[2023] JMCA Crim 46

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 70/ 2013

CHRISTOPHER ALLEN v R

Ms Jacqueline Cummings for the appellant

Miss Donnette Henriques and Marvin Richards for the Crown.

2 May 2022 and 27 October 2023

Application for leave to appeal against conviction and sentence – Whether corroboration warning necessary – Evidence of a child – Evidence of a complainant in a sexual-offence case – Whether sentence manifestly excessive – Time spent on remand before sentencing – Whether sentencing process in keeping with authorities

F WILLIAMS JA

[1] Having obtained permission to appeal from a single judge of this court, the appellant brought this appeal against his convictions and sentences for the offences of rape and indecent assault, contrary to common law. The appellant was convicted in the Saint Elizabeth Circuit Court on 26 June 2013 before a judge ('the learned trial judge') sitting with a jury and sentenced to 18 and three years' imprisonment respectively for the said offences, with the sentences to run concurrently. On 2 May 2022, the court heard his appeal, and, with a promise of brief reasons to follow, which is now being fulfilled, ordered as follows:

> "1. The appeal against conviction is dismissed.
>
> 2. The conviction is affirmed.
>
> 3. The appeal against sentence is allowed in part in that, while the sentences of 18 years'

imprisonment for rape and 3 years' imprisonment for indecent assault, both at hard labour and to run concurrently, are affirmed, the appellant is to be credited with the period of 2 years and 3 months spent in custody on pre-trial remand so that, in effect, he will serve a sentence of 15 years and 9 months' imprisonment at hard labour for rape and 9 months' imprisonment at hard labour for indecent assault.

4. The sentences are to be reckoned as having commenced on the date on which they were imposed, that is, 19 July 2013."

The trial

Case for the Crown

[2] The case for the Crown rested on the testimony of several witnesses. The virtual complainant, who was seven years of age at the time of the incident and nine years old at the time of trial, was found by the learned trial judge to be competent to give evidence. She was the sole identifying witness. She testified that, on 1 March 2011, she took a taxi at her school gate in order to get home. She stated that she was seated in the rear passenger seat along with other children. She further testified that, when she was the only passenger remaining in the vehicle, the driver turned onto a ball field and stopped the car. He thereafter took off her clothes and inserted his penis into her vagina and placed his mouth on her vagina. She testified that the driver then drove to the Lacovia Post Office, where he left her.

[3] The virtual complainant further testified that she told her mother about the incident and was taken to the police station and the hospital. She testified that she later identified the appellant on a video identification parade as the man who had raped and assaulted her on the day in question.

[4] The mother of the virtual complainant testified, among other things, that samples were taken from the virtual complainant in the form of swabs, along with her school uniform (which she had been wearing at the time of the incident).

[5] Corporal Pearline Simmonds also gave evidence in the matter. Her testimony showed that the integrity of the chain of custody of the deoxyribonucleic acid ('DNA') samples and clothing taken from the virtual complainant was maintained. She also testified that DNA samples and a pair of underpants were taken from the appellant and that those items were labelled and submitted for DNA analysis. Additionally, she testified that at the Lacovia Police Station, the virtual complainant identified, as the car in which she had been assaulted, a motor vehicle that had been seized from the appellant at the time of his arrest.

[6] Mrs Sherron Brydson gave testimony of DNA analysis that was conducted in the matter. She testified that sections of the virtual complainant's underwear revealed a mixed profile, from at least two individuals. She further testified that the appellant could not be excluded as a contributor to the male DNA found in semen on the virtual complainant's underwear.

Case for the defence

[7] The appellant made an unsworn statement from the dock. He denied the allegations against him and stated that he had been falsely accused. The appellant also contended that he had no prior convictions. He further stated that he was a mechanic and that he did not operate a taxi.

