JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 126 OF 2004

BEFORE: THE HON.MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

STEVE MORRIS
v
REGINA

Miss Velma Hylton Q.C. for the Applicant.

Dirk Harrison, Deputy Director of Public Prosecutions (Ag.) and Miss Melissa Simms, Crown Counsel (Ag.), for the Crown.

29th April, 2nd May and 19th December, 2008

HARRISON, J.A:

1. The applicant was convicted in the Manchester Circuit Court on the 28th day of May, 2004 for the offence of rape before Mrs. Norma McIntosh J., and a jury and was sentenced to 15 years imprisonment at hard labour. The single judge refused his application for leave to appeal so he has renewed this application to the Court.

2. On April 19, 2003 at about 2:00 p.m., the complainant S.D. a 12 year old school girl, was returning home having had her hair combed. She was in the process of using a short cut in Albion District, Manchester when the applicant grabbed her from behind, covered her mouth, held a knife at her throat and had sexual intercourse with her without her consent. He was known to her for a period of three years prior to the

incident. During the act of sexual intercourse she was able to see his face and had no difficulty in recognizing him.

3. A report was subsequently made to the police and she was taken to the hospital in order to be medically examined. When the applicant was arrested, he admitted that he knew the complainant but denied that he had sexually assaulted her.

4. At trial the applicant made an unsworn statement from the dock. His defence was one of an alibi. He said:

> "On that day, Saturday, when they say I raped Miss Dixon I have been all that day washing". And he ended by saying, "I don't know anything about Miss Dixon's rape".

5. Two grounds of appeal were filed on behalf of the applicant. Miss Velma Hylton Q.C. for the applicant contended firstly that the learned trial judge misdirected the jury on the burden of proof in that she gave the jury the impression that the applicant had a duty to establish his innocence. She submitted that although the learned judge had directed the jury that the applicant was not on trial to prove his innocence, it would appear that she had confused the jury when she invited them to conclude that he had failed in his attempt to establish his innocence.

6. Mr. Harrison, Deputy Director of Public Prosecutions, submitted however, that the learned judge had given adequate directions on the burden of proof. He argued that Counsel's reference to page 44 of the record was taken out of context and should be read in conjunction with the preceding passages found at page 43. He submitted that the learned judge had made it abundantly clear to the jury that the applicant was not on

trial to prove his innocence. However, he said that the judge had omitted to inform the jury that the applicant could have said nothing at all. Notwithstanding this omission, Mr. Harrison submitted, she had reminded the jury that there was no obligation on his part to prove his innocence.

7. Mr. Harrison further submitted that the words ("establish his innocence") used by the judge, would not have caused the jury to be confused and to believe that the applicant was obliged to establish his innocence.

8. We now turn to the summing-up in order to examine certain passages and to determine whether the learned judge had misdirected the jury when she told them that the applicant "may attempt to establish his innocence".

9. It is our view that the judge's directions to the jury on whom the burden of proof rests were accurately stated. At page 15 she said:

> "The burden of proving the guilt of the accused is on the prosecution. The accused man is not required to prove his innocence so he can sit down there and say nothing and just wait and see if the prosecution will be able to prove its case against him. And, the prosecution is required to prove the guilt of the accused to you beyond a reasonable doubt. Now, what does that mean? It means the prosecution must put before you evidence which satisfies you until you feel sure the accused is guilty..."

At page 43 of the record, the learned trial judge said:

> "Now you will recall when I was giving you directions in law and telling you about the burden the prosecution has, that the accused man is not on trial to prove his innocence and so he could sit and say nothing, just wait to see if the

> prosecution can prove its case against him. However **he may attempt to establish his innocence** although he is not obliged to do so and in attempting to establish his innocence he may do one of three things. He may come in the witness box here and as the witness did and at which point the prosecuting attorney would have an opportunity to cross-examine him. (emphasis supplied)
>
> Prosecuting attorney has no right to cross-examine him if he gives a statement from the dock....The next thing he could do is to speak from the dock, and in this case he elected to speak from the dock".

She continued at page 44:

> "That is not evidence on oath. That is called an unsworn statement and it is his right so to do if that is how he wants to establish his innocence. Because you must remember he has nothing to prove, so it is entirely up to him whether he wants to say anything and he decided to stay in the dock. It is entirely a matter for you what weight you give to what he has told you from the dock...."

And at page 44 lines 24-25, page 45 lines 1 - 7 she said:

> "..."On that day, Saturday, when they say I raped Miss Dixon I have been all that day washing". And he ended by saying, "I don't know anything about Miss Dixon's rape". So that was his statement. That is what he had to tell you in his attempt to establish his innocence, it is entirely for you to decide if it has any weight and how much weight you would give it".

10. The authorities have made it abundantly clear that there is never any onus on an accused man to prove his innocence. It is the duty of the prosecution to satisfy the jury so that they feel sure of his guilt.

11. In **R v Hugh O'Connor** (1978) 16 JLR 269 the trial judge directed the jury inter alia:

> "If having regard to the statement made by the accused man having given the effect that you think it deserves you come to the conclusion as was suggested to the little girl that she agreed to the intercourse with this man then of course it means that **his attempt to prove his innocence would have succeeded**. If having given what he has said your best consideration you come to the conclusion that, well, I don't really know who to believe it leaves you in that state of ambivalence it would mean that the prosecution has not established the case so that you can feel sure." (emphasis supplied)

12. The Court found no fault with the learned judge using the words, "it means that his attempt to prove his innocence..." but it was of the view that in the circumstances of the case, the jury could have been confused by the directions given as to the evidential value of the unsworn statement. The appeal was allowed for the latter reason and the conviction quashed. In the interest of justice a new trial was ordered.

