[2013] JMCA Crim 54

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 87/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA

RICHARD PEARCE v R

Mrs Jacqueline Samuels-Brown and Nicholas Edmond for the appellant

Mrs Ann-Marie Feurtado-Richards and Miss Michelle Salmon for the Crown

23, 24, 25 February; 26 March 2010 and 11 November 2013

PANTON P

[1] The appellant, a constable in the Jamaica Constabulary Force, was convicted on 24 July 2008 of the offence of carnal abuse. The victim's date of birth was 22 December 1994 and the offence was committed on "a day unknown" in December 2007.

[2] The appellant was committed to stand trial in the Saint Thomas Circuit Court but, due to the destruction by fire of the legendary Morant Bay Court House, the trial actually took place in the Supreme Court building on King Street, Kingston. It was presided over by Donald McIntosh J, with a jury, and on 29 July 2008, the learned judge sentenced the appellant to five years imprisonment.

[3] At the time of our dismissal of the appeal, we gave brief oral reasons for so doing and ordered that the sentence should run from 24 October 2008. We apologize for only now putting our reasons in writing.

[4] Leave to appeal from the conviction had been granted by a single judge of this court on the basis that "the learned trial judge omitted to give the jury specific directions on how to treat with previous inconsistent statements". We noted that no specific ground was advanced along those lines but we make no criticism of that fact.

The prosecution's case

[5] The complainant was an eighth grade high school student. She was walking on the road in Morant Bay on a day in December 2007 when the appellant called to her. She responded and eventually went into the front seat of a car that the appellant was driving. This was during morning school hours and the complainant was dressed in her school uniform. The appellant drove and parked the car in a secluded lane. Prior to that, he had asked her if he could touch her hair but she had replied that she did not like people touching her hair.

[6] While in the lane, the appellant adjusted the seat on which the complainant was sitting, removed her underwear, went over her and laid on her in the seat, and then proceeded to have sexual intercourse with her in that position. After this act, he gave her $100.00 and took her to her school. Later, the complainant noticed blood on her underwear.

[7] The appellant was known to the complainant before the incident, and she had travelled in his car before that day. The appellant had a daughter who was in the same class as the complainant.

[8] On 31 December 2007, a boy and two young men visited the premises where the complainant lived with her grandmother. The latter made a telephone call to the complainant's father who came and took her to the Morant Bay Police Station where the complainant made a report to the police of the incident involving the appellant. In her written statement to the police, the complainant stated that the incident took place in the afternoon on her way from school, and that the appellant took her to her taxi stand afterwards.

The defence

[9] The appellant gave evidence in which he denied having sexual intercourse with the complainant. He admitted driving a "robot taxi" and giving the complainant a ride in his car on a morning in December 2007. He had "picked her up" at the bus terminus in Morant Bay. He had not known her before but she was with another girl whom he knew before. The complainant, he said, sat in the rear of the car whereas the girl he knew sat in the front seat. He noticed that the complainant's hair was "untidily" and her clothes were "not in place", and so he spoke to her about it. He let off both girls at about 9 a.m. at the school gate. He never saw the complainant again until when he attended at the Resident Magistrate's Court at Yallahs, apparently for the preliminary examination to be conducted into the case.

The grounds of appeal

[10] The grounds of appeal were few but the complaints by the appellant were manifold. There were two original grounds. The first challenged the admission into evidence of the entire written statement given by the complainant to the police; the second ground complained that the summation of the learned trial judge was inadequate. However, these were not pursued - at least, not in the form in which they were filed. Indeed, instead, Mrs Jacqueline Samuels-Brown, counsel for the appellant, filed, argued and relied on four supplemental grounds. The third of these supplemental grounds listed 18 complaints of alleged "inadequate and/or unbalanced" treatment of the evidence by the judge in his directions to the jury.