The grounds of appeal

[8] At the hearing of this appeal, counsel for the appellant sought and was granted leave to abandon the original grounds of appeal and to argue four supplemental grounds. The supplemental grounds are set out below:

> "(a) The Learned Trial Judge failed to give adequate warning or proper directions to the jury on the danger of conviction on the sole identification of a child witness.
>
> (b) The Learned Trial Judge failed to adequately warn the jury on the dangers of acting on the uncorroborated evidence of a complainant in a sexual case or in addition to have given a separate warning on the dangers of acting on the uncorroborated evidence of a child.

(c) The directions given by the Learned Trial Judge to the foreman of the Jury when they returned without a unanimous verdict or split vote were inadequate, and not the proper directions in the circumstances.

(d) The Learned Trial Judge failed to give an explanation on how she arrived at her sentences of the Appellant which were manifestly excessive having regard to the offences herein."

[9] That having been done, Ms Cummings also declared her intention to argue only ground (d). However, as she did not formally abandon grounds of appeal (a) to (c), it is still necessary to give some consideration to those grounds, having regard to the written submissions filed.

[10] It is convenient to discuss grounds (a) and (b) together.

Ground (a) the learned trial judge failed to give adequate warning or proper directions to the jury on the danger of conviction on the sole identification of a child witness.

Ground (b) the learned trial judge failed to adequately warn the jury on the dangers of acting on the uncorroborated evidence of a complainant in a sexual case or in addition to have given a separate warning on the dangers of acting on the uncorroborated evidence of a child.

Submissions

[11] In her written submissions, counsel for the appellant argued that the learned trial judge, in her summation, failed adequately to warn the jury that it was dangerous to convict the appellant in circumstances in which: (i) the virtual complainant was a minor; (ii) the offences were of a sexual nature; and (iii) the virtual complainant was the sole identifying witness, which heightened the need for corroboration. Counsel further argued that the learned trial judge did not adequately use the term "danger of conviction on identification of one sole witness" in her summation to the jury.

[12] In written submissions, Crown Counsel, on the other hand, argued that the learned trial judge had adequately directed the jury on the identification evidence elicited from the virtual complainant. Further, Crown Counsel submitted that that identification evidence was corroborated by the DNA evidence. Crown Counsel further argued that, although there was no general requirement for a corroboration warning

for a child witness, or one for a virtual complainant in a sexual-offence case, those warnings were in fact given by the learned trial judge.

Discussion

[13] In a trial in which the quality of the identification evidence is good, the case may safely be left to the jury for them to assess such evidence, provided that they are warned of any special need for caution in the circumstances of that case.

Legislative provisions

[14] It may be useful, at this juncture, to refer briefly to the Sexual Offences Act ('the Act'), which took effect on 30 June 2011, whilst immediately acknowledging that that Act was not in effect either at the time the offences in this case were committed, or when the appellant was tried. Section 26(1) of the Act removes any semblance of a requirement for corroboration in sexual cases tried under the Act. It reads as follows:

> "26.- (1) Subject to subsection (2), where a person is tried for the offence of rape or any other sexual offence under this Act, it shall not be necessary for the judge to give a warning to the jury as to the danger of convicting the accused in the absence of corroboration of the complainant's evidence.
>
> (2) Notwithstanding the provisions of subsection (1) the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining-
>
> (a) whether to accept the complainant's uncorroborated evidence; and
>
> (b) the weight to be given to such evidence."
>
> (Emphasis added)

[15] In summary, the Act stipulates that a corroboration warning is not mandatory in cases of rape and other sexual offences tried under the Act, but it is a matter that is left to the discretion of the individual judge.

[16] Section 31Q of the Evidence Act also makes it unnecessary for a child's evidence to be corroborated in order to sustain a conviction. It is in almost the exact terms as section 26(1) of the Act and reads as follows:

> "31Q. – (1) Subject to subsection (2), it shall not be necessary for the evidence given by a child in civil or criminal proceedings to be corroborated for a determination of liability, a conviction or any other issue, as the case may be, in such proceedings.
>
> (2) Notwithstanding the provisions of subsection (1), the trial judge (whether a judge of the Supreme Court or a Resident Magistrate) may –
>
> (a) in a trial by jury, where the trial judge considers that the circumstances of the case so require, give a warning to the jury to exercise caution in determining whether to accept uncorroborated evidence of the child and the weight to be given to such evidence; or
>
> (b) in a trial by judge alone, where the trial judge considers that the circumstances of the case so require, give himself the warning as provided under paragraph (a)."

