[2022] JMCA Crim 69

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2018CR00070

ANDRE CHIN-YEE v R

Terrence Williams for the applicant

Ms Natalee Malcolm and Mrs Yanique Taylor-Campbell for the Crown

5 and 20 December 2022

LAING JA (AG)

Background

[1] On 21 December 2017, Andre Chin-Yee ('the appellant') was convicted after a trial before a judge ('the learned trial judge') sitting with a jury in the Circuit Court for the parish of Saint James, holden at Montego Bay in that parish. He was found guilty on an indictment charging him with seven counts of grievous sexual assault contrary to section 3(1) of the Sexual Offences Act ('the Act') and two counts of incest contrary to section 7(1) of the Act. On 13 July 2018. He was sentenced to 18 years' imprisonment at hard labour on all counts of grievous sexual assault, with the stipulation that he serves 12 years before being eligible for parole. He was sentenced to 20 years' imprisonment at hard labour for each of the offences of incest, with the stipulation that he serves 12 years before being eligible for parole. The sentences of 18 years were ordered to run concurrently to each other and concurrently with the sentences of 20 years which were also ordered to run concurrently with each other.

[2] The court heard submissions in respect of the grounds of appeal and, on 6 December 2022, we made the following orders:

1. The application for leave to appeal is granted;

2. The hearing of the application is treated as the hearing of the appeal;

3. The appeal against conviction and sentence is allowed;

4. The conviction is quashed and the sentence is set aside;

5. A judgment and verdict of acquittal is entered.

At that time, we promised to put our reason in writing. This is a fulfilment of that promise.

The trial

[3] The prosecution relied mainly on two witnesses as to fact, namely, the virtual complainants, who were the appellant's daughters. They will be referred to as 'A', and 'B', respectively, for purposes of this appeal. 'A' was born on 1 May 1999 and B on 26 November 2003. At the time of the trial 'A' was 18 years of age and 'B' was 14 years of age. The evidence of the complainants chronicled their experience with the appellant and certain incidents involving his conduct with them, which was sexual in nature.

[4] 'A' recounted the first such incident between herself and the appellant as having occurred between May 2005 and May 2006, and these allegations formed the basis for count 1 of the indictment. The evidence which supported the remaining counts two to nine of the indictment, covered alleged acts of the applicant between May 2014 and December 2015.

[5] The appellant gave sworn evidence at his trial, in which he denied having committed the offences. The essence of the case for the defence, was that the evidence of A and B were concocted. The appellant asserted that they each had a motive to lie. In the case of A, her motive, he said, was borne out of his attempts to discipline her and to curb her immoral lifestyle. In the case of B, her reason for making the allegations against

him was that she was copying her elder sister as she had done in the past and was predisposed to do. Thus, based on the defence as deployed, the main issue at trial was one of credibility.

The grounds of appeal

[6] The appellant applied for leave to appeal his conviction and sentence. His application was considered by a single judge of this court who granted leave to appeal against the sentence only. The appellant, as is his right, renewed his application for leave to appeal his conviction and sentence before this court.

[7] Mr Williams, on behalf of the appellant, with the court's leave, abandoned the grounds previously filed. He was permitted to rely on the supplemental grounds of appeal filed with the court. The new grounds are as follows:

> "1. The trial was a nullity as the indictment was unsigned.
>
> 2. The taking of the majority verdict was improper and a nullity as the learned trial Judge failed to ascertain whether the jury's verdict on each count was by an acceptable majority.
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> 3. The conviction on the first count of the indictment was a nullity as the defendant was found guilty of a criminal offence on account of any [sic] act or omission which did not, at the time it took place, constitute a criminal offence.
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> 4. The learned trial judge erred in failing to sufficiently direct the jury as to how the delay in the reporting of the charges could have adversely affected the defence.
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> 5. The appellant was denied a fair trial given the adducing of inadmissible and prejudicial evidence alleging that the appellant had committed offences not included in the indictment.
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> 6. The learned trial judge erred in failing to give a direction that the jury was not to rely on the evidence of each virtual complainant to support the credibility of the other and to warn the jury of the danger that their evidence was contaminated by their out of court contact.

