[2014] JMCA Crim 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 19 & 21/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

PATRICK BROWN AND RICHARD MCLEAN v R

Cecil J Mitchell for the 1st applicant

Glenroy Mellish for the 2nd applicant

Mrs Kamar Henry Anderson and Miss Patrice Hickson for the Crown

31 March and 2 May 2014

MANGATAL JA (Ag)

[1] This is an application by Messrs Patrick Brown and Richard McLean ("the 1st applicant" and "the 2nd applicant" respectively) for leave to appeal against their respective convictions and sentences in the Clarendon Circuit Court. They were tried before Beckford J and a jury of seven on 23 and 24 February 2011. A single judge of this court refused the applicants leave to appeal but they have renewed their applications before the court. The applicants were convicted on an indictment charging them with the offence of rape. The 1st and 2nd applicants were sentenced on 24 February 2011, to serve 16 and 18 years imprisonment at hard labour respectively.

[2] The convictions arise out of allegations, which were accepted by the tribunal of fact, that on 13 April 2009, in the parish of Clarendon, the applicants unlawfully had sexual intercourse with the complainant without her consent.

[3] Both applicants filed original grounds of appeal, and also filed supplemental grounds of appeal. Counsel Mr Mitchell on behalf of the 1st applicant filed four supplemental grounds of appeal and sought and obtained the court's permission to abandon the original and to argue only the supplemental grounds. Mr Mellish, who appeared for the 2nd applicant, abandoned the original grounds of appeal filed and sought and obtained the court's leave to argue one sole supplemental ground of appeal. He candidly conceded that save for this supplemental ground, the directions to the jury given by the learned trial judge in relation to the 2nd applicant were unimpeachable.

The 1st applicant's supplemental grounds of appeal

[4] **Ground one**

> "That the learned Trial Judge gave an irreparably wrong direction to the Jury when the Trial Judge told the Jury as follows:
>
> > "*Now if what each of them have told you, you accept, you believe, then you have to find them not guilty. If what they have said to you leaves you in doubt as to what the Prosecution has told you, then you have to find them guilty.*"
> > [underlining emphasis provided]
>
> That this direction was not only wrong but prevented the Appellant from having a fair trial and from having his case being given an appropriate consideration by the Jury.

Ground two

> "That the identification of the Appellant [sic] Brown was carried out by way of an informal parade in circumstances where the holding of a formal and a proper identification parade was necessary. In effect the identification of the Appellant Brown was by way of dock identification. The identification of the Appellant Brown was flawed beyond redemption."

Ground three

> "That by reason of the irredeemably flawed identification of the Appellant Brown the Learned Trial Judge should have discharged Brown at the end of the Crown's case and entered a verdict of Not Guilty in favour of the Appellant Brown particularly as there was no evidence other than the identification of the Complainant to connect Brown to the offence."

Ground four

> "That the directions given to the jury in respect of the matter of unanimous verdict was [sic] so erroneous that the Jury must have formed the view that an [sic] unanimous verdict was mandatory. Hence the Appellant [sic] thereby lost the opportunity of an acquittal."

The 2nd applicant's supplemental ground of appeal

> "The learned trial judge erred in law in advising the jury that their verdict should be unanimous which may have had the effect of pressurizing one or more members of the jury in arriving at a verdict which is adverse to the Applicant. This error resulted in a substantial miscarriage of justice."

The 1st applicant's supplemental grounds one to three

[5] Ultimately, in the course of argument and discourse with the court, Mr Mitchell conceded that in relation to ground one, the transcript clearly contained a typographical error where it is recorded that the learned trial judge stated that "if what they [the applicants] have said to you leaves you in doubt as to what the Prosecution has told you, then you have to find them guilty". Alternatively, counsel conceded that when

one looks at the summation in its entirety, and the learned trial judge's directions and language as a whole, it is plain that no reasonable jury could have understood the learned judge to mean that they would have to find the applicants guilty, as opposed to not guilty, in circumstances where they were left in doubt. We entirely agree with those reasonable concessions by counsel.

[6] We turn now to consider ground three. It should be noted that, in response to a query from the court, Mr Mitchell indicated that at the trial counsel who then appeared for the 1st applicant did not make a no-case submission. The law is clear that where experienced counsel fail to make a no-case submission in circumstances where the prosecution's evidence is arguably insufficient, the trial judge is neither required nor entitled to intervene. However, whilst the interests of justice may demand that the judge take the initiative, in ***Eiley and Others v R***, [2009] UKPC 40, Lord Phillips at paragraph 50 pointed out that "It would, however, have been an unusual and extreme step for the judge to have ruled that there was no case upon which the jury could safely convict in the absence of any submission to this effect from any defendant." It is only in those exceptional circumstances, that a Court of Appeal may quash a conviction on that basis, notwithstanding defence counsel's failure to make a submission (see Blackstone's **Criminal Practice**, 1993, paragraph D12.35 and the case of ***R v Juett*** [1981] Crim LR 113 there discussed).