[17] Although section 31Q of the Evidence Act was enacted in 2015 and so subsequent to the appellant's trial in 2013, it, along with the other statutory provisions, is mentioned as indicating the current thinking on the part of the legislature and the evolution of the law in relation to the need for a corroboration warning in sexual-offence cases.

[18] In briefly reviewing another statutory provision, it may be observed as well that section 20(1) of the Child Care and Protection Act exempts an accused from conviction in the absence of corroboration where (i) a child under 14 years does not understand the oath and (ii) where unsworn evidence is received. However, that section was inapplicable to the appellant's trial as the complainant was found to understand the oath and so, competent to give sworn evidence.

The common law position at the time of trial

[19] The foregoing review indicates the position in the Act and the various other legislative provisions at the time this appeal came on for hearing. As previously acknowledged, however, in this case, the applicant was not tried under the Act or under any other statute, but under the common law. The question then arises: what was the position at common law with respect to any warnings on corroboration in sexual-offence cases? The answer to this may be seen in the case of **Mervin Jarrett v R** [2017] JMCA Crim 8. In that case, Morrison P, writing on behalf of the court, opined that the discretionary stance now taken in the Act with respect to corroboration warnings is a reflection of the common law position. The learned President, at para. [18], stated as follows:

> "[18] We will first say a word on the matter of corroboration. By section 26(1) of the Sexual Offences Act 2009, there is now no mandatory requirement for a corroboration warning in relation to the evidence of the complainant in a sexual case. Instead, as section 26(2) provides, the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining (a) whether to accept the complainant's uncorroborated evidence; and (b) the weight to be given to such evidence. **These provisions reflect the position to which the common law had already come**, as demonstrated by the decision of the Privy Council in **R v Gilbert** [2002] UKPC 17 (applying **R v Makanjuola; R v Easton** [1995] 1 WLR 1348), which confirmed **that the question whether to give a corroboration warning in sexual cases was a matter for the discretion of the trial judge** (see also the decision of this court in **R v Prince Duncan & Herman Ellis**, SCCA Nos 147 & 148/2003, judgment delivered 1 February 2008)." (Emphasis Supplied)

[20] In **R v Prince Duncan and Herman Ellis**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 147 & 148/2003, judgment delivered 1 February 2008, Smith JA, writing on behalf of this court, after reviewing the authority of **Makanjoula** (1995) 1 WLR 1348, at page 1451, and, in particular, the dicta of Lord Taylor CJ therein, made the following observation at page 19 of this court's judgment:

> "This decision is, in our view, applicable to this jurisdiction. Therefore, unless otherwise enacted by statute, the guidance given by Lord Taylor should now be followed. The rule requiring a mandatory corroboration warning in sexual cases has been weighed in the balance and found wanting. It should now be only a matter of historical interest." (Emphasis supplied)

[21] Therefore, the common-law position at the time the offences were committed and the appellant was tried, was that, while a corroboration warning would, in years gone by, have been required, it was left to the discretion of a trial judge to decide whether, in the circumstances of each case, it was appropriate to give a corroboration warning in a sexual-offence case.