13. In **R v Alfred Hart** (1978) 16 JLR 165, the trial judge said early in his directions when dealing with the nature and conduct of the defence:

> "Now, although there is no duty on the accused to prove his innocence, common prudence would suggest that he would attempt to do so and this accused man **did attempt to prove his innocence**. He stood where he was in the dock and he made a statement. He also called a witness to support him. Now, if you consider that attempt has succeeded, then, of course, he is not guilty and you will be obliged to return a verdict of not guilty. If, however, he fails in that attempt, then you must consider all the evidence including what he has told you and what his witness testified from the witness box, and see whether you are satisfied to the extent that you feel sure that the Prosecution has proved its case. If, upon a review of all the evidence, including what he has told you and what his witness has also told you, you are left in a state of reasonable doubt, then in those circumstances, you will be obliged to resolve that doubt in his favour and find him not guilty." (emphasis supplied)

The Court also found no fault with the directions that the accused man "did attempt to prove his innocence".

14. In **Regina v Frances Dove, Winston Dixon and Stanford Flowers** (1982) 19 JLR 447 a ground of appeal complained that the learned trial judge had misdirected the jury on the burden of proof in that on the directions given, the jury could be left with the view that the defence had a duty to convince them as to the truth of their stories. The court found no fault with the directions which stated:

> "Now members of the jury, if the accused's statements convince you of their innocence then you must let them go, you have to acquit them. Or, if it raises any reasonable doubt in your minds then you must acquit them. On the other hand it might just strengthen the case for the prosecution. If it does and you are satisfied that the prosecution has made out his case, then it is open to you to convict them. But if in view of all the evidence you are in a state of doubt so that you say you don't know where the truth lies then you have to acquit the accused and you must remember, each accused stands before you as if he or she were the only person standing in the dock". (p.451 H).

15. Lord Chief Justice Goddard in the very well-known case of **R v Henry Lazarus Lobell** [1957] 41 Cr. App. R 100 at 104 gave very timely guidance as to how to sum up to a jury and to explain the function of doubt in arriving at a verdict. He said:

> "The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence, the proper verdict would be "not guilty". A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence, which may have one of three results: it may convince them of the

> innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution. It is perhaps a fine distinction to say that before a jury can find a particular issue in favour of an accused person, he must give some evidence on which it can be found but nonetheless the onus remains on the prosecution; what it really amounts to is that if in the result the jury are left in doubt where the truth lies, the verdict should be "not guilty" and this is as true of an issue as to self-defence, as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence."

We believe that this model direction is worthy of emulation. A trial judge has the duty to make it abundantly clear to the jury that if what the accused says leaves them in a state of doubt then the prosecution would have failed to prove the case to their satisfaction so that they can feel sure.

16. We have given serious consideration to the submissions of Counsel but we see nothing objectionable in the directions given by the learned judge in the instant case. We have therefore concluded that the directions "however he may attempt to establish his innocence although he is not obliged to do so" would not have caused the jury to be confused and to believe that the applicant was obliged to establish his innocence. Her directions at page 15 of the summation (supra) made it abundantly clear to them that the burden of proof rested squarely on the shoulders of the prosecution. We think there is really nothing in the point raised by learned Counsel for the applicant, so ground (a) fails.

17. The second ground of appeal complained that the learned judge wrongly directed the jury regarding the burden of proof where the defence of alibi is raised. Miss Hylton

Q.C. argued that the learned judge had misdirected the jury when she directed them that there was a false alibi and that the applicant must satisfy them that there is some reason for him making this false alibi. She submitted that this direction gave the jury the impression that he was under an obligation to satisfy them about something. This is what the learned judge said at pages 23 and 24 of the transcript:

> "I must also point out to you, Madam Foreman and members of the jury, the defence of the alibi that the accused man has raised. He is saying he was not there, he was somewhere else. I have to point out to you that it is not for him to prove that he was not there. The burden of proving the case remains on the prosecution. It is for the prosecution to prove to you, that the accused was where the prosecution's witness said he was and doing what the prosecution's witness says he was doing. Even if you reject his alibi in his defence, that does not allow you to come to the conclusion that therefore he is guilty, because, there may be many reasons for putting a false alibi.
>
> For instance, a genuine mistake about the date, genuine mistake about anything that relates to what he says he was doing that particular time. So, only if he has satisfied you, that that is the only reason for him making up this false alibi, that you can find support for the evidence of identification. The mere fact that the accused has lied about his whereabouts, does not by itself prove it. It is what the prosecution's witness says he was doing". (emphasis supplied)

18. It seems to us that there is a typographical error in the words underlined in the above paragraph. The first part of the sentence appears to be misleading when you consider what is said in the concluding section of the sentence. We get the impression that the word "he" should read "Crown". However, closer towards the end of her directions to the jury, the learned judge seemed to have corrected what was our concern and at page 54 she said:

> "Remember if you find he has lied you can only regard that as support for the evidence of his identification by S.D. as the person who committed the offence, if you are satisfied he has deliberately lied to you in an effort to deceive you in thinking he is not the person".

19. We respectfully disagree with the submissions of Miss Hylton Q.C. and also find no merit in this ground of appeal. It therefore fails.

20. The application for leave to appeal is refused. The conviction and sentence are affirmed. The sentence is to commence on the 4th September, 2004.