7. The sentence was manifestly excessive and the mandatory minimum sentence unconstitutional."

[8] In respect of ground three, the Crown conceded that this ground had merit. The offence of grievous sexual assault is alleged in count one of the indictment to have been committed on a date unknown between 1 May 2005 and 1 May 2006. During this period that offence was unknown in this jurisdiction, having been created by the Sexual Offences Act of 2009. Accordingly, the applicant succeeds on this ground of appeal.

[9] Mr Williams indicated that he would not be pursuing ground seven, and that ground requires no additional attention by this court.

[10] The orders referred to above, were based primarily on our conclusion in respect of ground 6, and accordingly, for purposes of this judgment, although we heard extensive submissions, we do not find it necessary to address the other grounds fully, except to say that none of them had any merit.

Ground Six-The learned trial judge erred in failing to give a direction that the jury was not to rely on the evidence of each virtual complainant to support the credibility of the other and to warn the jury of the danger that their evidence was contaminated by their out of court contact

The applicant's submissions

[11] Mr Williams relied on the case of **R v McCalmont and Wade** [2010] NICA 27 ('**McCalmont and Wade**'). He noted that, in that case, it was not disputed that the judge told the jury to consider each count and the evidence about it separately. He also reminded the jury that the similarities between the evidence of the two complainants provided no mutual support of their allegations. However, the Court of Appeal in Northern Ireland held that the defence case was that the allegations arose from a conspiracy between the complainants. Accordingly, having regard to the regularity of the contact between the complainants, the frequency of their conversations about their allegations, and the similarity of their complaints, this was a case which required some reference to the possibility of contamination whether innocent or deliberate, conscious or subconscious.

[12] However, the plinth of Mr Williams' submission on this ground, was that in the instant case, unlike the situation in **McCalmont and Wade**, the learned trial judge did not give a direction that the evidence of one complainant cannot be used to support the evidence of the other complainant, as it was not enough to say that each count must be treated separately. In support of his submission on this point counsel relied on the case of **Director of Public Prosecutions v Boardman** [1975] AC 421 ('**DPP v Boardman**') and the judgment of Lord Cross at page 459 D-E, where he opined that in cases involving 'similar fact' evidence, separate trials should be considered. However, where the charges relate to different persons and they are tried together, the judge will have to tell the jury that in considering whether the accused is guilty of the offence alleged against him by one person, they must put out of their minds the fact that another person is making similar allegations against him.

[13] Counsel also relied on the case of **R v Adams** [2019] EWCA Crim 1363, in which the court expressed a similar view, and in that case held that the jury ought to have been directed that, in considering whether the offences involving one complainant was committed, they should ignore the evidence relating to the allegations made by the other complainant, and vice versa.

[14] In order to illustrate the deficiency in the summation of the learned trial judge, counsel invited us to examine page 90 line 19 to page 91 line 6 of the summation which is in the following terms:

> "Madam Foreman and your members, it doesn't take a rocket scientist. You have heard two accounts of a story. They both cannot be true. Someone, or some persons are lying. Therefore, that is the critical and narrow issue that you must decide, where is the truth in the case. I want you to remember firstly, that you are to consider the evidence against and for the defendant on each count of the indictment separately, bearing in mind that the evidence as it relates to each count is different, so your verdicts do not have to be the same on each count ..."

[15] Counsel submitted that not only did the learned trial judge not give the direction for the jury to consider each victim's evidence independently, but she further erred in 'lumping' the two complainants together and suggesting that the case involved the two of them against their father. Counsel relied on the portion of the summation located at page 91 line 15 to 23 as follows:

> "The Prosecution's case rises or falls with ['A'] and [B], so it's only if you believe that they are truthful and they are reliable and accurate and they are not lying, only then you can find Mr. Chin-Yee guilty. If you don't believe ['A'] and ['B'] or if you are not sure that they are speaking the truth, you must acquit him on all nine counts of the indictment."

The Crown's submissions

[16] In respect of the need for a direction on collusion, the Crown also relied on the case of **McCalmont and Wade**, but emphasized the portion of the judgment in which Higgins LJ in addressing the danger of contamination at para. 24, concluded that:

> "We agree that much will depend on the facts of an individual case whether a warning about the danger of collusion or contamination should be given. It is clearly not necessary in every case in which there are several complainants ..."

