JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 190/06

BEFORE: THE HON. MR JUSTICE SMITH, J.A.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE MORRISON, J.A.

RICHARD BARRETT v R

Mr Robert Fletcher for the applicant

Mr John Tyme, Assistant Director of Public Prosecutions and Miss Keisha Prince, Crown Counsel (Ag), for the Crown

12, 16 January and 3 April 2009

MORRISON, J.A.:

1. On 16 January 2009 we refused this application for leave to appeal and ordered that the applicant's sentence should run from 26 January 2007. These are the promised reasons for that decision.

2. The applicant was charged with the offences of illegal possession of firearm, abduction and rape. He was arraigned and tried in the High Court Division of the Gun Court held at King Street in the city and parish of Kingston before Beckford J.

3. The prosecution's case was that on 16 March 2006 the complainant, a 16 year old schoolgirl, was on her way home from school at about 3:30 p.m. accompanied by two little girls, when she was

accosted by the applicant. The applicant was known to her as "Ganja Baby" and she had known him for over a year before. He spoke to her, drew a gun from his waist, picked up his bicycle which was leaning on a fence nearby, took her by the hand and told her that she was "going up to his yard now". He moved off riding the bicycle slowly and holding her by her hand. The two little girls continued down the road to their home, while the complainant went along with the applicant out of fear.

4. The applicant took the complainant to a house where she was led into a bedroom. The applicant then took off his clothes and ordered the complainant to do the same. After she had complied, he ordered her on to the bed in the room, got on top of her and had sexual intercourse with her. All of this was done without her consent. When he was finished, he went into the bathroom, from which she heard the shower running. While he was in the bathroom, she used her cellular phone to send text messages to "the man and the lady that my mother left me with." When, after about three minutes, the applicant came out of the bathroom, he gave rag and soap to the complainant and told her to have a bath, which she did.

5. Thereafter, she put on her clothes and went outside the house where she saw the applicant making a call on his cellular phone. It appears that he was making arrangements for someone to exchange firearms with him, for in a short while a man appeared with another – black – firearm, which

the applicant took in exchange for the one originally seen by the complainant. The applicant then sent the complainant to the shop to make a purchase for him and when she returned she saw the man with whom her mother had left her coming along the road on a bicycle. That gentleman put her on his bicycle and took her to the Olympic Way Police Station, where she made a report to the police. She was in due course taken by the police, she said, "to a place where they test you" and tested by a doctor.

6. Sergeant Claudette Kirlew of the Centre for Investigation of Sexual Offences and Child Abuse testified that the complainant was examined by a doctor at the centre and that she had recorded a statement from the complainant. She received from the doctor a medical certificate, as well as swabs and smears, which were labelled and in due course handed over to the Government Forensic Laboratory. However, no report from the laboratory was tendered on behalf of the prosecution at the trial and it appears that none was ever received by the police.

7. At the close of the Crown's case an unsuccessful submission was made on behalf of the applicant that he should not be called upon to answer. Thereafter, the applicant made an unsworn statement from the dock. In it, he did not dispute knowing the complainant or having encountered her in the street on the afternoon in question. However, his account of what then took place was that she had voluntarily

accompanied him to a place on Penwood Road "to burn some CDs" and that they remained there for some time, to use his words, "listening CDs while I was waiting for my CDs to finish burn". He concluded his brief statement by asserting that he did not force the complainant to come with him, show her a gun or have sex with her.

8. Two members of the staff of the Forensic Science Laboratory were called as witnesses for the defence. The first witness testified to having received certain exhibits in the case from Sergeant Kirlew, while the second witness, Dr Judith Henry-Mowatt, the Director of the laboratory, testified to the vaginal swabs and smears received having been subjected to microscopic examination. According to her evidence, these were her findings:

> "In the case of vaginal swabs and smears that I examined microscopically, on the swab I found a trace of human blood, no semen was detected. On the vaginal smears I found a few red blood cells, no spermatozoa and a few pus cells. On the mouth swab examined, there was also a trace of human blood, on the swab no semen was also detected. On the pair of panties examined, neither blood nor semen was detected. Those are my findings."

7. Dr Henry-Mowatt was then briefly cross-examined by counsel for the Crown:

> "**Q**. Can you conclusively state that the person from whom these samples were taken did not recently have intercourse on that day, the 17th of March?

A: There was no evidence, scientific evidence of recent...

Q: Can you state conclusively that the...

HER LADYSHIP: Well, what the doctor is saying, the doctor is a scientist and she is saying there was no scientific evidence. Is that what you are saying?

A: Yes.

Q. Can you explain to us what could account for such results if one did have sexual inter [sic] intercourse?

A; As in what results are you asking me to account for?

