[2013] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 14/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE BROOKS JA (Ag)

CONSTANTINE ATKINSON v R

Terrence Williams instructed by Mrs Carolyn Reid-Cameron for the applicant

Miss Maxine Jackson for the Crown

19, 20, 21 April, 20 December 2010 and 31 May 2013

PANTON P

[1] This application for leave to appeal was refused on 20 December 2010. The sentence was at that time ordered to run from 21 April 2008. These are the reasons for our decision.

[2] The applicant was convicted on 11 January 2008 before Mangatal J and a jury on an indictment containing three counts, they being two for incest and one for buggery. The sentences, which were imposed on 21 January 2008, were as follows:

Count one – incest: six years imprisonment

Count two – buggery: six years imprisonment

Count three – incest: six years imprisonment

The sentences on counts one and two were ordered to run concurrently and that on count three to run consecutively to the others.

[3] The particulars in respect of the first count charged that the applicant committed the offence of incest on a day unknown between 1 and 30 November 2006 in the parish of Clarendon. The second count charged that the applicant buggered the said complainant on a day unknown between 1 September 2002 and 31 July 2004, and the third count charged that he committed incest on a day unknown between 1 February and 1 March 2004. The dates of the offences were the object of amendments during the course of the trial.

Summary of prosecution's case

[4] The allegations of the prosecution were that on three occasions the applicant assaulted the complainant in the manner described in the indictment. At the time of the incidents, the complainant, who was born on 19 February 1992, and the applicant were at the family home at night with the complainant's brother, who was born on 18 August 2000. The brother was in a different room on each occasion, and on at least one of those occasions he was asleep. The acts were committed after the applicant had instructed the complainant to proceed to the bedroom of his choice, and to remove the garments that she was wearing. On one occasion, the applicant used a condom.

[5] The complainant's mother was absent from the home at the time of the incidents as she is a fish vendor who had to be at a fishing village on a regular basis to await the arrival of the night's catch of fish to purchase same for sale next day. The evidence disclosed that, prior to the incidents, there was a good relationship between the applicant and the complainant.

The defence

[6] The applicant made a brief unsworn statement in which he said that he had not committed the acts and that the complainant and her mother had plotted to have the charges laid against him.

The application for leave to appeal

[7] The application for leave to appeal having been refused by a single judge of this court, it was renewed with much vigour through Mr Terrence Williams, instructed by Mrs Carolyn Reid-Cameron. It was resisted with equal resoluteness by Miss Maxine Jackson for the prosecution.

[8] The applicant filed two grounds of appeal with his application, namely, "(a) unfair trial", and "(b) insufficient evidence to warrant a conviction and sentence"." These were superseded by those settled by Mrs Reid-Cameron and argued by Mr Williams. They are as follows:

"**GROUND 1**

The Learned Trial Judge erred in law in failing to discharge the jury after prejudicial information was disclosed during the trial, thus depriving the Applicant/Appellant of a fair trial.

GROUND 2

The Learned Trial Judge erred in the exercise of her discretion by granting several amendments to the indictment as she failed to:

(a) Ensure that the manner in which the amendments were granted could not cause the jury to misapprehend that the Bench was giving judicial imprimatur to the virtual complainant's evidence.

(b) consider whether the Crown was unfairly manipulating the proceedings.

(c) consider the fact that retained Counsel was not present for the examination-in-chief of the virtual complainant;

thus depriving the Applicant/Appellant of a fair trial.

GROUND 3

The Applicant/Appellant was denied a fair trial and the verdict was rendered unsafe having regard to the fact that no evidence of his good character was adduced or admitted and consequently no 'good character' direction was given by the Learned Trial Judge on his behalf.

GROUND 4

The Applicant/Appellant's right to a fair trial was denied by the failure of the Crown to disclose potentially material information namely, a report on the medical examination of the virtual complainant done pursuant to the

investigation of the case brought against the Applicant /Appellant.