Supplemental ground 2

[11] It is convenient to deal firstly with ground 2 of the supplemental grounds. It reads:

> "The Learned Trial Judge erred in preventing the doctor from giving evidence as to the history recounted to him by the virtual complainant as, inter alia,
>
> a. A jury is entitled and ought to know the material on which an expert bases his opinion before being invited to accept such opinion.
>
> b. The said material potentially contradicted the evidence of the complainant and to a probability was a previous inconsistent statement of the complainant, which the defence was entitled to expose and/or explore."

[12] Mrs Samuels-Brown submitted that as a matter of law the learned trial judge erred in preventing the doctor from giving evidence as to the history given by the complainant, as evidence potentially beneficial to the appellant was excluded. Thereby, she said, the appellant was denied a fair trial. Mrs Feurtado-Richards for the prosecution responded that the history of the complainant, if given in evidence by the doctor, would breach the hearsay rule. She cited the cases ***R v Turner*** [1975] 1 All ER 70 and ***R v Abadom*** [1983] 1 All ER 364 in support of her view that the learned judge was correct.

[13] In ***R v Turner***, it was held that an expert opinion was only necessary where the expert could furnish the court with scientific information that was likely to be outside the experience and knowledge of the judge or jury. That case was one in which the appellant had battered his pregnant girlfriend's head with a hammer thereby killing her. She had told him that the child she was carrying was not his as she had conceived after having been involved with two other men while he was in prison. He said he had lost his self control, did not realize what he was doing, and had not intended to harm her. His counsel sought to call a psychiatrist with a view to help the jury to accept as credible the appellant's account of the events, and to indicate why the appellant was likely to have been provoked. The judge indicated his wish to see the report that would indicate what the psychiatrist was likely to say in evidence. The report contained a long account of the appellant's personality and medical history as well as his family background. Some of the information had come from medical records; others had come from the appellant himself and from his family and friends. The trial judge ruled that

the report was irrelevant and inadmissible as it contained 'hearsay character evidence'. In delivering the judgment of the English Court of Appeal, Lawton, LJ said:

> "… all the facts on which the psychiatrist based his opinion were hearsay save for those which he observed for himself during his examination of the appellant such as his appearance of depression and his becoming emotional when discussing the deceased girl and his own family. It is not for this court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts on which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked." [page 73 c-d]

[14] In ***R v Abadom***, the English Court of Appeal maintained consistency by applying the principle in ***Turner*** and holding that when an expert witness was asked to express an opinion on a question, the primary facts on which that opinion was based had to be proved by admissible evidence given either by the expert himself or some other competent witness.

[15] The evidence of the doctor in the instant case was simply that he examined the complainant on 31 December 2007 and found that her hymen was not intact, and that its breach was not recent. It should be noted that the cross-examination of the doctor by very experienced counsel for the appellant at trial, Mr Earle deLisser, lasted exactly one minute. It is recorded on page 45 of the transcript at lines 10-21. It reads thus:

"**TIME 2:38 P.M.**

Q. Doctor, in coming to your findings you would rely on what the patient says to you, naturally?

A. Yes.

Q. And on this occasion you did spoke [sic] with the young lady?

A. Yes.

Q. And that is where you got the history from?

A. Yes, I did.

Mr. E. DELLISSER: I have no further question.

(Mr. E. Dellisser sits at 2.39 p.m.)"

[16] The learned judge asked some questions resulting in the doctor saying that when the hymen has healed after a breach it is very difficult to determine when the breach has occurred. Normally, he said, it takes about two weeks to heal.

[17] An examination of the transcript revealed that the doctor's evidence in chief as well as under cross-examination was not interrupted by the learned trial judge. He did not in any form or manner prevent the doctor from answering any question during those processes. As stated earlier, the learned judge asked some questions of his own, as he was entitled to do, and counsel for the defence when asked if he wished to question the doctor further, replied in the negative. In any event, there was nothing else for the doctor to say as anything else would have been hearsay.

[18] The submissions on this ground of appeal were totally without any factual base, and so the ground failed.

