[2011] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 40/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

LAWRENCE LYNCH v R

Ian Wilkinson, Ms Sharon Donaldson and Mrs Dionne Jackson-Miller for the appellant

Mrs Caroline Hay for the Crown

7 and 8 February 2011

ORAL JUDGMENT

PANTON P

[1] The appellant was convicted in the St Ann Circuit Court by a jury on 18 February 2009 of the offence of carnal abuse. He was sentenced on 6 March 2009 to 15 years imprisonment at hard labour. His application for leave to appeal his conviction was met with approval by a single judge of this court, who expressed the view that the learned trial judge did not adequately deal with the issues which arose in the case, for example, he did not address the alibi defence put forward by the appellant in his sworn testimony. Also, it appeared from the particulars of the offence that a young person warning may well have been

required but none was given. There were other concerns expressed by the single judge, all in all she gave leave to appeal and also granted legal aid.

[2] Learned attorney for the appellant, Mr Wilkinson, filed supplementary grounds of appeal. There were six such grounds in addition to one challenging the sentence. There need only be mention of three of these grounds - 1, 2 and 3:

> "1. The learned trial judge erred in failing to direct the jury sufficiently in relation to the issue of visual identification evidence and to highlight or link the effect of a number of serious weaknesses in the prosecution's case on the prosecution's burden of proof.
>
> 2. The learned trial judge failed to direct the jury properly, or at all, in relation to the principles relevant to the defence of alibi especially in the context of the Appellant's sworn testimony and having regard to the lacunae on the prosecution's case regarding the visual identification evidence. This omission was fatal as it deprived the Appellant of a fair trial with the inevitable consequence that there was a grave and substantial miscarriage of justice.
>
> 3. The learned trial judge erred in law in failing to direct or warn the jury that there was a risk of acting on the uncorroborated evidence of a child, particularly bearing in mind that the Particulars of Offence on the germane indictment stated that the alleged victim was, at the material time, '... **under the age of twelve (12 years.**' "

[3] At the commencement of the hearing of the appeal yesterday and which was reaffirmed today, both Mr Wilkinson and Mrs Caroline Hay for the

prosecution agreed and expressed the view that the situation was such that the conviction ought not to be allowed to stand.

[4] We, having examined the record of the summation and having considered the views of the single judge and counsel, are in agreement that the conviction cannot be allowed to stand. The learned trial judge did indeed fail to address the issues which required his attention - issues which ought to have been properly addressed to the jury. The evidence that was presented, as gleaned from the summation, is, with the greatest of respect, somewhat patchy. The evidence indicates that the child was pounced on by the appellant and taken from her residence to another residence, and there the sexual assault took place.

[5] The evidence of the doctor indicated that the hymen was intact but there had been bruising in the general area of the vagina. The appellant gave evidence and, in that evidence, he indicated that he was elsewhere. Incidentally, the complainant had testified that initially, she was held from behind and was not able to get a proper view of her assailant until she had been taken to the other house. Be that as it may, the appellant gave evidence that he was elsewhere.

[6] The learned trial judge failed to address the question of the alibi. He did not indicate to the jury that there was no burden on the appellant to prove an alibi nor did he indicate that if it was accepted there should be an acquittal. He did not instruct the jury that if the alibi was doubted, there should be an

acquittal and if rejected, it did not necessarily mean that there should be a conviction. There can only be a conviction if the case for the prosecution made the jury feel sure. So far as the question of identification is concerned, that appeared to have been a live issue which required directions which are well-known along the lines of ***Turnbull***. Those directions were not forthcoming.

[7] There was a question of an attempt by the learned trial judge to define corroboration. It has to be described as an attempt because this is what is said on page 15 line 24, to page 16 line 6:

> "Matters involving sexual intercourse are always matters done in private, so, in law we say that there ought to be what we call corroboration. In other words, some fact, some material fact that shows that sexual intercourse occurred and that this particular person, the person accused, had sexual intercourse with the complainant."

This is clearly an incomplete definition of corroboration, in that, the learned trial judge ought to have stressed that corroboration is independent evidence which confirms in some material particular, the allegation of the complainant, not merely that she was the victim of a sexual assault but that the accused man was the person who committed the assault.