[17] Ms Malcolm highlighted the fact that the learned trial judge gave a specific direction in relation to each count of the indictment and the date or period each offence was alleged to have been committed, the ingredients of that offence, and the possible verdicts. This can be found at page 36 line 17 to 25 and page 37 line 1 to 8 as follows:

> "... Madam Foreman and your members, you must consider the case against and for the defendant on each of those counts separately. You are required to return separate verdict on each count. So you must consider the evidence as it relates to each count separately. The evidence on each count of the indictment is different. So your verdicts need not be the same. You should not, for example, say, well. I find him guilty on Count 1, so he is guilty on all the other eight counts. And similarly, you should not say, well I find him not guilty on count 1, so he's not guilty on the other eight counts of the

> indictment. You are to go through and consider the evidence on each count separately and return a verdict on each count separately."

[18] Ms Malcolm admitted that the learned trial judge did not give a direction to the jury that the evidence of one complainant could not support the allegations of the other, and vice versa. She initially submitted that whereas such a direction would have been desirable, the omission to give it in clear terms was not fatal to the conviction. Counsel was directed by the court to examine para. 23 of **McCalmont and Wade** and the statement there, that such a direction was essential. Having further considered the point, Ms Malcolm graciously conceded that the summing-up may have been prejudicial to the applicant and that this may have resulted in a miscarriage of justice.

Analysis

[19] Having regard to the clear authorities on the point, we arrived at the same conclusion attributed to Ms Malcolm at end in the foregoing paragraph. In that regard, counsel's decision, was, with the greatest of respect, predictable and anticipated, despite counsel's best efforts initially, at presenting an alternative viewpoint. Our position was shaped by our review of the authorities which were commended to us by both counsel for our consideration.

[20] In **R v Adams** at para. 18 the court found that in addition to directing the jury that in assessing each count they should only have regard to the evidence which was relevant to that count and should ignore the evidence relating to other counts, the trial judge should have gone further:

> "… In particular, the jury should have been told that, when considering whether each of the alleged offences involving M was committed, they should ignore the evidence relating to the allegations made by G, and vice versa. **In the absence of such a direction, we think that the jury would naturally assume that they were entitled, when considering any particular count, to have regard to any of the evidence they had heard during the trial if**

> **they thought that evidence relevant** …" (Emphasis supplied)

[21] In **DPP v Boardman**, in referring to the need for the direction to the jury that in considering whether the accused is guilty of the offence against him by one complainant they must put out of their minds the similar allegations against him by another complainant, Lord Cross of Chelsea stated that:

> "… But, as the Court of Criminal Appeal said in Rex v Sims [1946] KB 531, 536, it is asking too much of any jury to tell them to perform mental gymnastics of this sort. If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons ..."

Whereas this statement expresses an admirable desire to prevent subjecting the jury to 'mental gymnastics' in these kinds of cases, the reality which we face, is that courts in the current era because of, among other things, the sheer volume of cases, are required to consider cases against accused persons in which there are more than one complainant giving evidence of allegations that are similar. This is especially so in cases involving sexual offences.

[22] In the applicant's case, it is not disputed that there are glaring similarities in the evidence of the complainants which would have been noted by the jury. It is, therefore, precisely the risk of the natural assumption by the jury that the evidence of each complainant could support the evidence of the other, which provides the rationale for a direction, the objective of which is to disabuse the jury of their inclination to so find.

[23] In **McCalmont and Wade**, the court conducted a review of the authorities in English and Northern Ireland. At para. [23] it considered the case of **R v D** (CR) [2004] 1 CR App R 19 and made the following observations which we find helpful:

> "[23] In *R v D* a stepfather was convicted of rape and other sexual offences against his two stepdaughters. The charges

> were tried together and no reliance was placed on similar fact. The appellant appealed on the ground that the judge failed in his summing-up to deal adequately with how the jury should approach the fact that they were considering cases involving two complainants in the same indictment. In allowing the appeal it was held [that] the counts were properly joined. **However in the circumstances it was essential for the jury to be directed in clear terms that the evidence on each set of allegations was to be treated separately and that the evidence in relation to an allegation in respect of one complainant could not be treated as proof of an allegation relating to the other complainant.** The directions given by the trial judge did not make this sufficiently clear and the risk arose that the jury had not given the required separate consideration to the evidence of the complainants. Therefore the convictions were unsafe ..." (Emphasis supplied)

[24] It was common ground between the parties in the case before us, that the learned trial judge gave adequate directions to the jury about the need to consider the evidence in respect of each count separately. We note that the learned trial judge, quite admirably, between pages 41 and 48 of her summation, separated each count and the evidence led by the prosecution in support thereof. The jury was helpfully guided as to the evidence that would have to be accepted before they could find the applicant guilty in respect of each specific count. Unfortunately, the learned trial judge did not take the extra step of warning the jury that it should not use the evidence in support of the counts relating to one complainant, to support a finding of guilt in relation to the allegations by the other complainant, or vice versa. In the context of the similarity in the allegations of both complainants, such a warning was essential.