[22] A careful review of the transcript in this case shows that the appellant having contended that the virtual complainant was mistaken in her identification, the learned trial judge was careful to identify to the jury the particulars of the identification, including possible weaknesses. The learned trial judge, for example, directed the jury to consider:

(a) that the appellant was previously unknown to the virtual complainant (page 20, lines 9 to 10 of the summation);

(b) the circumstances under which the virtual complainant testified that she was able to see the appellant and her description of the appellant in that the virtual complainant did not say she saw his face for the whole time but that she saw his back when he went to buy Cheese Trix and saw his face when he was coming back to her. The virtual complainant described the appellant's hair as fuzzy and that it was covered with a 'kerchief' and a 'rasta' cap. The learned trial judge also referred to the appellant's statement that his hair was not locked at the time of the commission of the offence alleged against him, but that it had come to be that way as a result of his being in custody (page 20, line 20 to page 23, line 24 of the summation);

(c) that the complainant testified to seeing the appellant's face for 10, six and four seconds (page 24, line 17 to page 25, line 19 of the summation, respectively);

(d) that an honest witness may be a mistaken witness (page 24, lines 6 to 9 of the summation);

(e) that the other witnesses did not address what had happened (page 32, lines 13 to 15);

[23] Then, in relation to the specific warnings complained of (that is, the alleged omission by the learned trial judge to give directions on the evidence of a child and in a sexual-offence case), at page 16, line 7 to page 17 line 14 of the summation, the learned trial judge warned the jury in the following terms:

> "**Now, this being a sexual offence and it involves a young girl of tender age**, the comment I make is that I found her to be a bright little girl…but at the end of the day you still have to be careful as you consider her evidence, because **we recognise that young children can have overactive imaginations, they can make up stories.** We appreciate that **young children may be influenced to give evidence to say things that are not so**. **So in cases where we have young children, we have to consider their evidence carefully**. **Furthermore, it is a sexual offence, so with those things combined, the law says before you can convict on her evidence, you have to be satisfied so that you feel sure, but it is also considered dangerous to convict when there is no corroboration**, which means that there is no independent evidence supporting what she has said, which means that if there is some other evidence that can confirm that, yes, sex took place and that yes, this was the man who have [sic] committed the offence. If there is no independent evidence, you appreciate that there is none, you appreciate that it is dangerous to convict without it, but if you are still satisfied after you consider all these carefully, you are still satisfied so that you feel sure on her evidence alone, you can convict. If, on her evidence alone you are satisfied." (Emphasis supplied)

[24] What is patently clear from the summation, is that the learned trial judge gave both a corroboration warning for a child of tender years and a warning in relation to a complainant in a sexual-offence case. What is more, the learned trial judge gave those warnings in circumstances in which the appellant was also not excluded from the commission of the offences by the evidence of DNA analysis, Mrs Brydson having testified that the analysis revealed that the appellant could not be excluded as a contributor to the semen found on the virtual complainant's underwear. It is, therefore, quite apparent that the duty of the learned trial judge in this regard was sufficiently discharged and so this ground could not serve as a basis for undermining the conviction.

Ground (c) the directions given by the learned trial judge to the foreman of the jury when they returned without a unanimous verdict or split vote were inadequate, and not the proper directions in the circumstances.

Submissions

[25] In her written submissions, counsel for the appellant argued that the jury were placed under undue pressure to return a unanimous verdict when the learned trial judge directed them to return to the jury room. Additionally, counsel contended that the learned trial judge was wrong to have the jury retire after 3:00 pm as it amounted to putting pressure on them to return a unanimous verdict.

[26] In written submissions, Crown Counsel argued that the directions given to the jury when they had returned without a unanimous verdict, were appropriate and could not be properly construed as exerting improper pressure on the jury.

Discussion

[27] The Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book') at para. 1 of page 345, states that a trial judge should direct the jury that:

> "(1) they should try to arrive at a unanimous verdict (in respect of each count and each defendant); and
>
> (2) they may have heard of majority verdicts but they should put this out of their minds and concentrate on reaching a unanimous verdict/s. If a time were to come when the court could accept a majority verdict the judge

> will deal with the issue at that time. This would only happen if the judge were to decide that it is an appropriate course to take."

