[2010] JMCA Crim 22

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 152 & 153/2007

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

FABIAN BURKE
RICHARD JACKSON v R

Leroy Equiano for the applicants

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions & Adley Duncan for the Crown

18, 19 & 23 March 2010

ORAL JUDGMENT

PANTON, P.

[1] These applicants for leave to appeal were convicted in the St. Mary Circuit Court on 27 November 2007 of the offence of carnal abuse and sentenced to 5 years imprisonment each. Having been refused leave by a single judge of this court, they have now renewed their applications to the court.

[2] The evidence supporting the convictions was to the effect that both men had sexual intercourse with a 12 year old girl in a bus driven by

the applicant Jackson. The girl had accepted Jackson's invitation to come to see him as he had something to ask her. She entered the bus. He drove away with her into bushes where he forced her into the back section of the bus and had sexual intercourse with her. He was joined in the act by the applicant Burke who was the conductor on that bus. Each applicant had sexual intercourse with her twice. Both applicants gave sworn evidence denying having intercourse with the complainant.

[3] The grounds of appeal put forward by learned counsel Mr. Leroy Equiano were as follows:

> "1. The learned trial judge's summation was very biased towards the prosecution's case and in so doing failed to represent the applicant's case to the jury fairly.
>
> 2. The nature of the case and the evidence adduced required that the learned trial judge present the case to the jury in a fair and even-handed manner.
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> 3. The learned trial judge though he gave the required corroboration warning, he failed to define corroboration and to assist the jury with whether there was corroboration in the case and if, what possible evidence could amount to corroboration.
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> 4. The learned trial judge erred when he allowed the jury to retire late in the afternoon at approximately 5:27 p.m. The risk being that the jury may be forced to make a hastly (sic) decision.
>
> 5. The learned trial judge, during the course of the trial made certain prejudicial comments.

He conducted a line of questioning during which he unfairly challenge the credibility of one of the accused in the presence of the jury.

6. The applicants did not get a fair trial because evidence of his good character was never placed before the jury."

[4] Ground 6 was not pursued. Grounds 1, 2 and 5 were argued together by Mr Equiano. He submitted that it was impossible for the applicants to have had a fair trial as the judge virtually told the jury to reject the defence and to see the applicants as persons not to be believed.

[5] Particular reference is made to page 17, line 24 to page 18, line 11 of the transcript where the learned judge said:

> "Interestingly enough, if you look at her evidence you will find that the two accused persons agree with just about everything else except the intercourse, and you don't need anybody to tell you why they would not agree, but you still have to decide whether or not the two men, these two men, these two big men, these two men who have sisters, have daughters, would be taking a girl around with them in the bus and the first time you hearing that poor K has $500.00 to pay bus fare all day to ride around in a bus was when Burke was asked if she paid any money."

The description of the complainant by the use of the word "poor" indicates a line of sympathy which we find was totally unnecessary and was prejudicial to the applicant's case. So far as the definition of

corroboration is concerned, we find that the learned judge failed to define corroboration. Although he told the jury that there was need for corroboration, he did not say what corroboration is, and he did not instruct the jury that in any event, in this case, there was no corroboration.

[6] In respect of the challenge to the jury's role being usurped, reference was made to page 12 of the transcript, beginning at line 7. This is what was said:

> "At the end of the day, it is a matter for you whether having heard K, having seen her, you have heard her give evidence, you have seen her tested by Mr. Hibbert, who cross-examined her; heard how she stood up, you have seen her stand up under the cross-examination, the whole case really boils down to what you make of her. Do you accept her as a witness of truth? Do you accept her evidence or does it leave you in a state of doubt?"

We find that this statement by the learned judge in instructing the jury was most unfortunate, in that, he clearly usurped the functions of the jury in indicating that in his view, the sole witness, the complainant had stood up under cross-examination. This was a finding of fact. In other words, she having stood up under cross-examination, her evidence was truthful. That is what the learned judge was saying and in matters involving trial by jury, there is no place for a judge to be indicating that a witness has stood up under cross-examination. That is a matter for the jury to conclude.

[7] There were other instances which we do not feel necessary to refer to. However, we should say that we make no finding in respect of ground 4 which complained of the jury being sent out at 5:27 p.m. The case was a simple one and perhaps had it not been for these unfortunate lapses, that point, as to the late retirement, would not be regarded as being of any moment but we make no comment on it – suffice it to say, that the circumstances are such that we cannot allow these convictions to stand.

[8] The applications for leave to appeal are granted. The hearing of the applications is treated as the hearing of the appeals which are allowed. The convictions are quashed and the sentences are set aside. However, the circumstances are such that we find, that the interests of justice require that a new trial be ordered to take place as soon as possible.