[25] Furthermore, the failure to give such a warning was compounded by the directions of the learned trial judge at page 91 of her summation where she treated the complainants' evidence together. Reference has previously been made to this in the summary of the submissions by Mr Williams. An additional example of the learned trial judge's treatment of the complainants together may be found at page 95 lines 16 to 25 and page 96 line 1 of the transcript where she said:

> "… You can only convict him when you return to the Prosecution's case and you find that the prosecution's witnesses are speaking the truth, especially [A] and [B]. If you don't believe [A] and [B], not guilty on all nine counts of the indictment. If you are not sure that [A] and [B] are speaking the truth, not guilty on all nine counts of the indictment. Only guilty if you accept them as truthful, only time you can say that he is guilty."

[26] There was accordingly a real risk that the jury may have considered that the case was one of contrasting versions of the facts, with the collective evidence of both complainants on the one hand, against the applicant on the other. In these circumstances, we find that the summation in respect of this issue was not as fair to the applicant as it should have been, and resulted in a miscarriage of justice.

Should there be a retrial?

The submissions

[27] Both counsel relied on the case of **Russell v R** [2021] JMCA Crim 34 ('**Russell**') as authority for the approach to be taken in deciding whether a retrial should be ordered and the factors to be considered.

[28] Ms Malcolm submitted that, having regard to the fact that the verdict was not unanimous, it would be inaccurate to assert that it was overwhelmingly strong. However, the offences were of a very serious nature and these types of offences have become very prevalent in the society. Counsel pointed to the fact that the trial lasted six days and was relatively short, accordingly the time and expense of a new trial would not be substantial. Furthermore, counsel indicated that the prosecution would likely not pursue the first count in light of the date the offence is alleged to have taken place, that is, between 1 May 2005 and 1 May 2006. By doing so, the prosecution would not have to grapple with the challenge to that count on the basis that it was historical in nature, and the remaining offences would not be subject to such a complaint since they have been allegedly committed, starting in 2014. If this approach is utilised, approximately eight years would have passed by the date of the retrial, for the earliest offences. Additionally, counsel

advised us that her preliminary enquiries indicated that the trial could be commenced within a short period because the witnesses are available.

[29] Counsel for the Crown urged us to consider the impact on the public of the case and the prevalence of these sorts of offences. Counsel submitted that, considering all the circumstances she had highlighted, a retrial should be ordered.

[30] In response, Mr Williams submitted that the case was one involving versions of events given by each complainant, which were not admitted by the applicant. Importantly, there was no scientific evidence to support the case of the prosecution. The case could, therefore, not objectively be considered to be a strong one and this was evidenced by the majority verdict. He posited that if a retrial is ordered, the applicant would have to face charges in respect of offences alleged to have been committed as early as 2014, presuming that the allegations which formed the basis of count 1 are excluded. He noted that, crucially the applicant had spent just shy of five years in custody.

Analysis and conclusion on the issue of the retrial

[31] It was not disputed that the authority of the court to order a retrial in any particular case, is governed by section 14(2) of the Judicature (Appellate Jurisdiction) Act which is in the following terms.

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[32] In **Russell**, at para. [61] Brooks P identified the relevant factors to be considered as follows:

> [61] In considering whether or not to order a new trial, the court must, in the interest of justice, perform a balancing act, taking into account a number of factors. Each case will turn on its own particular facts. The case of **Dennis Reid v The Queen** (1978) 16 JLR 246; (1978) 27 WIR 254; [1980] AC

343 ('**Dennis Reid**') is the pre-eminent authority for guidance on this issue. The relevant guidance is to be found at pages 250 – 251 of the JLR. Their Lordships pointed to some of the considerations that should be taken into account in deciding whether or not to order a new trial are:

> a. the strength of the prosecution's case;
>
> b. the seriousness or otherwise of the offence;
>
> c. the prevalence of the offence;
>
> d. length of the previous trial;
>
> e. the time and expense that a new trial would demand;
>
> f. the effect of a new trial on the accused;
>
> g. the length of time that would have elapsed between the event leading to the charges, and the new trial;
>
> h. the evidence that would be available at the new trial; and
>
> i. the public impact that the case could have.