Supplemental grounds 1 and 4

[19] These grounds were argued together, and are as follows:

> **Ground 1**
>
> "The Applicant did not receive a fair trial as the cross-examination of the prosecution witnesses was unduly curtailed by the Learned Trial Judge.
>
> …
>
> **Ground 4**
>
> The Learned Trial Judge's demonstrated hostility to defence counsel operated and/or had the potential effect of undermining, emasculating, impugning the Appellant's defence."

There was an alternative to this ground. It is as follows:

> "The Learned Trial Judge interventions doing [sic] examination by defence counsel and references to defence counsel's conduct of the trial during the summing up, to a probability, had the effect of undermining, emasculating, impugning limiting the Appellant's presentation of his defence and/or the credibility of his case and accordingly adversely impacting on a fair trial."

[20] According to Mrs Samuels-Brown, the learned judge prevented defence counsel from fully testing the complainant's credibility during the process of cross-examination. In attempting to substantiate this, she referred to pages 20 - 22 of the transcript of the notes of evidence where the judge admitted in evidence the statement of the complainant which conflicted, in parts, with her viva voce evidence before the jury. Mrs

Samuels-Brown also included in this area of complaint a reference to page 32 line 25 and page 33 line 1.

[21] We carefully examined the passages involved, and took due note of the following evidence which is recorded from page 20 line 12 to page 22 line 9.

> "Q. Now, a police officer took a statement from you that night, the night of the 31st, police officer took a statement from you?
>
> A. Yes, sir.
>
> Q. And in that statement …?
>
> HIS LORDSHIP: No, no, no, no, no, no.
>
> MR DELLISSER: I am sorry.
>
> HIS LORDSHIP: No, no.
>
> Q. You told the police …?
>
> HIS LORDSHIP: Counsel Dellisser, you have the statement?
>
> MR DELLISSER: Yes, sir.
>
> HIS LORDSHIP: You want the statement?
>
> MR DELISSER: Yes, m'Lord.
>
> HIS LORDSHIP: Let's have it.
>
> MR DELLISSER: Yes, m'Lord, Could I have the statement?
>
> HIS LORDSHIP: Is that police person coming?
>
> MR DELLISSER: She is not on the indictment, m'Lord
>
> HIS LORDSHIP: Very well. Let's have the statement. Original, you have the original?

MR DELLISSER: Yes, m'Lord

HIS LORDSHIP: Well, why don't you show it to her?

MR DELLISSER: Show her her signature, please.

(Document shown to witness)

Q. You see your signature?

HIS LORDSHIP: Show her the statement. I need to know if that's the statement she gave the police. Look at it. Can you read?

THE WITNESS: (Nods)

HIS LORDSHIP: Look and see if that is the statement you gave the police.

THE WITNESS: Yes, sir.

HIS LORDSHIP: This is it?

THE WITNESS: Yes, sir.

HIS LORDSHIP: Good. Read it to her.

(Document read to witness)

HIS LORDSHIP: You want it in evidence, Mr Dellisser?

MR DELLISSER: Yes, m'Lord.

HIS LORDSHIP: So admitted, Exhibit One. Now, you can ask her anything you want about it.

MR DELLISSER: Yes, m'Lord."

[22] In our view, Mrs Feurtado-Richards was correct when she submitted that the fact that the statement contained inconsistencies, and that the learned judge facilitated its admission into evidence without the strict formalities of the Evidence Act having been observed were matters that enured to the benefit of the appellant in the conduct of his

defence. The learned judge invited Mr deLisser to ask the witness "anything …about it" (meaning the statement). And Mr deLisser did ask questions thereafter.

[23] As regards the complaint in respect of page 32 line 25 and page 33 line 1, this is what is recorded in those lines. Mr deLisser asked the complainant:

> "Did you lie in the first statement?"

She responded: "I am not going to answer you".