GROUND 5

The Applicant/Appellant was denied a fair trial as his Counsel failed to (a) take adequate instructions, (b) be present for the examination-in-chief of the virtual complainant, and amendments to the indictment, (c) adduce evidence of the Applicant/Appellant's good character.

GROUND 6

The Learned Trial Judge failed to assist the jury as to how they should treat evidence adduced by leading questions.

GROUND 7

Sentence manifestly excessive."

The submissions and comment thereon

[9] In relation to ground one, it was submitted that the jury should have been discharged because prosecuting counsel had elicited from the complainant evidence of indecent assault, not connected with the exact criminal acts complained of in the indictment. The indecent assault described by the complainant was the touching of her breasts and vagina. We agreed with Miss Jackson's submission that this evidence was negligible when viewed in the context of the events. Given the denial by the applicant of any act of incest or buggery, we were not able to see how it could be said that the evidence of the touching of the breasts and vagina with the hand was prejudicial. Such acts were clearly preparatory for the ultimate assault. In any event, we were satisfied that the learned trial judge gave an appropriate warning to the jury. She told them that

they were to ignore any evidence given that did not relate to the three counts before the court.

[10] So far as the giving of irrelevant incriminating evidence against an accused is concerned, the evidence complained of in this case fell far short of what would have been required for the discharge of the jury. An apt case for appreciating when there is a need for such drastic action by a trial judge is ***McClymouth v R*** (1995) 51 WIR 178. There, the main witness for the prosecution in a case of murder, when challenged by defence counsel on the issue of her credibility, stated that counsel was speaking as if it was the first murder that the appellant had committed. She also commented that the said defence counsel had appeared for the appellant at the trial for that other murder. This court felt that it was not sufficient for the learned trial judge in that case to merely give the jury a warning (which he did) to disregard that evidence – the jury ought to have been discharged.

[11] During the early stage of the trial of this matter, Mr Ernest Smith who was on record as appearing for the applicant was absent. However, he had arranged for Mr Dwight Reece to represent the applicant until he (Mr Smith) arrived. He eventually arrived for the post-lunch sitting of the court. During the period of time that Mr Reece had conduct of the defence, several amendments were made to the indictment. These amendments were in respect of the dates of the commission of the offences, and the addition of a third count. The amendments formed the basis for the complaint in ground two.

[12] Mr Williams submitted that the learned trial judge, in granting the application for the amendments, applied the wrong test, and that there should have been an adjournment to determine whether the defence was prepared to meet the new charge. He submitted that "the circumstances of the amendments cumulatively resulted in an injustice". He complained that the change in the dates "robbed the Applicant/Appellant of re-enforcing the position that the complainant lied". Further, Mr Williams said, at the time of the making of two significant amendments, the applicant's retained counsel was not present. He submitted that counsel who was holding, was embarrassed in that he had no instructions and so could not have effectively repelled the application for the amendments.

[13] Miss Jackson, in reply, pointed to the fact that section 6(1) of the Indictments Act permits the amendment of an indictment at any stage of a trial, to meet the circumstances of the case. The amendments in this case, she said, were not aimed at curing a material defect as the defence comprised -

(a) a complete denial of the acts charged; and
(b) an allegation of malice on the part of the complainant and her mother.

[14] We carefully examined the transcript of the proceedings and noted that although counsel who had been retained was not present, the applicant was not left to stand alone. He had with him competent counsel of fairly long standing. There is a practice direction dated 11 September 2002, issued by the then Chief Justice with the

concurrence of the puisne judges, requiring counsel whose name is on record and who is unable to be present at a trial to make arrangements for the representation of the client in his or her to ensure that the matter may proceed. This was done in this case. We noted that in any event no serious objection was taken to the amendments. In fact, both counsel were agreed on the need for the amendments.