Q: If someone is to go to the beach shortly after having intercourse and go to the lab after, could that account.

A: After...

HER LADYSHIP: She can't:..

MR. SMITH: Yes or no?

HER LADYSHIP: She can't give you...

A: We operate on, in its simplicity every contact will leave a trace. In the case of sexual assault, a trace can be any number of things and usually in most instances it's the presence or persistence of biological fluid left by the assailant. The persistence of semen would depend on a number of factors, two examples, it would depend on how long afterwards she was examined by the doctor. If she was raped today and examined three days later it's almost unlikely that semen would exist.

MR.SMITH: Would that one factor be, if a complainant was to take a bath after intercourse?

A: Cleansing action would...

Q: That could account for the results today?

HER LADYSHIP: That is not what the doctor is saying.

> The doctor is saying that cleansing action would affect the persistence of semen. You would not be able to see, you asked about the bath, if a person takes a bath, the doctor already told you that what she speaks to is scientific evidence. When you ask the question, if a person takes a bath, would semen be seen, the doctor says it would affect the presence of semen, in other words it could wash away the semen.

Q: So it is your evidence that taking a bath would compromise integrity evidence [sic]?

A: Most definitely."

8. The applicant was found guilty by the trial judge on counts 1 and 3 of the indictment (illegal possession of firearm and rape), but acquitted on count 2 (abduction), which the judge did not find to be proved. He was sentenced to 9 years imprisonment on count 1 and 15 years on count 3, sentences to run concurrently.

9. In this court, Mr Robert Fletcher, who did not appear for the applicant at his trial, filed and was given permission to argue two supplemental grounds of appeal on his behalf:

"(1) The treatment of certain critical issues in the case by counsel for the defence and the trial judge was inadequate thereby denying the applicant a fair and balanced assessment of his case.

(2) The sentence is manifestly excessive".

10. However, Mr. Fletcher did not pursue ground 2, and accordingly confined his very able arguments to ground 1, which he sub-divided into two main issues. Firstly, he pointed out that cross-examination of the complainant had revealed that several of the matters on which she had given evidence were not to be found in her statement to the police (Mr Fletcher pointed in all to twelve instances of this). It accordingly followed, Mr Fletcher submitted, that much of her evidence amounted to recent concoctions, therefore impugning her credibility. It was therefore critical, so the submission went, that counsel for the applicant should have cross-examined the police officer who took the statement from the complainant on these omissions and discrepancies. This not having been done, it was submitted that the learned trial judge ought herself to have canvassed these matters with the Crown's witness; instead of doing this, Mr Fletcher complained, the judge then proceeded to provide "speculative reasons'why the police did not record some aspects of the evidence that the complainant gave in court".

11. The second issue had to do with the absence of any medical evidence from the prosecution's case, coupled with the fact that the judge dealt "cursorily" with the scientific evidence called on behalf of the defence. As with the first matter, he complained, this issue was not "adequately explored and aired", with the result that the applicant's trial fell short of being "fair and balanced".

12. Mr Tyme accepted that there were numerous inconsistencies in the complainant's evidence which might fruitfully have been explored in cross-examination of the police officers by defence counsel. However, he submitted that the question for this court should be whether the applicant was denied the substance of a fair trial as a result of the omission to do so and in this regard we were referred to the judgment of this court in ***Ricardo Whilby v R*** (Supreme Court Criminal Appeal No. 72/99, judgment delivered 20 December 2000).

13. Mr Tyme also pointed out that, in at least five of the instances identified by Mr Fletcher as discrepancies between the complainant's evidence and her police statement, what the complainant in fact told the court was that she had not told those things to the police at all. Indeed, she had in fact tendered an explanation for this in re-examination when she told the court that the police officer "didn't get all the statement when I was telling him, he was writing it same time; I didn't tell

him everything". The result of this, Mr Tyme commented, was that cross-examination on these matters would have in any event been unavailing. Finally on this point, Mr Tyme submitted that all of these issues had been adequately dealt with by the judge in her summing up.

14. As to the complaint about the scientific evidence called by the defence, Mr Tyme submitted that the judge did not factor that evidence into her reasoning or conclusion in any way.

15. To take Mr Fletcher's first issue first, in ***Ricardo Whilby,*** this court pointed out that the circumstances in which a complaint about counsel's conduct of the defence will give rise to a successful challenge on appeal "must of necessity be extremely rare" (per Cooke JA (Ag) at page 11, quoting from ***R v Clinton*** [1993]1WLR 1181,1186). In every case, it will be necessary for the appellate court to make its own assessment of the effect of such shortcomings on the part of counsel as there might have been on the trial and the verdict (see per Cooke JA (Ag) at page 12).