Mr deLisser then made a suggestion to the witness as to what had transpired on the morning of the incident with the appellant, but the witness did not answer. The learned judge intervened and asked the witness if what was suggested was correct. The witness asked that the question be repeated. The judge himself obliged by repeating the suggestion that Mr deLisser had put. The witness replied in the negative.

[24] We did not see in these passages any abridging of the cross-examination. Rather, we formed the impression that the learned judge was trying to assist counsel for the defence in a situation where the witness had become impatient with the questioning which had become repetitive. It is to be expected that some witnesses may get annoyed when counsel repeats questions that have already been answered. The expression of such annoyance, whether in words or by silence, cannot, on that score alone, be a ground for quashing a conviction.

[25] Mrs Samuels-Brown accused the learned judge of descending into the arena at significant junctures in the case and displaying "what could be regarded as open hostility to the defence and thereby potentially causing the defence to be diminished in

the eyes of the jury". This accusation was based on what Mrs Samuels-Brown characterized as a failure by the judge to intervene when the witness refused to answer certain questions. This, she said, was encouragement for the witness along what was a mistaken path.

[26] An examination of the record revealed that at page 24 line 19, the witness did not answer a question. However, the very question had been asked at page 23 lines 4 to 10. When Mr deLisser insisted on having the witness repeat her answer, the learned judge told him to "move on, please" (page 25 line 2). It seemed to us that, in those circumstances, the learned judge was correct to prod Mr deLisser to proceed with another question. It is not the duty of counsel to be repetitive, as repetition results in unnecessarily long trials. It is quite farfetched therefore to say that encouraging counsel to get on with the trial diminished him in the eyes of the jury. We found no merit in these grounds.

Supplemental ground 3

[27] This ground complained that the learned trial judge's directions to the jury as to how to treat with the evidence were inadequate and/or unbalanced. As said earlier, as many as 18 areas of the summation did not find favour with the appellant and formed the basis of complaint. In view of the fact that we found no substance in these complaints, there is no basis for listing all of them. However, some are quoted and dealt with hereunder.

[28] Ground 3 (b) reads as follows:

> "In juxtaposing the two possible verdicts of guilty or not guilty the Learned Trial Judge directed the jury that they must acquit if they felt sure but if they had doubt they should so resolve it in favour of the defence. In so doing the Learned Trial Judge [sic] to a probability left the jury with a duty to convict according to their oath but on the other hand an option to acquit. (Emphasis added)"

On examining the transcript, this is what we noted the learned judge as saying:

> "The prosecution must prove the guilt of the accused by making you feel sure of it, nothing less than that will do. If after considering all the evidence you are sure that the accused is guilty, then you must, in keeping with your oath return a verdict of guilty. If however, you are not sure, if you have a reasonable doubt, then your verdict must be in keeping with your oath, one of not guilty."

Clearly, there was no question of the judge merely giving the jury an option to acquit the appellant if they were in doubt about the case. He told the jury that in such a situation their verdict "must be in keeping with [their] oath, one of not guilty". The complaint in that regard was not well-founded.

[29] As regards the other limb of the instruction to the jury, we took note of the fact that the judge said that, if after considering all the evidence they were sure that the accused was guilty, then they "**must** … return a verdict of guilty". On that aspect, the learned judge was in error. It is well settled that juries should not be directed that they must necessarily convict if they find certain facts to have been established. There should be no blurring of the division of duty between the judge and the jury. The judge

is to direct on the law whereas the jury is to decide the facts. The former should not be seen to be attempting to usurp the role of the latter.

[30] In ***Regina v Williams and Banks*** (1994) 31 JLR 315, it was held that the trial judge had erred in directing the jury that if they accepted Williams' cautioned statement they must find him guilty of murder. In so doing, said the Court of Appeal, the judge had substituted his view of the application of the law to the facts which was the role of the jury. The function of the jury is to find the facts, to draw inferences from those facts and to apply the law given on the facts found. The role of the trial judge is to assist them in arriving at a correct decision. However, in the circumstances, the court applied the proviso. This approach by the Court of Appeal met with the approval of the Privy Council, as seen by the report of their judgment at [1997] 51 WIR 212. The Privy Council quoted from Lord Keith's judgment in ***DPP v Stonehouse*** [1977] 2 All ER 909 at 940, which had been also quoted by the Court of Appeal in its judgment.