[7] In a case such as the present where the issue is as to identification, the case should only have been withdrawn from the jury if the evidence of identification could be said to have rested on so slender a base as to render it unreliable and therefore

insufficient to found a conviction (see this court's decision in ***Brown & McCallum v R*** SCCA Nos 92 & 93 /2006, per Morrison JA at pages 20-21 and the cases there cited). Whilst we have not had the benefit of the transcript of the evidence and proceedings at the trial, save with regard to the summation and sentencing aspects of the trial, in our view this was not such a case where it could be said that there was such a slender base. Thus, this case would have passed the threshold had a submission been made. In any event, there would certainly have been no exceptional circumstances such as to require the learned trial judge to have intervened of her own volition and taken the unusual and extreme step of ruling that there was no case to answer in the absence of a submission to that effect on behalf of the 1st applicant.

[8] As regards ground two, the learned trial judge pointed out the weaknesses in the identification evidence. She pointed out that the 1st applicant was not known to the complainant before the incident. She indicated that in these circumstances it was desirable that there should have been a formal identification parade, that there had been a flawed informal identification parade, and she gave directions on dock identification. We agree with Mrs Henry Anderson that the learned trial judge treated the case as resting almost solely on dock identification. Regard must be had to the circumstances in which the identification took place, the complainant's opportunity for identifying the 1st applicant in close quarters, the length of time over which the incident was alleged to have occurred, and other relevant conditions. We agree with Mrs Henry Anderson that when these factors are juxtaposed with the identification evidence, the learned trial judge's directions to the jury cannot be described as anything but thorough

and comprehensive. The directions and warnings were fair, and the judge's clear analysis of the relevant considerations and identification of all the areas of weakness were admirable. We agree with Mrs Henry Anderson that in this regard the summation was totally within the requirements of the law in this area.

The arguments in respect of the 1st applicant's fourth supplemental ground and the 2nd applicant's sole supplemental ground of appeal

[9] This ground was common to the applications made on behalf of both applicants and it was the only ground in respect of which counsel for the Crown provided written submissions. It turned out to be the ground that occupied most of the court's time during the hearing and deliberations. Mr Mellish advanced arguments which were adopted by Mr Mitchell. Counsel referred to page 27 of the transcript where the learned trial judge was giving the jury directions in relation to giving their verdict. In what was essentially her final charge to the jury, just prior to inviting them to retire and consider their verdict, Her Ladyship stated:

> "You each take to the jury room your individual experience and wisdom. You give your views and you listen to the views of others. It is by discussion, argument and give and take that you will come to an agreement. Your verdict should be unanimous. Your verdict can only be guilty or not guilty in respect of each count." (Underlining emphasis provided)

[10] Counsel referred to section 44 (3) of the Jury Act, which provides:

> "**44.(3)** On trials on indictment before the Circuit Court for offences other than murder or treason, the verdict of the jury may be unanimous, or a verdict of a majority of not less than five to two may, after the lapse of one hour from the

> retirement of the jury, be received by the Court as the verdict of the jury."

[11] Mr Mellish referred to the decision of this court in ***R v Tommy Walker*** SCCA No 105/2000, where Panton JA (as he then was), approved and applied the dicta in the English Court of Appeal's oft-cited decision in ***R v Watson and Others*** [1988] 1 QB 690. At page 4 of ***R v Tommy Walker***, Panton JA stated:

> "In *Watson*, a decision of the English Court of Appeal, it was held that, since a jury had to be free to deliberate without any form of pressure being imposed on them, they should, at the judge's discretion, be directed in terms that make it clear that no pressure was being exerted.
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> In ***R v. McKenna*** [1960] 1 All E.R. 326, a case cited in argument in *Watson*, the earlier English Court of Criminal Appeal held:
>
> > "*It is a cardinal principle of English criminal law that a jury in considering their verdict shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat: they still stand between the Crown and the subject, and they are still one of the main defences of personal liberty'."*

[12] Counsel submitted that the learned trial judge's statement to the jury may have been "infelicitous". However, the submission continued, it was at best, confusing. Both counsel submitted that the learned trial judge's direction may well have dissuaded any number of jurors from reaching a verdict favourable to the applicant. It was for this reason that they asked the court to quash the convictions. Mr Mellish on behalf of the 2nd applicant, conceded, however, that in the event that the court did decide to quash the conviction on this basis, he would not find it unreasonable for a retrial to be ordered in this matter.

