JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 55/05

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

ALBERT EDMONDSON v REGINA

Jack Hines for the appellant

Ms. Opal Smith, Assistant Director of Public Prosecutions for the Crown

February 2 & 3, 2009

PANTON, P.

1. The appellant was convicted on March 10, 2005, in the High Court Division of the Gun Court, sitting in Morant Bay, St. Thomas, of the offences of illegal possession of firearm, burglary and rape. He was sentenced to concurrent terms of imprisonment of ten years, twelve years and twenty years respectively.

2. The record indicates that the appellant gave notice of his intention to appeal eleven days after he was sentenced. It took over a year for the transcript of the proceedings to reach the Court of Appeal. Within two months, a single judge of this Court gave leave to appeal and recommended legal aid. It appears that there was some difficulty in assigning counsel on a legal aid basis as the record shows that the matter was not listed for hearing until June 2007. At that

time, it had to be taken out of the list for further efforts to be made to assign counsel. Finally, it was relisted yesterday, February 2, 2009 when we heard submissions. We take this opportunity to encourage more members of the legal profession to make themselves available to accept legal aid assignments in the Court of Appeal.

3. Learned counsel Mr. Jack Hines, for the appellant, filed a single ground of appeal which reads thus:

> "The learned trial judge erred in that he failed to consider adequately the issue of consent which error impacted particularly on his finding of guilt for the offence of rape but also as a consequence on the other offences."

4. The case presented by the prosecution was to the effect that the appellant, who was known to the complainant, a mother of three, broke and entered her dwelling-house at Mount Lebanus district in the parish of St. Thomas during the night of the 23rd September 2003. He pulled two glass louvre blades from a window to the room of the complainant's daughters. That act attracted the attention of the complainant who was then ordered at gunpoint by the appellant to open the door. She complied, amidst the screams of two of her daughters, who were then aged eleven years and seven years respectively. He then proceeded to have sexual intercourse with her for about an hour in her bedroom. The appellant used a condom, and placed the firearm on the dressing table. Her youngest child, who was five months old, was asleep in the

complainant's bedroom during the act. Thereafter, the appellant requested and was given, the use of a "waste pan or chimmey". When he was leaving the bedroom he told the complainant that he was going "a hill" now. Before leaving the premises, he replaced the two louvre blades that he had taken out of the window. The next morning, the complainant made a report at the Morant Bay Police Station.

5. The appellant gave evidence at the trial. This is rather unusual in our jurisdiction where most accused persons remain in the shelter of the dock and make unsworn statements that cannot be tested for veracity. The defence was that sexual intercourse had taken place by consent. He has known the complainant since 1993, and they have had "a relationship going" since then. He and one Carlos, the boyfriend of the complainant, were friends. Carlos works in Montego Bay so he (the appellant) and the complainant "were stealing love on the side". He admitted going to the house on the night in question but denied breaking into the house or pointing a gun at the complainant. He also denied taking out, and then replacing the louvre blades. Although it was never suggested to the complainant, the appellant said in evidence that while they were in the bedroom having sexual intercourse, the complainant's second daughter came into the room and asked if the appellant was her father.

6. The nature of the defence was such therefore, that it was necessary for the learned judge to specifically direct his mind to those areas of the case that

impacted on the question of consent. Mr. Hines submitted that it was natural to have expected the complainant to at least say she would be complaining to Carlos about the behaviour of his friend, the appellant, if her allegations were true. The likely reason for the complaint to the police was, he said, the intrusion by the child during the act. He maintained this position, although the Court pointed out to him that there had been no cross-examination of the complainant on the point. In summary, he submitted that the judge had not shown that he had sufficiently considered all the surrounding circumstances.

7. Miss Opal Smith, for the Crown, in responding to Mr. Hines' submissions, contended that the learned judge was correct in approaching the matter from the point of view of credibility. He accepted the complainant as a witness of truth and rejected the appellant's story. Having done so, he was entitled to convict the appellant. So far as the making of a complaint to Carlos was concerned, Miss Smith adopted the words of the complainant by saying: "what difference would it have made?"