[31] In the circumstances of the instant case, we formed the view that the verdict of the jury would not have been any different had the learned judge not made that error.

[32] In ground 3 (c), the complaint was stated thus:

> "In the context of this case the Learned Trial Judge's directions that the virtual complainant's sexual history was irrelevant is in error as it impacted on the circumstances in which the virtual complainant came to make her initial report and on her credibility."

Mrs Samules-Brown said that the grandmother became suspicious when young men came to her house and called the complainant on 31 December 2007. There was thus reason for the jury to be given an understanding of the basis for the suspicion. She

said that although it was not fully explored, there was evidence to suggest that the complainant had been sexually active prior to the date of the incident. Accordingly, she submitted, her previous history was "of relevance to her credibility generally, and as to whether she was speaking the truth on this occasion".

[33] Here again, it was necessary to look at what the learned judge actually said. The transcript of the summation reads thus:

> "Now what defence attorney went on to tell you is what she told the father, and all that is not evidence before you. You don't know what she told the father. What you do know is that eventually [the complainant] ended up at the police station, but he was now also trying to suggest that this girl was actively having sex, and suggesting that this is the reason why these two boys came to the house. There is no evidence why they came to the house, and that evidence would not be put before you because it would be what is called hearsay evidence, and not admissible in a criminal court.
>
> Now why I mention this, is simply this, for the purpose of your deliberation is, it really does not matter whether she was having sex with 10 people, or 11 people, or one person. It doesn't matter if these boys were, in fact, having sex with her. What is relevant, or what you need to consider and bear in mind is, even if she is having sex with other people they are not before you. The person who is charged before you is one person, and you are called upon, having hear [sic] the evidence, to decide whether or not he was a person who had sexual intercourse with [the complainant]; that basically is what you are called upon to decide."(page 14 of the transcript).

We found no fault with the judge's statements on the issue. The important point, as the learned judge stressed, was whether the appellant had had sexual intercourse with the

complainant. It was not for the judge to invite the jury to speculate on the complainant's sexual history and thereby make a linkage of some sort between that history and the complaint against the appellant.

[34] Ground 3 (i) was to the effect that:

> "The Learned Trial Judge detracted from directions on the legal requirement for corroboration as he went on to cast doubt and/or raise skepticism on the basis or justification for this rule in terms that "**it is said** that an offence of a sexual nature is easy to manufacture and hard to prove [sic]".

It was the appellant, not the court, who added the emphasis noted in the passage setting out this ground. It was difficult to fathom the basis of the complaint, as there was no elaboration of it in the submissions. We took the view that it could not be that the complaint was against the statement that an offence of this nature was "easy to manufacture", seeing that the 42nd edition of Archbold's Criminal Pleading Evidence and Practice carries the following statement at paragraphs 16-21:

> "No particular formula is required, but the jury should be warned in plain language that it is dangerous to convict on the evidence of the complainant alone, because experience has shown that female complainants have told false stories for various reasons, and sometimes for no reason at all."

The source of this statement is the judgment of Salmon LJ in ***R v Henry and Manning*** (1969) 53 Cr App R 150. At page 153, the learned Lord Justice said:

> "This Court has said again and again, and I hope, quite recently made it clear, in … O'Reilly [1967] 2 All ER 766, that there is no magic formula or mumbo jumbo required in a direction relating to corroboration. What the judge has to do is to use clear and simple language that will

> without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all."

[35] The only error that we were able to detect in the passage quoted in the supplemental ground was an error created by the appellant himself. In the complaint (see para. 34 above), Donald McIntosh J is quoted as having used the words "hard to prove". The transcript, however, has him saying "hard to disprove" [see p 32 lines 11 and 12] the latter words being in keeping with the law and practice.