The Crown's arguments

[13] Mrs Henry Anderson candidly conceded that in her view the learned trial judge had erred in law in advising the jury that their verdict should be unanimous. She submitted that the proper direction to the jury on retiring to consider their verdict should have been one that urged the jurors to seek to reach a unanimous decision. Reference was made to Blackstone's **Criminal Practice**, 1997, paragraph D15.16, under the sub-heading "Unanimity".

[14] Counsel submitted that the effect of such a misdirection is material in that it had the potential of conveying or implying to a juror that because there was an obligation to agree on a verdict, there was therefore no room for disagreement, if after full and honest consideration, he could not accept the view of his colleagues. Counsel referred to the Canadian decision of ***Latour v The King*** [1951] 1 DLR 534. That case concerned a murder trial where, as a result of a number of misdirections by the trial judge to the jury, a retrial was ordered. At page 545, Fauteux J, delivering the judgment of the Supreme Court of Canada stated:

> "The other matter, in which comments may be added, although the point was not raised by the appellant, is related to the following direction given to the jury: "This is an important case and you must agree upon a verdict. This means that you must be unanimous.
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> This is all that was said on the subject. If one of the jurors could have reasonably understood from this direction - and it may be open to such construction - that there was an obligation to agree upon a verdict, the direction would be bad in law. For it is not only the right but the duty of a juror to disagree if, after full and sincere consideration of the facts of the case, in the light of the directions received on the law, he is unable conscientiously, to accept, after honest discussion with his colleagues, the views of the latter. To

> render a verdict, the jurors must be unanimous but this does not mean that they are obliged to agree, but that only a unanimity of views shall constitute a verdict bringing the case to an end. The obligation is not to agree but to co-operate honestly in the study of the facts of a case for its proper determination according to law."

[15] We also found instructive a passage on page 839 of ***Latour v The King,*** where Fauteux J quoted with approval from a number of authorities, including ***Rex v Gallagher*** (1922) 63 DLR 629 at 630 and 37 Can. CC 83, at p. 84, 17 Alta. LR 519. Stuart LJ is reported to have astutely stated:

> "It is not what the Judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal."

[16] As Mrs Henry Anderson pointed out, the approach taken in ***Latour v The King*** has been applied in our region, notably in the decision of the Court of Appeal of Trinidad and Tobago in ***Mohammed et al v R*** TT 1992 CA 2. At pages 3-4 of the judgment, Ibrahim JA stated:

> "The test to be applied in determining whether the direction given is satisfactory is if one of the jurors could have reasonably understood that there was an <u>obligation</u> to agree upon a verdict then the direction would be bad in law. That test was applied in ***Rex. v Latour*** (1951) SCR 19 and which we approve. Applying that test to the instant case can we say that the right to disagree was left with the jury? The judge told the jury "the twelve of you must agree one way or the other with respect to each accused"…."There is no intermediary in this, it is either the accused is guilty as charged or not guilty - so twelve of you must agree

> unanimously, that is twelve of you must agree ones [sic] way or the other..."
>
> It is quite clear that the language used by the judge was of a compelling nature and the fact that it was given as the final charge to the jury must have left them in no doubt whatever that they must arrive at an agreement. There is nothing in that direction to suggest to them that he was leaving with them their [sic] finally to disagree if they are so disposed. Accordingly, we are of the opinion that that was a misdirection given to the jury and on that alone the appeal succeeds." (Underlining emphasis provided)

[17] Accordingly, counsel for the Crown conceded that there was a substantial miscarriage of justice. However, it was urged upon the court that in the circumstances of this case a verdict of acquittal should not be entered, and instead, the court should order a new trial in the interests of justice. Mrs Henry Anderson submitted that the offence is a serious one and the prosecution's evidence was of a good quality.

Analysis

[18] As argued by both applicants, and indeed, as conceded by the Crown, the judge's duty was to direct the jury to consider their verdict and to seek to reach a unanimous decision. As pointed out by Panton JA in ***R v Tommy Walker*** and the other cases cited, the jury must be left to deliberate in complete freedom, and they should be directed in terms that do not exert or purport to exert any improper pressure on them.