16. In our view, it has not been demonstrated in this case that counsel was clearly derelict in her duty in not cross-examining the police witnesses on the complainant's alleged recent concoctions. The decision whether, or to what extent, to cross-examine is often a difficult one for counsel and sometimes has to be made on the spur of the moment. Given that, as it turned out, what the complainant was saying in several of the instances of

which Mr Fletcher complains was that she had not included some of the details which she was now supplying in evidence in her statement to the police at all, counsel could well have taken the view that it might have been counter-productive to have embarked on an exploratory exercise with the police witness on these and other matters. We certainly cannot say that in these circumstances it was not the prudent thing for counsel to have done to leave well enough alone.

17. But even on the assumption that counsel was in fact guilty of an error of judgment in this regard, we cannot agree with Mr Fletcher that the trial judge was thereby under any obligation to explore these matters herself. Save for the well established duty of the trial judge to assist an unrepresented defendant in the conduct of his defence, in particular when he is examining or cross-examining witnesses, or giving evidence himself (see ***Archbold 2008***, paragraph 4-309) we know of no principle or authority, and none was cited to us by Mr Fletcher, that would impose a duty on the trial judge to intervene in the manner contended for in this case.

18. The important question for consideration is therefore, in our view, how did the judge deal with this issue in her summing up? The judge pointed out at the outset that the main issue was credibility:

"So I have to look at whatever discrepancies, as

> well as the Defence allegations. The Defence's contention is that these matters in her evidence [were] of recent concoction".

19. The judge then went through some of the matters said to be discrepant, commenting in respect of one of them "clearly that is a discrepancy but does it go to the root of the case? Is it such that it would change the evidence as given by the complainant? I do not find it to be so. Yes, it is a discrepancy but I don't think it is one which would affect the credibility of the complainant". The judge observed that the complainant had said, by way of explanation of some of the omissions from her statement to the police, that "She told the officer some things and they were not put in; is not everything she told the police that he put in her statement...She said he told her to sign and she signed". She then went on to supply her own comment that "When one is traumatised it is not everyone is going to listen keenly to hear everything that is read back...".

20. And then the learned judge concluded as follows:

> "... but the Defence said these things have not been recorded in the complainant's statement, so clearly it must be that the complainant is not speaking the truth I don't accept that.
>
> Now, since this is a question of credibility, the thing that the court must determine and I have gone through all of this, is whether or not the court accepts the evidence. I reject the defence.
>
> The defendant said that he went with the

> complainant to burn Cds and this is something, and he never saw anybody come for her. I do not accept that, I reject it. I accept the evidence of the complainant because he is saying on that day, at that time, he saw her coming from school with the two girls. Up to that point he is corroborating her story and just as he said she left her bag and he said she left the bag with the other girl and that is what she had been saying all along. He stops at the point-where he stops is where she went with him to Penwood Road, went up Penwood Road, that is where he took her, that is her evidence and he is corroborating her, Penwood Road, he went to burn Cds and he took her there and had sexual intercourse."

21. While it is true that the judge did supply an explanation for the omission of some matters from her police statement that, as Mr Fletcher submitted, was entirely speculative ("I know probably she didn't hear half of what was read back to her"), it is nevertheless clear that what she was doing was seeking to assess the overall impact of the omissions on the credibility of the complainant. That is, was her evidence on these matters a recent concoction, as the defence suggested, or was her evidence capable of belief or, in a word, credible? At the end of the day, having warned herself in appropriate terms of the desirability of corroboration in a case such as this, the judge concluded that the complainant had been truthful in her evidence:

> "I saw her, I heard her and I accept her evidence. I accept what she is saying is the truth. I do not accept that she went with him to burn Cds or listen to any Cds. I do not accept that."

22. Taken as a whole, therefore, it is our view that the judge gave full and adequate consideration to the impact of the various discrepancies in the case, in particular on the credibility of the complainant, and that there is accordingly no basis to disturb her conclusion.

23. With regard to the scientific evidence called on behalf of the defence, while it could be said that the judge got more involved during cross-examination in elucidating some of the evidence given by Dr Henry-Mowatt than she might have done ("The doctor is saying that cleansing action would affect the persistence of semen...in other words it would wash away the semen"), it was ultimately entirely a matter for her sitting as judge and jury to determine whether the complainant was to be believed when she said that the applicant had had sexual intercourse with her, notwithstanding the analyst's evidence that upon her examination of the vaginal swabs and smears no semen was detected. Dr Henry-Mowatt's comment that the fact that the complainant had taken a bath after intercourse would "most definitely" compromise the integrity of the scientific evidence provided ample basis for the judge's conclusion that in the circumstances the expert evidence "could not assist one way or another".

24. It is for these reasons that, in the result, the application for leave to appeal was refused and the order made that the applicant's sentence should run from 26 January 2007.