[36] In any event, the point was regarded as moot given the fact that a direction as regards corroboration in cases of this nature is no longer obligatory in every case. This court has stated the new path that is to be followed. In ***Regina v Prince Duncan and Herman Ellis*** (SCCA Nos 147 & 148/2003 – delivered 1 February 2008), Smith JA delivering the judgment of the court said:

> "…unless otherwise enacted by statute, the guidance given by Lord Taylor should now be followed. The rule requiring a mandatory corroboration warning in sexual cases has been weighed in the balance and found wanting. It should now be only a matter of historical interest."

Smith, JA was referring to Lord Taylor's judgment in ***Makanjuola*** (1995) 1 WLR 1348 at 1351 where the principles to be applied were redefined and summarized. There

being no longer a mandatory requirement for a corroboration warning, even if the learned judge was incorrect in what he said, it would not have mattered.

[37] Ground 3 (j) reads thus:

> "The Learned Trial Judge misdirected the jury relative to the reason for the need for caution before accepting the evidence of young children as it is not a part of that warning or direction that 'children may be less likely to be acting from improper motive than adults'."

As was the case with ground 3 (i), no specific submissions were made in support of this ground. However, we viewed the complaint as being an extension of the complaint in ground 3 (i) in relation to the directions on corroboration.

[38] Judges all over the Commonwealth have consistently directed juries on the need for them to be cautious in assessing the evidence of children. In ***Kendall v The Queen*** [1962] SCR 469, a judgment of the Supreme Court of Canada, on appeal from the Court of Appeal of Ontario, Judson J, speaking for the panel of seven, said at page 473:

> "The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility."

A study paper prepared by the Evidence Project of the Law Reform Commission of Canada in 1975 commented that "The dangers inherent in the testimony of children result largely from non deliberate distortion in their perception, memory and narration".

[39] Jamaica is no different from Canada or the United Kingdom so far as it concerns the need for caution as regards the evidence of children. There was nothing inherently wrong with the statement of the judge that children may be less likely to be acting from improper motive than adults. Their youthfulness and lack of experience in the machinations that adults are known for are sufficient reasons to justify the remarks made by the learned judge to the jury.

Credibility

[40] The other complaints in supplemental ground three were either repetition of matters dealt with in the other grounds, or were matters relating to the credibility of the complainant. As regards the issue of credibility, the jury was left in no doubt that it was absolutely necessary for them to determine the case on the basis of whether they believed the evidence given by the complainant at the trial. The prosecution and the defence were agreed that the appellant gave the complainant a ride in his car on a morning in December 2007. The main issue was whether sexual intercourse had taken place in the lane, as claimed by the complainant.

[41] In his final words to the jury before they retired, the learned judge drew their attention to the fact that counsel for the defence had suggested to them that they should not accept the complainant as a witness of truth, "for more reasons than one" . He then referred to the fact that the complainant had said in her written statement that the incident had happened in the afternoon on her way from school, yet in the evidence before the jury, she had said it was in the morning while she was on her way to school. This is what the learned judge said:

> "He (that is, defence counsel) says that, because of that, you can't believe her and you shouldn't believe her. I am not going to tell you to, I am going to leave it to you to decide for yourself what you make of it. Now you have seen her, you have heard her. You have seen the accused; he gave evidence on oath, and what he is saying is a complete denial; he never had sexual intercourse with this young girl. You are the judges of the facts. It is you who decide what evidence to accept and what evidence to reject. It is you who must decide where the truth lies."

Those directions were flawless and most appropriate in the circumstances of the case.

[42] The challenge to the conviction was based on what were perceived by the appellant as errors and also hostility on the part of the trial judge. The perception was not well founded. We concluded that the trial was conducted fairly, and that the jury was satisfied beyond a reasonable doubt that the complainant was a witness of truth. In the circumstances, there was no reason to disturb the conviction or sentence.