JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 111 of 1972

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

R. v. CLIVIS BOOTHE

S. Beresford for the Appellant.

P. Harrison for the Crown.

18th January; 9th February, 1973

EDUN, J.A.:

On the date of the hearing of this appeal, we allowed the appeal, quashed the conviction, set aside the sentence and in the interest of justice, ordered a re-trial of the appellant at the present sitting of the Home Circuit Court. In the meantime, the appellant is to remain in custody. We promised then to put our reasons in writing. We do so now.

The appellant was charged on indictment as follows: on count 1, with the offence of common assault of the complainant Valerie Douglas; on count 2, with the offence of rape of Valerie Douglas; and on count 3, with the offence of common assault of Lycius Newman. Valerie Douglas was born on July 23, 1958 and at the time when the offence upon her was committed, she was less than 14 years of age by about three months. She said in evidence that on October, 7, 1971, at about 8.15 to 8.30 a.m., a school boy Samuel Forbes, of about the same age, and herself were at a bus-stop when the appellant came up to her with something in his hand looking like a gun and told her to move. They were then marched down the busy street for a distance of about 15 to 20 chains to Victoria Pier. At one stage, she was in front and at another, with the appellant beside her. That was the evidence supporting count 1 of the indictment.

She was marched down to the remains of a demolished building where the appellant then pushed her into a little part and grabbed up the two of them and said: "Ah going to kill the two of you". She said "don't kill me".

The appellant said: "You will have to give me a grind first". He picked up a brick and told her to lie down. As she would not lie down, he pushed her down and pushed Forbes in the corner. The appellant then drew down his pants, went over her and drew down her panties. She was pushing him off. "He took out his tea-pot, came down on me and started to rape me. He put his tea-pot in my tun-tun ... I don't remember what happened after that. I next found myself in hospital." It would appear that a doctor examined her but no doctor was called at the trial to give evidence.

Lycius Newman said that October 7, was his birthday. He was celebrating it by "knocking" a few beers and had gone to the sea-side off Hanover Street to have a swim. He came out from the sea and it was around 12 o'clock when he saw the appellant with a book and he was singing, entertaining the two children. He watched on at the entertainment for about 5 minutes and the appellant walked off with the boy and the complainant following him. He then saw the little boy jump through a window of the old building. He became suspicious. He ran across a lane and met the boy who told him something. He then moved immediately to the building where he heard the voice of the girl crying out. He approached near enough to see the appellant with his bath trunk down. The appellant took out his ratchet knife and flashed it after him (evidence supporting the 3rd count). He picked up a stone, and hit down the appellant. The girl then ran out and as she approached him, she fainted. He caught her before she fell. He went inside the building, then some firemen came.

Fong, a fireman, said he and his men answered a call of fire and he was at the bottom of Hanover Street when about mid-day he saw a little boy running across the building and was crying out "Police". He spoke to him and he then instructed his men to circle the building. He saw the appellant was over the girl and winding up himself. The appellant jumped up as soon as he saw Fong and said: "is she give me you know, Sah! Is she give me." The appellant had his pants below his knees, his private part which was stiff was out of his pants. The dress of the little girl was up and her panties down. With assistance of his men, he took the appellant out of the building, took up the girl who attempted to walk but she collapsed. She was conscious but crying. Later, the police came and the appellant was given in custody.

In his defence, in an unsworn statement, the appellant said he was a fisherman and he did his fishing down Hanover Street beach, and in the old house he kept his fishing tackle. For some time before he said he was losing his fishing line. On October, 7, he was fishing when he saw the boy and girl go into the big room in the building. He went up and as he reached the building the little boy ran out with something in his hand. He saw the girl coming out and she said: "Lord sah, ah me bredda, Sir. Every 12 o'clock me come down ya sah". And she called out "Lord, Lord, Murder! Oh!" And that when he looked around a whole heap of people run down on him, held the girl at the same time and started to beat him. He was taken to Kingston Public Hospital where he was examined by a doctor. He denied all allegations of rape or assault.

Learned attorney for the appellant submitted firstly that the verdict was unreasonable and could not be supported having regard to the evidence, and secondly, that the learned trial judge misdirected the jury on the question of corroboration. On the first ground he argued that the complainant said she was "marched down" by the appellant at about 8.15 to 8.30 a.m., but both Newman and Fong were positive that they had seen the appellant and the girl at about 12.15 to 12.30 p.m. There was no explanation as to what had happened during the intervening period of 4 hours. It was obvious then that the appellant's story was true when he said that he had met the girl in the building about 12 o'clock. It was obvious, too, that the girl was lying. On the second ground the prosecution had charged the appellant with the offence of rape and there was no corroborative evidence as to the lack of consent and on that important aspect of the case, the learned trial judge had misdirected the jury. In answer to these submissions learned attorney for the Crown replied that there was evidence upon which the jury could reasonably have returned the verdict they did and on the question of a misdirection by the learned trial judge that in any event there was no miscarriage of justice.

We are of the view that if the jury believed Newman and Fong then they could have disbelieved the complainant when she said that she was "marched down" by the appellant at about 8.15 to 8.30 a.m., but yet accept her evidence that she was in the building at about 12 o'clock and believed what Newman and Fong said they saw. We, therefore, saw no merit in the

first submission by learned attorney for the appellant. Indeed it is to be observed that the jury found the appellant not guilty on count 1.