[8] Further, there was also a failure on the part of the learned trial judge to have directed the jury as to how they should approach the question of the evidence of a child of this age. He ought to have told the jury that there is a risk or danger in acting on the uncorroborated evidence of a child. He also

ought to have said, that a young child as this one is, is susceptible to the influence of other persons and, as hinted in the skeleton arguments so ably put together by Mr Wilkinson and his team, he ought to have indicated the possibility of an imaginative flight of fancy by the child.

[9] There was also a situation at this trial where at the end of the summation, learned counsel for the Crown, at the invitation of the learned trial judge, suggested that there may have been need for a direction in respect of indecent assault. That suggestion did not seem to find favour with the learned judge. However, on the basis of the evidence that was given by the doctor, it appears that there was a need for indecent assault to have been left to the jury. Page 27 of the record reveals the following exchange.

Miss Brooks said at line 19:

> "M'Lord, if you could leave indecent assault ..."

At line 21, the learned judge responded thus:

> "I contemplated and I think it would either be believe or not believe. I think it would be either all or nothing."

Then Miss Brooks concluded at lines 24 - 25:

> "Very well, and I am not too sure if you had explained the indictment."

We think that given the evidence of the doctor, it is an ideal case where there ought to have been an alternative of indecent assault left for the jury to

contemplate. Therefore, we agree that the conviction ought to be quashed and the sentence set aside.

[10] This morning, we heard submissions in respect of the question of a re-trial. Learned counsel Mr Wilkinson in his usual industrious style referred to the well-known case of ***Reid v R*** (1978) 27 WIR 254 and for good measure, he added the case of ***Andre Bennett and Augustus John v The Queen*** Privy Council Appeal No 74/2000 delivered on 17 July 2001. This latter reference seems to have been a part of a dissenting judgment of Lord Stein.

[11] Mr Wilkinson highlighted the fact that three years would have passed since the commission of the offence, were there to be a new trial, and that it would substantially affect the recollection of the witnesses. He pointed to the possibility of the Crown being given another chance to fill the gaps in the evidence. He submitted for consideration that this is not a strong case and that the complainant would be more mature. Also, there would be the fact of the appellant going through the ordeal of a second trial. He however conceded the fact that this offence is a very serious one. He was reluctant to agree that it is a prevalent offence but I think we can take judicial notice that the court records do indicate that this is indeed a prevalent offence.

[12] Mrs Hay has countered by citing the case of ***Jason Ellis John v The State*** a decision of the Court of Appeal of Trinidad and Tobago Cr. App. No

58/2000, delivered 25 November 2005, which places reliance also on ***Reid.*** She referred to paragraph 23 of that judgment which reads thus:

> "Notwithstanding, the above analysis, there is other compelling evidence that the lapse of time herein is quite acceptable. Although the Privy Council in Crosdale v The Queen, 46 WIR 278, PC held that a period of seven years 'delay' between commission of the offence and possible retrial was the permissible limit, there are cases such as Anthony Nevada Johnson v The State, Cr. App. No. 125 of 1998 and Glenroy Bishop v The state, 60 W.I.R 370 in which retrials have been ordered for periods in excess of the suggested limit. Furthermore, it is noted that the Privy Council in Crosdale did not order a retrial though the period of delay amounted to less than seven years. This clearly illustrates that each case must be assessed on its merits and reliance on rigid rules would prove inadequate in the justice of the case."

[13] We are of the view that given the seriousness and prevalence of the offence, this matter ought to be retried. We do not share the fears of Mr Wilkinson as to the question of filling of gaps by the prosecution. The case is quite a simple one and although the learned trial judge made reference to the fact that it was a simple case, we ought not to have been going through this exercise at this time had the learned trial judge treated the matter as such. We are satisfied that there is evidence which ought to be put back before a jury and that there is no need for the prosecution to attempt to fill any gaps in this case and indeed we would caution them against any such attempt.

[14] The appeal is allowed, the conviction is quashed and the sentence is set aside. In the interests of justice a new trial is ordered to take place as soon as possible.