[28] The learned trial judge's direction regarding the initial split verdict is recorded at page 54, lines 1 to 25 and page 55, lines 1 to 20 of the summation. The jury was sent out at 2:26 pm and first returned at 3:15 pm. That time span did not permit the taking of a verdict that was not unanimous. After being informed that the verdict was not a unanimous one, the learned trial judge inquired whether the jury required further directions. To this they replied 'no'. The jury were then directed to return for further collective deliberations and told that only after sufficient time had passed would the court take a verdict which was not unanimous. This the learned judge was empowered to do by section 44(4) of the Jury Act. The jury then retired again at 3:19 pm. The jury returned a second time at 3:51 pm with a unanimous verdict of guilty on both counts.

[29] It is the accepted position that the jury should be allowed to deliberate in complete freedom and that no improper pressure should be exerted on them. The learned trial judge, as recommended by the Bench Book, directed the jury to return to the jury room to continue their deliberations in an effort to try to come to a unanimous verdict. It is also noted that the initial retirement of the jury was at 2:26 pm, which was before the 3:00 pm recommended cut-off time for the jury to retire to deliberate (see page 346, para. 5 of the Bench Book). Based on these considerations, there is nothing in the circumstances of this case to indicate that the learned trial judge's directions exerted undue pressure on the jury such as to make the convictions unsafe, or at all. The directions to the jury could not reasonably be said to have deprived them of their freedom to deliberate or placed them under undue pressure. The appellant, therefore, fails on this ground of appeal.

Ground (d) the learned trial judge failed to give an explanation on how she arrived at her sentences of the appellant which were manifestly excessive having regard to the offences herein.

Submissions

[30] In relation to the issue of sentence, counsel for the appellant averred that the learned trial judge's sentencing remarks did not set out the particular considerations

that ought to guide sentencing and further failed to account for the appellant's pre-conviction custodial period.

[31] Counsel for the Crown conceded that the sentencing remarks of the learned trial judge did not follow the format as outlined in recent case law but argued that it nonetheless addressed the factors necessary to arrive at an appropriate sentence. Crown Counsel also conceded that neither was there any express statement by the learned trial judge that the pre-conviction custodial period of the appellant had been taken into consideration in arriving at an appropriate sentence.

Discussion

[32] An appellate court will not lightly interfere with the sentencing discretion of a trial judge. It will do so only where the sentence is inadequate or excessive such as to satisfy the appellate court that there was a failure to apply the right principles (see, for example, **R v Ball** (1951) 35 Cr App R 164). It is acknowledged that the learned trial judge did not methodically set out her sentencing considerations. While it is noted that cases such as **Meisha Clement v R** [2016] JMCA Crim 26, which set out detailed sentencing guidelines, were decided after the appellant's trial, it must also be noted that those guidelines are really an amalgamation of the previously-existing law and guidance on sentencing, enshrined in such cases as **Evrald Dunkley v R**, (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002. The court is, however, satisfied that the sentences of 18 years for rape and three years for indecent assault fall within the usual range of sentences for those offences. The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Court, December 2017 recommend sentences of 15 to 25 years for rape with three to 10 years for indecent assault. The sentences that were imposed in this case, therefore, cannot fairly be said to have been manifestly excessive.

[33] In the Privy Council case of **Callachand & Anor v The State of Mauritus** [2008] UKPC 49 (an appeal from the Court of Appeal of Mauritius), Sir Paul Kennedy, in delivering the advice of the board, stated at para. 9 that:

> "... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing."

[34] It is also accepted that, in circumstances in which credit is not given, the reason for doing so must be explicitly stated. Regrettably, the learned trial judge in this case, failed to adhere to these requirements. Accordingly, the appellant will have to be and, in fact, is credited with the period of two years and three months that he spent in custody on pre-trial remand; so that, in effect, he will serve a sentence of 15 years and nine months' imprisonment at hard labour for rape and nine months' imprisonment at hard labour for indecent assault, the sentences are to run concurrently.

[35] It was for these reasons that we made the orders stated at para. [1] hereof.