[15] We noted also that retained counsel (Mr Smith) duly arrived and played a very active role in the conduct of the rest of the trial. He was fully aware of the amendments and made no complaint; neither did he seek to have any witness recalled for cross-examination. This stance by Mr Smith was in keeping with what Mr Reece had said to the learned judge earlier. Mr Reece had sought the permission of the judge to withdraw from the courtroom to answer a telephone call from Mr Smith. On his return to the courtroom, Mr Reece informed the learned judge that Mr Smith had "his concerns", but was "not overly anxious" about the amendments. We formed the view that, in the circumstances, it was really too late in the day for this complaint to be advanced before us, and we saw nothing to indicate that any prejudice was done to the cause of the applicant by these amendments. The dates of the offences were of no moment in the circumstances of the case, seeing that the issue was credibility. It was a straight question of whether the acts had taken place, or not.

[16] The applicant complained that there was no "good character" direction given in his favour. Mr Williams submitted that the failure of counsel to adduce evidence of good character was a source of prejudice to the applicant as such a direction would

have enured to his advantage. He submitted further that the evidence in this case was not such that would invite the application of the proviso.

[17] Without underestimating the importance and value of a good character direction, we noted that the complainant had given evidence indicative of a previously good relationship between her and the applicant and that the jury had been reminded of this. In view of the fact that the applicant as well as Mrs Reid-Cameron filed affidavits that reflected adversely on the efforts of counsel who had been retained by the applicant, we sought a response from Mr Smith who, as stated earlier, appeared for the applicant at the trial. In a letter to the Registrar of this court, Mr Smith stated that the applicant had advised him "that his wife had poisoned the minds of persons against him that he was not in a position to have anyone testify for him". We took the view that this statement ascribed by counsel to the applicant was in keeping with the position of the defence that the charge had been concocted by the applicant's wife and the complainant. Therefore, neither Mr Smith nor the learned judge could be faulted, in the one case for not raising the issue of, or in the other case for not giving, a "good character" direction. We noted that, in making his submission, Mr Williams said that he was not saying that there was any error on the part of the judge.

[18] Ground four complained that the applicant was denied a fair trial in that the prosecution failed to disclose potentially material information, namely a medical report in respect of the complainant. This ground emanates from information gathered from the written statement of the investigating officer, Constable Meleta Simms. She gave evidence of receiving the complainant's report on 2 February 2007, and of arresting and

charging the applicant on the following day. According to the constable, the complainant "was later medically examined at the private office" of a doctor located on Manchester Avenue, May Pen.

[19] Mr Williams submitted that the failure to obtain and serve the medical report on the applicant was a breach of his constitutional rights. The Crown, he said, had a duty to serve on the defence "anything that assists, or may assist, anything they collected or could have collected". He submitted that there were three points to be noted:

I. The complainant had a genital complaint, and this would have proved fertile ground for cross-examination;

II. There was no sign of anal intercourse; and

III. The date of the applicant's arrest was the date of the complainant's visit to the doctor.

[20] The applicant, Mr Williams said, should have been treated like the appellants in **Sangster and Dixon v R** (Privy Council Appeal No 8/2002), delivered 6 November 2002. The test, he said, is: might the jury have been affected by this evidence? In **Sangster and Dixon**, there was in existence a video recording showing scenes in a bank where a robbery had taken place. The murder followed the robbery. At the hearing of the appeal before the Privy Council, the video recording was for the first time seen by a court. Some of the pictures showed the faces and clothing of men who were carrying out the robbery. The appellants were not among the images seen on the

recording. The failure by the police to investigate and secure the recording was held to be fatal to the conviction of the appellants. Their Lordships were satisfied that the evidence of the video tape was material in the sense that, if it had been disclosed to the defence and had been led at the trial, it "might reasonably have affected the decision of the trial jury to convict" (***R v Pendleton*** [2001] UKHL 66 per Lord Bingham of Cornhill at para. 19; [2002] 1 WLR 72, 83G).

[21] In the instant case, we were in agreement with Miss Jackson that the non-disclosure of the medical certificate was insignificant as the complainant was examined long after the time of the commission of the offences. The passage of time meant that the medical evidence would have had no impact on the case, there being no long-lasting visible effect of the incidents on the complainant.

[22] It was for the foregoing reasons that we refused leave to appeal and made the order stated in paragraph [1].