IN THE SUPREME COURT
OF THE FALKLAND ISLANDS

Case No. SC/CRIM/1/10

BWTWEEN:

REGINA

Appellant

v

JOAN PAUL CANCINO CONTRERAS

Respondent

Representation:

Appellant: Ciaran Rankin (col)

Respondent: Keith Watson (sol)

Judgment

1. This is an Appeal under s.22 Administration of Justice Ordinance, a Case having been Stated by the Senior Magistrate on a point of law for the opinion of this Court.

2. On 10 March 2010 the Senior Magistrate acquitted the Respondent of sexual assault under s.3 Sexual Offences Act 2003 (the Act), incorporated into the law of the Falkland Islands by the Sexual Offences Ordinance 2005. It is submitted by the Appellant that he was wrong in law to have done so.

3. S.3 of the Act states that a person (A) commits an offence if:

   (a) He intentionally touches another person (B),
   (b) The touching is sexual,
   (c) B does not consent to the touching, and
   (d) A does not reasonably believe that B consents.

4. This Court is only concerned with (b) and the definition of the word "sexual" in s.78 of the Act which defines a touching as sexual if a reasonable person would consider that:

   (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

5. The facts found by the Senior Magistrate are set out in paragraph 2 of the Case Stated. In summary he found that the Respondent and Complainant lived together. They had both been drinking at a party where they had an argument. The Complainant returned home, locked the doors and went to bed. Later she unlocked the doors. The Respondent came home between 2.30am. and 3 am. He undressed to his boxer shorts and they then became involved in an argument as to where he had been and with whom. At one point the Complainant was seated in the porch and the Respondent was standing in front of her. He then pulled down his boxer shorts exposing his genitals and placed his hand on or near the back of the Complainant's head and applied pressure. She pushed him away and the act was repeated. It was not alleged that his genitals evidenced any sexual arousal but she believed that his intention was that she should perform oral sex on him. He asserted that he only wished her to see his genitals to show that he had not had any sexual activity with another woman, of which she had accused him during the argument.

6. The first question in the Application was whether the touching was because of its nature sexual under s. 78 (a), and therefore the offence was made out without having to consider any circumstances or any explanation. Mr. Rankin, who appears for the Respondent today, accepts that this assertion cannot be sustained, and that the Senior Magistrate was did not err in law in rejecting the submission that the touching was, because of its very nature, sexual.. I consider that that this concession must be right, and that the Senior Magistrate was correct in law in his finding.

7. The remaining questions all relate to the construction of s.78 (b), guidance in relation to which is contained in the England and Wales Court of Appeal decision in R v Karl Anthony H (2005) 2 Cr. App. R.9, where, as here, the nature of the touching was not inevitably sexual. The Court stated that it was important to note that there were two requirements in section 78 (b). Firstly that the touching because of its nature may be sexual and secondly, because of its circumstances or the purpose of any person in relation to it (or both), it is sexual. It was necessary for both halves to be established.

8. S.78 (b) was clearly intended to cover a situation where the requirement of that the touching was unarguably sexual cannot be met, but where the touching "may" because of its nature be sexual. All that the first limb requires is a finding that the touching may have been sexual in nature which requires further consideration under the second limb. It is accepted that the Senior Magistrate was entitled so to find, and therefore to move on to consider the

second limb of s.78 (b). I do not consider that sexual arousal of the Respondent was necessary for such a finding.

9. Having done so, it is accepted that the Senior Magistrate was entitled to consider all of the circumstances and/or the Respondent's stated intention. He found that the Respondent showed no evidence of sexual arousal, that both parties had been arguing almost constantly throughout that day making mutual accusations of infidelity, and that the Complainant did not understand what the Respondent was saying to her in Spanish. He referred to the Respondent's explanation that he was merely asking her to look at his genitals so that she could see that there was no physical evidence of sexual activity with another woman. He referred to the fact that thereafter they both stayed in the house, albeit sleeping apart, and that the Complainant did not report the matter to the police until the following evening, when she said she wanted to see what they made of it. In the light of these findings the Senior Magistrate concluded that a reasonable person could not be sure that the Respondent's assertion was not correct, and therefore was not satisfied that the touching was sexual within s.78 (b).

10. Mr. Rankin submits that the Senior Magistrate took too narrow a view of the word "sexual." He submitted that the circumstances in which there was an argument over sexual infidelity, where the Respondent removes his boxer shorts whilst standing near to the seated Complainant, and pulls her head towards them, was enough for it to be sexual, even accepting the Respondent's explanation. The allegation of sexual infidelity made this sexual. He doubted, however, if the circumstances were the same but no touching had taken place, an allegation of indecent exposure could be made out.

11. He distinguished this case from a situation where a man may have injured his genitals climbing over a fence and then had touched his partner to get her to look at his genitals to assess the extent of the damage. Therefore, in effect, he submitted that the Respondent should still have been convicted, even though the allegation that he was in fact touching her to perform oral sex was not made out.

12. Mr. Watson, for the Respondent, pointed out that the circumstances alleged by the Appellant to make the touching sexual, namely an allegation of sexual activity with another woman, were remote from the touching both as to place and time, and allegedly involved a third party. Further, no sexual intention relating to the touching had been established. In all the circumstances of the case, including the fact that the situation was highly charged in view of the allegations that were flying about, and the fact that these two were living together, he submitted entitled the Senior Magistrate to find, as a matter of law, that this touching was not in fact sexual.

13. I agree. S.78 (b) clearly entitled the Court to take into account all circumstances and explanations, and I am satisfied that the Case Stated confirms that the Senior Magistrate, having correctly directed himself to consider the matter as a reasonable person, did precisely that. Having done so, he concluded that such a person would not be able to be sure that the Respondent intended the Complainant to perform oral sex, nor to be sure that the Respondent's explanation was not correct. I consider that he was entitled so to find. Having so found, I do not accept that as a matter of law he was bound nevertheless to find the touching to be sexual. I accept Mr. Watson's submissions. I consider that the Senior Magistrate was entitled, as a matter of law, to find that the Prosecution had failed to prove that the touching was sexual, and the Respondent was entitled to be acquitted.

14. I accordingly answer the questions at paragraph 7 (6) (ii) and (iii) of the Case Stated, as to whether the Senior Magistrate erred as a matter of law, in the negative.

Christopher Gardner QC
Chief Justice

16 June 2010