[19] In ***Watson***, at page 700 F-G, Lord Chief Justice Lane, gave guidance, which has become known as "the Watson direction." At pages 700-701, Lane CJ stated:

> "In the judgment of this Court there is no reason why a Jury should not be directed as follows: "Each of you has taken an oath to

return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the Jury system. Each of you takes into the Jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily [10 of] you cannot reach agreement you must say so."

It is a matter for the discretion of the Judge as to whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we have heard, are often dangerous and should, if possible, be avoided. Where the words are thought necessary or desirable, they are probably best included as a part of the summing up or given or repeated after the Jury had time to consider the majority direction." (Underlining emphasis provided)

[20] Lane CJ's discussion of ***Creasy*** (1953) 37 Cr App R 179 in ***Watson*** at pages 694-695, is instructive:

"In ***Creasy*** (1953) 37 Cr. App. R. 179, the words used were : It is very desirable that you should come to a conclusion one way or the other….because it only means that some other Jury have got to do your work for you all over again, if you do not….and that is why it is highly essential that you should come to a definite conclusion. It is a hardship upon all concerned if you do not. The way that Juries arrive at a verdict is, of course, by a method of one member listening to what the other has to say and by a process of give and take. Of course, it is a verdict which you must all be agreed upon one way or the other….."

The Jury convicted. The direction was held not to invalidate the conviction, though Lord Goddard did go so far as to say " Perhaps it might have been put a little differently." At page 181 of the report he distinguished another decision which had disapproved of a direction containing the words " It is essential that you should give a verdict" It was perhaps a fine distinction. Fine distinctions

> are inevitable in this type of situation." (Underlining emphasis provided)

[21] We would echo the words of Lord Lane as we find them apposite in the instant case. Fine distinctions are inevitable in this type of situation. We are of the view that, at first blush, it would seem arguable that the learned trial judge's use of the word 'should' (as opposed to the word 'must') may not necessarily have signified to the jury that they were bound to agree. In the Concise Oxford English Dictionary, 11th Edition, there are a number of definitions given of the word 'should'. One definition given is that the word 'should' is a modal verb, "used to indicate obligation, duty, or correctness". However, two other definitions are provided i.e. "used to give or ask advice or suggestions", and "used to indicate what is probable". What we understand Stuart LJ to be declaring so ably in the passage quoted above at paragraph [15] from the Canadian case of ***Rex v Gallagher***, is that, even if the language used is capable of more than one meaning, one harmful and one innocuous, it is just as likely that the jury (or, indeed, in our view, even a single juror) could have understood the words in the prohibited sense as that they could have understood them in their harmless sense. In other words, we just cannot tell how they took the words. If that be the case, then the error is material.

[22] In our judgment, the learned trial judge fell into the pitfall which Lord Lane in ***Watson*** sought to warn against. She varied the words of the ***Watson*** direction, or in any event, used words which altered the crucial sense of the direction in so far as they

may have exerted improper pressure on the jury or its members. This is so because one possible meaning of the words used by the learned trial judge is that it was compulsory or obligatory for the jury to agree upon a verdict. In addition, this was essentially all that was said upon the topic of how they were to arrive at their verdict. Thus, there was nothing else said that could have provided an "antidote" to the forbidden, compulsory and incorrect meaning.

[23] Whilst the error may at first sight appear slight, when closely examined it is plainly of a fatal nature and renders the direction bad in law. In the circumstances, there was a miscarriage of justice. This is an unfortunate situation, as we are of the view that the learned trial judge conducted what was otherwise a careful and fair summation.

[24] This is however, not a case in which a verdict of acquittal should be substituted. The offence with which the applicants are charged is the serious and prevalent offence of rape. In ***Reid v R*** [1979] 2 All ER 904, at page 908g, the Judicial Committee of the Privy Council emphasized that a verdict of acquittal should not be entered "merely because of some technical blunder by the judge in the conduct of the trial or in his summation to the jury".

[25] In our judgment, although the applicants were convicted over three years ago, it would be in the interests of justice that a new trial be ordered. This is not a case in which the verdict of the jury is being set aside because of the inadequacy of the prosecution's evidence.

Conclusion

[26] In conclusion, therefore, we find that the learned trial judge's direction at the end of her summation, that the jury should reach a unanimous verdict, was bad in law and as a result the orders are as follows:

a. The applications for leave to appeal are granted.

b. The hearing of the applications is treated as the hearing of the appeals.

c. The appeals are allowed.

d. The convictions are quashed and the sentences are set aside.

e. New trials are ordered.