[2011] JMCA Crim 47

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 109/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

JUNIOR BOWES v R

Gladstone Wilson for the applicant

Mrs Caroline Hay for the Crown

16 May and 23 September 2011

HIBBERT JA (Ag)

[1] On 16 May 2011 we granted this application for leave to appeal and treated the hearing of the application as the hearing of the appeal. We allowed the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal. We now set out the reasons for our decision.

[2] The applicant, who was indicted on a charge of rape, was on 20 October 2009 convicted of the offence of carnal abuse and was on 22 October 2009 sentenced to be imprisoned and kept at hard labour for a period of five years. It is against this conviction and sentence that he applied for leave to appeal. The application for leave

was denied by a single judge and was renewed before us. He relied on the following grounds of appeal:

> "(a) That the Learned Trial Judge in her summing up erred in fact and in law in leaving the alternative verdict of Carnal Abuse to the jury as there was no fact, combination or permutation of facts from which a jury, properly directed could have found in this case that sexual intercourse took place with the complainant being a willing participant.
>
> (b) That the verdict was unreasonable having regard to the evidence."

[3] Before us Mr Wilson for the applicant submitted that on the basis of the evidence led at the trial there was nothing contained therein that could give rise to an alternative verdict of guilty of carnal abuse being left to the jury. He submitted that the evidence of the complainant clearly depicted a situation in which force and threats were used against her. Relying on the decision of this court in **Kevin Bryan v R** SCCA No 125/2007 delivered on 28 November 2008, he further submitted that this court ought to quash the conviction and set aside the sentence imposed on him.

[4] Counsel for the prosecution, however, submitted that from the circumstances of the case, a reasonable inference could be drawn that the complainant consented.

[5] At the trial, the complainant, a schoolgirl between the ages of 12 and 16 years, gave evidence that on 25 January 2006, at Stony Hill in the parish of St Andrew, she boarded a taxi which was operated by the applicant whom she knew before. The applicant, she stated, before taking her to her destination, drove to a restaurant in

Golden Spring where he offered to buy her lunch. She declined this offer. He then drove to Constant Spring, then to a secluded area on the Mount Salus Road where he slapped her, threatened to kill her and had sexual intercourse with her without her consent. The applicant in his defence denied taking her anywhere and having sexual intercourse with her.

[6] Towards the end of the summing up to the jury the learned trial judge directed them as follows:

> "If you find that sexual intercourse took place and that the complainant consented, then you have to find the accused not guilty of rape. If you find that he is not guilty of rape, you go on to consider whether he is guilty or not guilty of carnal abuse.
>
> Carnal abuse is having sexual intercourse with a girl under 16 years. The prosecution must prove that sexual intercourse took place, that the girl was under 16 and that it was the accused man who had sexual intercourse with her; consent is not an ingredient in this offence, it matters not whether she consented or not."

[7] Whereas the offence of rape is a common law offence, the offence of carnal abuse was created by statute under the Offences against the Person Act. Section 50, which is relevant to this case, stated:

> "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of sixteen years shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to imprisonment for a term not exceeding seven years."

[8] Section 49 (1) of the Act makes provision for the return of a verdict of guilty of carnal abuse as an alternative verdict on an indictment for rape. It states:

> "(1) If upon the trial of any indictment for rape, the jury are satisfied that the defendant is guilty of an offence under section 48 or 50, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in the indictment or of an attempt to commit the same, the jury may acquit the defendant of such felony and find him guilty of an offence under section 48 or 50 or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault."

[9] The issue of alternative verdicts also arises in other cases and was addressed in **R v Fairbanks** [1986] 1 WLR 1202. In that case Mustill LJ (as he then was) commented at page 1205 that a trial judge should ensure "that the issues left to the jury fairly reflect the issues <u>which arise on the evidence</u>" (emphasis mine). He also stated (pages 1205-6):

> "These cases bear out the conclusion, which we should in any event have reached, that the judge is obliged to leave the lesser alternative only if this is necessary in the interest of justice. Such interest will never be served in a situation where the lesser verdict simply does not arise on the way in which the case had been presented to the court: for example if the defence has never sought to deny that the full offence charged has been committed, but challenges that it was committed by the defendant."

[10] The dictum of Mustill LJ was expressly approved by the House of Lords in **R v Coutts** [2006] 4 All ER 353. Lord Bingham in that case also referred at page 367 to

the judge's duty to leave to the jury "any obvious alternative offence which there is evidence to support".

[11] In this court, in **Kevin Bryan v R** Morrison JA delivering the judgment of the court also cited with approval the dictum of Mustill LJ in **Fairbanks** and in paragraph 18 added:

> "However, it seems to us that the obverse side of the principle must also apply, with [sic] result that the alternative verdict of carnal abuse should only be left to the jury on a charge of rape where there is evidence upon which they might reasonably conclude that the defendant is guilty of that offence, that is, some evidence from which an inference of consensual sexual intercourse could be drawn to the requisite standard in the case of a complainant under 16."

[12] In our view, there was no evidence in the court below to show that the complainant consented to sexual intercourse with the applicant. Neither was there any evidence from which it could be reasonably inferred that she consented or might have consented to sexual intercourse with him. The learned trial judge having properly directed the jury that they should come to a decision "purely on the evidence which you have heard in this court" and later, "you are entitled to draw reasonable inferences from such facts as you find proved …", in the circumstances of this case, erred in leaving for the jury's consideration the alternative verdict of guilty of carnal abuse. For these reasons we granted the application and treated the hearing of the application as the hearing of the appeal which we allowed.