J A M A I C A

Court of Appeal

Supreme Court Criminal Appeal No. 125/71

Before: The Hon. Mr. Justice Luckhoo - Presiding
The Hon. Mr. Justice Fox
The Hon. Mr. Justice Edun

R. v. LLOYD JENKINS

Mr. Norman Wright for the applicant.
Mr. W.L. Morris for the Crown.

13th FEBRUARY, 1973

MR. JUSTICE LUCKHOO:

The applicant, Lloyd Jenkins, was on the 6th December, 1971, convicted on an indictment before Mr. Justice Grannum and a jury for rape alleged to have been committed on the 1st March, 1971. The applicant appealed on a number of grounds, only one of which appears to have some merit i.e. ground 5. The other grounds of appeal filed we feel are without merit and we do not propose to say anything about them.

The case for the prosecution was to the following effect: the complainant, Ivy Mulby, a girl of about 17 years of age, was awaiting transportation in the vicinity of the Deluxe Cinema on Spanish Town Road at about 11:00 a.m. on the 1st March, 1971, when the applicant, driving his motor car, came by. He offered her a lift to her home which she accepted. There were two other persons in the car and after dropping them off the applicant instead of taking the complainant to her home took her to a lonely spot and forced her to have sexual intercourse with him in the back seat of his mini-minor motor car. After intercourse had been completed she left the

car and ran to her home where she made a complaint to her mother as to what had occured. She was taken to a doctor who examined her. The police to whom a report was made went in search of the applicant. Before the police apprehended him the applicant had sought safety in flight. Later on he surrendered himself to the police and was charged with the offence of rape.

It was also a part of the case for the prosecution that the girl had never before had sexual intercourse with anyone. She was a virgin.

The case for the defence shortly put is to the following effect - the applicant stated that he had known the complainant for some two years before the 1st March, 1971; he was in love with her. She used to meet him and they were on an intimate basis for some little time before the 1st March, 1971. Further, there had been an attempt to have sexual intercourse on the 24th February, 1971 but that the attempt was not consummated because the girl was a virgin. On the 1st March, the complainant was awaiting transportation when he, the applicant, happened to come by. He picked her up and they proceeded to a place called Ferry, where he (the applicant) the complainant and Actg. Corporal of Police Hyatt who was a passenger in the car proceeded to have some refreshment, the complainant partaking of a nutrament. Corporal Hyatt went off to his police station at Ferry and it was at that point of time that he (the applicant) suggested to the complainant that they should go to his home to have sexual intercourse. The complainant agreed. They proceeded to the applicant's home and there willingly the girl gave herself to him. Thereafter he drove the girl home in his motor car.

It ought to be mentioned, too, that in her evidence the complainant had stated that although she was

acquainted with the applicant for some two years before the 1st March, 1971 she had never been out with him and had never exchanged words with him otherwise than to say 'good morning'. On the occasions when she saw him during that period he was visiting a young lady living next door to where she and her mother resided at that time.

The learned trial judge told the jury that the story of the complainant was not corroborated and the usual warning was given to the jury in respect of their acting upon the uncorroborated evidence of a complainant in a case of this kind. The learned trial judge also attracted the jury's attention to the fact that there were a number of discrepancies and contradictions in the Crown's case. He mentioned to the jury that each and every contradiction or discrepancy had been brought to their attention by learned attorney for the applicant Mr. Norman Wright during the course of his address at the conclusion of the evidence.

In respect of ground 5 of the grounds of appeal filed, Mr. Wright referred to certain pages in the transcript of the evidence on oath given by the applicant at his trial wherein it is recorded that the learned trial judge, during the course of the cross-examination of the applicant by learned attorney for the Crown, himself put questions to the applicant. It is contended on behalf of the applicant that these questions were of a searching and insistent nature directed to the applicant as to a possible motive why the complainant and other witnesses for the Crown should not be telling the truth: that such questions could have no other effect but to influence and prejudice the jury and indelibly imprint on their minds the impression that the applicant was under a duty to prove a motive for the witnesses for the Crown telling lies against the applicant and that unless the applicant could supply a

motive for their telling lies against him the case for the Crown would be made credible and should be believed.

Mr. Wright conceded that a trial judge has every right in the interest of justice and clarity to put questions to any witness, whether for the defence or the prosecution, and when properly done that this could expedite a trial. However, Mr. Wright contended that this right in a trial judge is to be exercised within certain well defined limitations. He cited in support of that contention, firstly, the case of Clewer v. R. (1953) 37 C.A.R. 37 - a decision of the Court of Criminal Appeal in England - more especially a passage in the judgment of the Lord Chief Justice appearing at page 41 -

> " Some of the judge's observations must have indicated to the jury that he himself had come to a conclusion with regard to the case that was adverse to the appellant and that he regarded the defence as devoid of any foundation."

