C.A. CRIMINAL LAW — Rape — Trial — Summing up — Verdict found with summing up — Application for leave to appeal refused

Case referred to

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JAMAICA

R v Cassells (1965) 8 WLR 270.

Evidence

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 189/87

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A.

R. vs. MARK BURKE

Mr. Norman Manley for applicant

Miss V. Bennett for the Crown

June 2, 1988

CAREY, J.A.:

On the 17th, 18th, 21st September and 12th October, 1987 the applicant Mark Burke stood his trial in the Home Circuit Court before Gordon, J., and a jury, and on conviction of the offence of Rape was sentenced to 5 years imprisonment at hard labour. He now applies for leave to appeal that conviction to this Court.

This morning, Mr. Manley, who appears for the applicant sought leave to argue some five (5) grounds of appeal which were settled by counsel other than himself. Some of these, he abandoned at the outset, and as to others, he endeavoured to put forward some argument. But at the end of the day, it was quite clear that there really was no merit in any of these grounds put forward.

As an example of what we were asked to consider, Ground 2 may be given, as illustrative. It was in the following form:

> "2. That the Learned Trial Judge erred in law when he directed the jury as follows: 'You may accept all or part of what a witness has told you.' It is submitted that the credit of a witness, in particular the Complainant, is indivisible, so that if the Jury accepted Burke's evidence that he had prior intercourse with the Complainant and disbelieved her on that issue, then the Jury would be entitled to disregard her evidence in toto as this would go to her credit."

It is enough merely to mention the ground to demonstrate that it is wholly misconceived. It is plain that the term 'the credit of a witness is indivisible', is a reference to the credit of one particular witness, and as we pointed out to counsel, this occurred in the case of R. v. Cassells which is reported (1965) 8 W.L.R. 270. In that case, the applicant was charged for cultivating ganja and the evidence against him came from certain police officers who testified that they had seen him planting ganja plants. They also denied, in the course of their testimony, that they had in any way assaulted him or caused him any injury. There was evidence from the appellant showing that he had received severe injuries and there was medical evidence confirming the injuries and disproving that such injuries, having regard to their nature, could have been sustained in a fall as the police officers had contended. The arguments before the Court then, was that if the police officers were lying as to the injuries they had inflicted, then they ought not to be believed on the substantive matter as to whether or not the appellant was planting ganja. It is in that context that this phrase must be appreciated. It certainly cannot be applied to the circumstances in this particular case - for the complainant, in this case, and we will summarize the facts in a moment, gave one story, which did not admit of divisibility.

Her story was that she was raped by the applicant, a man whom she knew but with whom she had never had any relationship, intimate, or otherwise. On the other hand, it was the story of the applicant that -

"he and she were deh." What we understand all that to mean is that, although he was denying that he had intercourse or had raped her on the day in question, theirs was an intimate relationship. Put another way, he was saying, the rape is denied but if the jury finds that intercourse took place, then it must have been consensual. Plainly, there really was no basis for this ground.

There was another ground put forward which was in the following form: (GROUND 3)

> "That the Learned Trial Judge's direction on the demeanour of the witness could have had the effect of confusing the Jury in part, when he directed, that 'at her age with her obvious intelligence, you may accept based on what she has said, that sexual intercourse did take place and the persons she claimed are her assailants'; this could have led the Jury to interpret these words to mean that once they believed her that sexual intercourse took place, then they were invited to accept that the Appellant must have been one of her assailants. It is submitted in any event that the direction must have had the effect of confusing the Jury."

We would point out that in the context in which these directions were given, the learned trial judge was explaining to the jury what, in law, could amount to sexual intercourse, and in that context was saying, that having regard to the age and intelligence of the victim, the witness would understand the meaning of 'intercourse' and that what her assailants did to her was to have sexual intercourse with her. It meant no more and no less than that. It certainly could not be understood as a direction to convict anyone. He certainly was not confusing the jury nor could the jury understand from that an obligation inevitably to find that her assailant was guilty of rape. So that ground again had no merit.

Mr. Manley endeavoured, faintly, to bring forward other points without merit, and what we would say is that at the end of the day everything that could possibly be said in favour of the applicant has been said, and really, the evidence was quite overwhelming against him.

The short facts were: On the night of the 4th August, 1986 this young lady, and we do not propose to give her name, was walking along a road, Headley Avenue in St. Andrew when she saw this applicant who called to her. When she went up to him, he pulled something resembling a gun and commanded her to walk; she was taken to a yard nearby where four men including the applicant sexually assaulted her, each in turn. It was a most revolting and disgraceful episode. She was boxed; her clothing was torn off; she was held down at all times by three of the men while the other man had his will; she was gagged; she was threatened with being shot and after all this, she was returned to her home and warned by this applicant that her house would be burnt down if she dared to make any report to the police. When the applicant was arrested on August 28 and cautioned, he is reported as saying - "A nuh mi alone rape her." His defence was that he did not rape her on the 4th, that they were friends and indeed, had an intimate relationship. Moreover, he maintained that on the 1st of August, certainly up to the 1st of August, they had indulged in sexual intercourse.

Plainly, the jury did not believe a word he said. We have given a patient hearing to what Mr. Manley has had to say to us. We have looked very carefully at the summing-up with which we can find no fault and in the result the application for leave will be refused, and the Court orders that the sentence begin to run from the date of the conviction.