrate erred by giving an express indication of his own disbelief in relation to the evidence of two witnesses.
5. That the learned Magistrate erred in law in rejecting a submission of no case to answer.
6. The conviction was unsafe and unsatisfactory.
7. There was a miscarriage of justice.

Advocate Thompson has amplified these headings before us.

What has taken place before us has been a very detailed examination of all the evidence the Crown Advocate, Advocate Santos Costa has with as equal skill as Advocate Thompson argued before us that the Crown's position is that the verdict is entirely safe and that, in those circumstances, this Court should not interfere.

We must remind ourselves constantly that the learned Magistrate is a juge d'instruction. His function is perhaps unique. He has to probe and question and satisfy himself on the evidence that the case is made out. He has no assistance. He has statements and other documents before him. It does seem to us surprising as we have said that the learned Magistrate opined that "*he didn't give a fig for the bleeding*".

We think that the bleeding was important to test the reliability of the witnesses and of the complainant in particular.

It seems to us highly improbable that even if the finger had been inserted in the anal canal it would have been the cause of the bleeding over a period of months. It is interesting that when Dr. Le Sueur saw the complainant on 6th August and did a proctoscopy he noted the presence of quite large haemorrhoids high up in the anal canal. When he withdrew the proctoscope a little, quite large quantities of blood appeared. Neither Dr. Le Sueur nor later Mr. Allardyce, the surgeon, noticed any scarring. The degree of insertion was not in point. Either there was insertion to cause bleeding or there was not. Certain matters are not in dispute.

The appellant walked into the watch room; he spoke the words which contained the threat, he pushed the complainant to the ground; he removed the complainant's trousers; he inserted his hand between the complainant's legs; he held up his finger and inserted it into the complainant's mouth.

The complainant said that he screamed when the appellant bent over him and inserted his hand between his thighs. Others heard a low grunt, but no scream and then blood according to the appellant trickled some five or six inches down the inside of his left leg. There was no blood on the floor. There was apparently no reaction from the complainant when the finger which he alleges had been inserted up his anus with sufficient force to cause bleeding was put into his mouth.

Certain other matters are surprising. After this incident the Watch went out to a nightclub. There did not appear to be animosity. When leading fireman H was shown

the blood in the toilet by the complainant in early July or late June the first question that H put to him was whether he had haemorrhoids - he replied in the negative. We know that to be untrue. That may have been caused by embarrassment as may the statement that he had been prescribed cream by the doctor. It is perfectly clear that haemorrhoids are not caused by digital penetration of the anus. As Dr. Holmes said in his evidence, first degree piles are very much internal, do not prolapse and only bleed at defecation. Any injury to the anal canal would have healed by primary intention in a matter of days. There was no scarring evident on examination. The complainant was certainly diagnosed as having haemorrhoids as early as November, 1993.

This Court has anxiously considered all the evidence and we agree with Crown Advocate Costa that there was corroborative evidence and we are, despite some anomalies, content that the learned Magistrate followed the rules of practice which were appropriate to the protection of the defence. The Court has listened very attentively to all the detailed points raised and the very adequate way that Crown Advocate Costa answered them. The learned Magistrate had the real advantage of seeing and hearing the witnesses but this Court has an added advantage of being able to review all the evidence at leisure over a considerable period f of time.

We are aware that this was not a jury trial but in R. -v- Cooper (1969) 1 QB 267, Widgery LJ gave the judgment of the Court of Appeal in these terms:

> ***"a case in which every issue was before the jury and in which the jury was properly instructed, and accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing up was impeccable, this Court should not lightly interfere … (We) are … charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the Court experiences it".***

We perhaps uniquely have that very lurking doubt of which Lord Widgery spoke. There may have been an injustice done. The complainant had received a sickness warning. His sickness return report showed a high sickness absence record from February, 1994. In 1995 he had 51 days absence out of 252 working days and 13 out of 116 working days in 1996. This had resulted in an interview with the Chief Airport Fire Officer who had said that he would continue to monitor the sick leave and expect to see an improvement over the next six months. It was at this time that he complained of the assault to H.

We shall say no more except that, like the Magistrate, we would hope that this culture of horseplay will be brought to an end. It does nothing for the good standing of a vital emergency service.

The lurking doubt allows us to uphold the appeal.

Authorities

Whelan: Aspects of Sentencing in the Superior Courts of Jersey: p.84: Anthony David Vaughan.

R. -v- Court (1986) 3 WLR 1029 CofA.

R. -v- Court (1988) 2 All ER 221; [1989] AC 28 HL.

A.G. -v- Annison (13th July, 1988) Jersey Unreported.

Archbold (1997 Ed'n): paras. 7-43 to 83: pp.857-872;
paras. 8-248 to 251: pp. 1085-6;
paras. 19-66, 67: p. 1594;
paras. 19-179 to 182: p. 1629;
paras. 20-148 to 163: pp. 1733-6;
paras. 21-144 to 150: pp. 1821-2.

Jones, Campbell, Smith, Nicholas, Blackwood, Muir (1986) 83 Cr.App.R. 375.

Aitken, Bennet, Barson (1992) 95 Cr.App.R. 304.

A.G. -v- de sa Caires (20th March, 1995) Jersey Unreported.

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R. -v- Cooper (1969) 1 QB 267.