Mr. Wright submitted that in the instant case when the judge asked questions of the applicant during the course of cross-examination by counsel for the Crown as to what possible reason witnesses for the Crown would have to tell the stories they did against the applicant he did so in a manner which conveyed to the jury that the judge himself regarded the defence put up by the applicant as devoid of any foundation and thereby made it impossible for the jury fairly to consider the defence advanced in this case. In effect, Mr. Wright argued that the way in which the judge asked questions of the applicant shifted the burden of proof from the Crown to the defence and this notwithstanding the general direction given by the judge in relation to the burden of proof

in the case; that the manner in which the judge went about asking questions of the applicant showed clearly bias in the judge in the sense of his identifying himself with the Crown's case.

Reference was also made to the case of R.v. Hamilton (1969) C.L.R. 486. In that case giving judgment, Lord Chief Justice Parker said, inter alia that interventions by a trial judge which may lead to the quashing of a conviction, are:

(i) those which invite the jury to disbelieve the defence's evidence in such terms that they cannot be cured by telling the jury that the facts are for them,

(ii) those which make it impossible for counsel to present the defence properly,

(iii) those which have the effect of preventing the defendant from doing himself justice and telling his story in his own way.

Mr. Wright argued that the first category thus enumerated was applicable to this case, i.e. interventions which invited the jury to disbelieve the defence's evidence in such terms that they cannot be cured by telling the jury that the facts are for them. Further, in support of that submission Mr. Wright cited to us the cases of R. v. Gilson & Cohen (1944) 29 C.A.R. 174, where Mr. Justice Wrottesley, at pp. 180 and 181 adopted a statement appearing in the judgment in the case of R. v. Cain (1936) 25 C.A.R. 204 at page205 -

" The judge began by doing something of which no one could complain. It was a long case, and he had taken a careful note, and it was quite right, so long as counsel for the defence had no objection, that the judge should put

" to the defendant when giving evidence the various allegations of the witnesses for the prosecution, in order that he might deal with them. So long as they were put colourlessly, no one could object. Indeed, counsel for the defence might have thought it assisted him in his task. There is no reason why the judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench. Cross-examination in cases of this kind is usually quite efficiently conducted by counsel for the Crown."

Mr. Wright contended that although that was a case where the interruption complained of took place during the examination-in-chief the Court's remarks are equally applicable to a case where a judge interrupts during the cross-examination of a witness, more especailly if that witness is the accused himself.

Another case cited by Mr. Wright in support of his contention was R. v. Bateman, (1964) 174 L.T. 336 - a judgment of the Court of Criminal Appeal in England.

Finally, Mr. Wright submitted that the summing-up itself left much to be desired in that it took the same slant towards the Crown as did the questions asked by the judge of the applicant. In such circumstances, Mr. Wright contended, this Court ought not to uphold the conviction and the appeal should be allowed.

We have carefully examined, along with Mr. Wright, the questions asked by the learned trial judge to which objection was taken before us, and although we are of the view that it would have been preferable for the learned trial judge to have reserved his questioning of the accused until after the examination-in-chief, the cross-examination and re-examination of the applicant had all been concluded we do not agree with Mr. Wright that the effect of the questions asked by the learned trial judge of the applicant was such as to indicate to the jury that the judge believed that the defence was without substance and that instead the Crown's case should be accepted by the jury. It should be observed that the learned trial judge did not seek at any stage to interrupt the applicant when he was telling his story to the jury. That story was fairly put to the jury. It is also not without significance that when at the end of the judge's questions Mr. Wright took exception to the questions asked and indicated to the judge that he felt that in the mind of the jury the questions would have the effect that the applicant was not

speaking the truth but rather that the witnesses for the prosecution were speaking the truth, the judge replied in these terms:

> " If you read that into it, then you are reading something completely wrong, all I am getting this witness to explain to the jury is why he is saying (that they are lying against him.)"

We do not think that the questions put by the learned trial judge to the applicant could have had the effect of a jury coming to the conclusion that the trial judge was belittling the defence or throwing a burden on the defence to prove something. Indeed, the judge in this case was on more than one occasion very meticulous in telling the jury that no burden of any kind whatsoever lay upon the defence.

In the result we do not see why the conviction should not be sustained. The application for leave to appeal is therefore refused.

Sentence will commence to run with effect from the 1st June, 1972.