8. The learned judge, in giving his reasons for arriving at his decision, related the evidence and then made his assessment. This is what he said, in part:

> "In relation to what (the complainant) has said, I find these findings of fact regarding the firearm. I am satisfied that the description she gave fitted that of a firearm. Yes, the accused man did go to the premises. I find as a fact. I reject his evidence in its entirety in relation to the gun and to the sexual act

> that he had that night. I am satisfied that he had a firearm that night which fits the description of firearm under the Firearms Act.
>
> As to whether there was a burglary, there is evidence that he put his head through that window. That in itself would constitute breaking and entering, because there is evidence that he removed two panes of glass by forcing the complainant to open the door; that constitutes constructive breaking and entering. Yes, I find that I am satisfied, having examined and assessed the evidence of the complainant and looking at her demeanour. She gave her evidence in a straightforward way. I don't think she was shaken in any way. I know it is quite easy to make an allegation of this sort, and I bear that in mind. There is no evidence of corroboration as regards the rape. However, I find that I believe the complainant; she has spoken the truth here today that this accused man came there that night, removed the panes of glass, pointed the gun at her, forced her to open that door and had sexual intercourse with her without her consent. I am satisfied to the extent that I feel sure that the complainant has spoken the truth. As I said, I reject the evidence of the accused man as it relates to the rape, when he said he never raped her." (p. 101 line 24 to p. 103 line 2)

9. In the circumstances of the case, there are certain aspects which in our view demanded the attention and analysis of the learned judge. Firstly, there was the question of the louvre blades. In that regard, the learned judge said:

> "The officer told us she made an observation of the house occupied by the complainant and indicated that she saw two to three louvre windows that seemed disturbed.
>
> Now, one would ask the question. If this man is going there for the first time, remove two louvre blades, commit the act of rape, then would he have had time to put back those panes of glass? Well,

> one does not know what is in his mind because what we have here is not somebody who they say never knew his victim; they have known each other for the last eleven years, but what the complainant is saying is that he has never come to her house before except for that night. So, I take that into account." (p. 99 line 20 – p. 100 line 7)

However, there is nothing in the record to indicate how the learned judge dealt with the questions he himself had raised.

10. It is well known that glass is a good source for the capturing of fingerprints. The evidence presented by the prosecution clearly showed that the appellant handled the louvre blades in a manner that would have resulted in his fingerprints being left on the blades. Considering the denial of the appellant, it seems to us that the police were obliged to process those blades for his prints. That they did not do so, was a serious defect in the investigations. This would have been a conclusive way of proving that there was no consent, bearing in mind that it is the prosecution's duty to prove lack of consent.

11. Secondly, there was an inexplicable difference in the evidence of the complainant as to the location of the firearm during the sexual act. In examination-in-chief, she said it was on the dressing-table (p. 17 line 4), but during cross-examination, she said it was on the bed beside them (p. 49 lines 12 - 15). Thirdly, the complainant gave evidence of hearing the splintering of glass, yet there was no evidence of any glass being broken. In fact the glass blades were taken out and replaced whole by the appellant, according to the

complainant. Fourthly, the complainant said that the appellant, when he was about to have intercourse with her, inquired if she had someone. The learned judge ought to have considered the improbability of this inquiry being made, given the fact that the witness and the appellant knew each other very well, and the appellant knew that his good friend Carlos was her boyfriend.

12. These instances were in our view clear warning signs that there was substance in the defence so far as the question of consent was concerned. It should also not have been overlooked that the appellant used a condom and remained for about an hour. Having done so, he then called for a "chimmey", and was thoughtful enough to replace the louvre blades.

13. We are not satisfied that the matter was a mere question of credibility, without specific attention being given to the issue of consent. In any event, the credibility of the complainant was seriously dented by the foregoing factual situations, and the demeanour alone of the complainant would not have been a sufficient pointer for the proper disposition of the matter. There is no indication in the learned judge's summation that he addressed his mind to those aspects of the evidence that have given us concern. As a result, we are constrained to quash the convictions and set aside the sentences. There is no room for a retrial, given the obvious shortcoming in the investigations specifically in the area of the fingerprints. This case clearly demonstrates the need for investigators to be

properly supervised and guided. Verdicts of acquittal are accordingly entered on the three counts.