On the evidence concerning proof of rape and corroboration, the learned trial judge said:-

At pp. 17-18:

"In rape, however, the Prosecution has to prove, whatever the age of the complainant - of the woman - whether girl or big woman, have to prove that there was no consent. And consent there means real consent. So that this little girl, although if the charge against the accused had been carnal abuse and not rape, although this little girl couldn't consent in the sense that he could use it as a defence, nevertheless if this little girl had agreed to it, had gone down there to meet the man in the old house and give it to him it would be a good defence to this charge of rape. But from the evidence that you have it is for you to say whether she in fact consented, to anything like that because she had her little friend there. Remember she told you about Samuel Forbes a little school-boy 13 years old. Both attending the same school. He is now off the island. In the United States. She referred to Sammy Forbes as her friend. And that was in answer to a question that Mr. Beresford asked her: what relationship is Samuel Forbes to you. So Sammy is with her all the time. She would be in the building. And according to Mr. Newman he actually saw both of them going into the building and shortly after that one run out. Now what the boy running out for? Must be something taking place - something taking place in there they didn't expect, and that Newman said when he went there he heard the girl crying. All that now would be matters for you to say whether that indicate that the girl didn't agree to this, didn't expect this. So it must be without her consent, by force, fear or fraud.

Then she was telling you about something resembling a gun that the man had. And he threw it away before he went into this building. But while he in the building he used words: a going kill the two of you. "And I said: no, don't kill me". He said well you would have to give me a grind first. Well if you believe that, that would be evidence of force, or fear, driving fear into her.

Now Mr. Panton, is there any evidence coming from this girl that during this intercourse now she had actually seen this knife?

MR. PANTON: No. She said she saw him with the knife. I remember that I asked her if she saw him with anything and she said no.

HIS LORDSHIP: Anyway that wouldn't affect the position. If you believe that the accused used force or fear in the circumstances as she has explained, that would be evidence for you to consider that, when she said that she did not agree to it."

At pp. 18-19:

"One other matter. Judges have always warned the jury in a case of rape or any case where a man is charged with committing some sexual offence that it is dangerous to convict an accused man on the uncorroborated evidence of the complainant. In other words if the complainant is the only person who is giving evidence implicating the accused and there is no other independent evidence in the case to support her story in a material particular making more probable that what she is saying is true and that it is safe to rely on it, then the judge usually tell the jury that it is unsafe to convict in the circumstances but to tell the jury that nevertheless even although it is unsafe, if they believe the complainant that notwithstanding the warning they can convict. Commonsense comes into it there."

At p. 19:

"But in this case, if you believe Mr. Fong that he saw the whole operation - saw the man on top of her winding up himself - saw the penis. Even when he saw the penis it is still stiff. And he saw the condition of the girl with her panties, and so on. If you believe that, then that would be evidence that you could accept. If you believe it - rather put it this way, evidence capable of corroborating the story in both particulars which they say should be pointed out to the jury: namely who did it, the accused. What did he do? Rape the woman. Along with the bit of evidence there, Mr. Newman, if you believe him that when he is going around the corner he heard a crying in there and he also now having surprised the accused the accused took out this knife and want to cut him and he saw the accused man because he told you of the condition in which he saw the accused and this girl. And you may think that the sudden collapse of this girl now, the girl fainting may very well have been the result of this thing. It could be because she was so frightened or what it is, just passed out. A combination!

So then, as far as corroboration is concerned my direction to you is that there is evidence - I need not go over it again, from Mr. Fong and from Mr. Newman which if you believe is capable of corroborating her story on both points, namely: that it was the accused who had intercourse with her, without her consent."

It is patent from the recital given at p.19 of the summing-up of the evidence of Fong that the learned trial judge was in error in directing the jury that Fong's evidence was capable of corroborating the complainant's story of the fact of sexual intercourse as well as the fact of the absence of consent on her part. Fong said nothing from which it could be inferred that there was a lack of consent on the part of the complainant.

In the case of Eric James v The Queen (1971) 55 C.A.R. p.299, a similar question arose where medical evidence in that case only confirmed the complainant's testimony that intercourse had taken place but the trial judge directed the jury that if they accepted that evidence it could amount to corroboration that intercourse had taken place without her consent. The Privy Council held that the direction was entirely wrong and the judge should have told the jury that there was no corroboration of the complainant's evidence. "His failure to do so was a serious misdirection, so serious so as to make it inevitable that the conviction should be quashed." Per Viscount Dilhorne at p.303. See also R. v. Richard Taylor, Court of Appeal (Jamaica) No. 115 of 1968 delivered 28th April 1969.
It should in addition be observed that Fong said that as soon as the appellant saw him, he jumped up and said: "is she give me you know, Sah! Is she give me!" This evidence was capable of being related to the issue of consent. This was not brought to the attention of the jury.

We have considered whether or not, in quashing the conviction, to substitute a conviction for unlawfully and carnally knowing a girl above the age of 12 and under 14, contrary to section 45 of the Offences Against the Person Law, Chapter 268 or of attempted rape or indecent assault. The record discloses that before the jury retired, learned attorney for the defence asked the judge whether the offence of indecent assault should have been left to the jury.

The learned trial judge had this to say to attorney for the defence: p. 21 of the summing-up.

> "No. As I said it only applies where the girl under 12 is the complainant in a rape case then the jury may acquit on the felony and convict of indecent assault or attempt. But it would not apply in a case where the girl is over 12 and under 14 and the charge is rape. That is my view."

The learned trial judge had obviously oversighted the provisions of section 44 of Chapter 268. The jury had therefore, no assistance from him in this regard and we cannot say what the verdict would have been had he directed them in accordance with the provisions of that section. Therefore, in the interests of justice, we ordered a re-trial.

Before leaving this case, we may mention that the learned trial judge sentenced the appellant on the conviction of common assault on Lycius Newman (count 3) to 2 years imprisonment at hard labour. The maximum period of imprisonment is one year with or without hard labour: Sec. 38 of the Offence Against the Person Law, Chapter 268.