Their Lordships emphasised that this is not an exhaustive list of the relevant factors. They also recognised that, depending on the case, some factors may carry greater weight than others. Since **Dennis Reid** was decided, their Lordships have also considered, in this context, in **Bell v Director of Public Prosecutions and Another** (1985) 32 WIR 317 ('**Bell v DPP**'), the issue of delay and the constitutional right to a fair trial within a reasonable time. That factor should also be taken into account in deciding whether to order a retrial."

[33] We accept the generally agreed position of counsel that the case is not a particularly strong one and the jury did not reach a unanimous verdict. Furthermore, the task of the prosecution will be made more difficult by the fact that, even if a retrial were to take place relatively quickly, at least eight years would have passed since the first offence is alleged to have taken place. This will potentially have an impact on the strength

of the case of the prosecution which will interrogated by the testing of the witnesses' memories.

[34] The offences are, without question, quite serious and the offence of grievous sexual assault in particular is prevalent in the society. This is a factor which weighs in favour of a retrial.

[35] The trial took six days and we agree with the submission of Ms Malcolm that it was relatively short. Accordingly, it did not consume a considerable amount of judicial time and resources. This is, therefore, not a major factor in determining whether a retrial should be ordered.

[36] The length of time that would have elapsed between the event leading to the charges, and the new trial is a factor which carries considerable weight in this case. This is because a retrial, if ordered, will take place at least eight years after the first of the events on which the Crown will rely, if it abandons the allegations of the earliest offence which was alleged to have taken place between May 2005 and May 2006. In assessing the effect that the retrial will have on the applicant, the passage of time is an important consideration. It may also have implications for the applicant's constitutional right to a fair trial within a reasonable time. In considering this issue in **Russell** at para. [72] Brooks P referred to the Privy Council decision of **Bell v DPP**:

> "[72] In assessing the constitutional right to a trial within a reasonable time, their Lordships introduced the element of the further time that will be required to commence the retrial. They said, in part, at page 326:
>
> '…Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless, in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed**, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the**

eventual date of retrial cannot be left out of account.'"
(Emphasis as in the original)

[37] Brooks P also referred to the case of **Mikal Tomlinson v R** [2020] JMCA Crim 54, in which the court quashed Mr Tomlinson's convictions for illegal possession of firearm and wounding with intent and declined to order a new trial. This was explained by Brooks P to have been in large measure influenced by the fact that "he had already served approximately six and a half years of his mandatory minimum sentence of 15 years and would have been subject to another mandatory minimum sentence of 15 years for the offence of wounding with intent, if he were convicted after a retrial".

[38] Brooks P acknowledged that there were cases from this court in which a retrial was ordered despite considerably longer periods of delay but those cases turned on their particular circumstances. In the case before us, we have placed due weight on the fact that the applicant has spent approximately five calendar years in custody. There are accordingly some similarities in the circumstances underlying the case of the applicant when compared with those under consideration in **Russell**.

[39] We accepted the indication of Ms Malcolm that the passage of time has not negatively affected the availability of the witnesses and a retrial is possible. There is also unquestionably a public benefit in having the allegations pursued and determined by a jury. However, the public impact would be reduced having regard to the nature of the offences, the prosecution of which requires privacy for the protection of the complainants. This is in contrast to a murder for example, such as that which was the subject of **Russel**l, which would ordinarily command greater public attention arising from more details being available about the facts of the case.

[40] We have also considered the interest of the complainants. The transcript of the trial suggests that recounting the allegations of which they spoke must have been a traumatic experience for them being teenagers as they then were. One can reasonably assume that it would probably be similarly traumatic for them to have to endure that experience again, even though they are older.

[41] Having considered these factors and attached weight them as we thought was appropriate in the particular circumstances of this case, we concluded that an order for a retrial would not have been appropriate.

[42] Accordingly, we made the orders at para. [2] above for the reasons stated herein.