[2013] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 156 and 159/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

FHANGCIYU RICHARDS
THRON McKENZIE v R

Patrick Atkinson QC for McKenzie

Robert Fletcher for Richards

Mrs Ann-Marie Feurtado-Richards, Miss Melissa Simms and Mrs Paula Archer Hall for the Crown

4, 5, 15 April 2011 and 22 March 2013

PANTON P

[1] On 15 April 2011, we made the following order in respect of these appeals:

> "Fhangciyu Richards
> The application for leave to appeal against conviction is refused.
>
> The appeal against sentence is allowed. The order making the sentence on count two consecutive to that on count one is quashed. The sentences imposed on

both counts are ordered to run concurrently and to commence from 24 February 2009.

Thron McKenzie
The application for leave to appeal against conviction is granted. The hearing of the application is treated as the hearing of the appeal which is allowed. The convictions are quashed and the sentences set aside. Judgment and verdict of acquittal entered."

At the time of making the order, we gave brief oral reasons, promising to put the full reasons later in writing. This we now do.

[2] The appellants were convicted on charges of illegal possession of firearm (count one) and rape (count two) in the High Court Division of the Gun Court held in Montego Bay, presided over by Sykes J. The trial commenced on 11 November 2008 and ended on 24 November 2008. On the latter date, each was sentenced to 12 years imprisonment on count one and 15 years imprisonment on count two, with an order that the sentence on count two was to be consecutive to that on count one.

[3] A single judge of this court refused leave to appeal against conviction, but granted leave to appeal against the sentences imposed, particularly due to the consecutive nature of the sentence on count two.

The grounds of appeal

[4] Both appellants filed identical grounds of appeal. They read thus:

"(1) Unfair trial

(2) Why the complainant told the judge of having two witnesses but the judge did not call any of them."

Counsel for Mr McKenzie filed supplemental grounds of appeal which were amended at the hearing to read as follows:

> "1. The conviction of the Appellant was unsafe as the identification evidence against the Appellant was flawed and the circumstances allowed for mistaken identification. The learned trial judge failed to remind himself of the specific weaknesses of the evidence of identification.
>
> 2. The Learned Trial Judge placed himself in the position of being prosecutor as well as Judge and jury in that he adduced all the direct evidence from the uncorroborated Complainant. This was unfair to the Appellant at least in appearance if not in fact and prejudiced the fairness of the Appellant's trial.
>
> 3. The sentence of the Court was excessive in all the circumstances of the case, particularly since incorrect principles of law were applied by the Learned Trial Judge."

[5] In the case of the appellant Richards, supplementary grounds of appeal were filed on his behalf. These were later amended to read as follows:

> "1. The learned trial judge so encroached upon the fundamental principle of fairness inherent in the separation of functions in trials as to render his decision unsafe and unsatisfactory.
>
> 2. The sentence is manifestly excessive."

The appeal against sentence

[6] Having considered the circumstances of the offences, we had no doubt that an error had been made in respect of the sentence on count two. We have repeatedly stated the principles that are to guide a sentencer when consideration is being given to ordering that a sentence is to run consecutive to one that has been imposed in circumstances where the offences are committed simultaneously. In ***Kirk Mitchell* v R** [2011] JMCA Crim 1 Brooks JA (Ag.) (as he then was) dealt with the principle of the imposition of sentences and whether they were to run concurrently or consecutively and canvassed several authorities out of this court and otherwise. We note that this matter was tried in November 2008. We assume that by now all first instance judges are fully aware of the principles that ought to guide them in such situations.

[7] At the time of sentencing these appellants, Sykes J referred to certain decisions of the English Court of Appeal which, with respect, are wholly irrelevant. The decisions of the English Court of Appeal do not bind sentencers in Jamaica.

[8] In the circumstances of the instant case, a sentence of 27 years is clearly manifestly excessive. It is ironic that none of the English cases cited by the learned judge regarded a double digit sentence as being appropriate in those cases. In the instant case, we regard as appropriate a sentence of 15 years. Incidentally, it is most unusual for a judge to be quoting case names and law report references to an accused person who is being sentenced. It is a practice which we would not encourage. When an accused person is being sentenced, what is required is that the sentencer should

demonstrate the considerations and principles that are guiding him or her. An accused person who is being sentenced has no interest in law report references and citations.

The applications for leave to appeal against conviction

[9] So far as the convictions are concerned, the appellants have renewed their applications for leave to appeal. The facts relied on by the prosecution present a disgusting picture. The complainant was allegedly ravished by two men, one of whom she knew before as "Fransoy" (the appellant Richards), and the other she did not know. The incident is supposed to have occurred in Montego Bay, Saint James, on 14 July 2008, at about 7:00 pm at Fransoy's house, she having gone there at his invitation to complete a sale transaction in respect of a phone and to collect a charger for the said phone.

[10] On her arrival at the house, the complainant was told that the charger was missing. Fransoy asked her to wait a little as "Boy Boy" would "soon come". The complainant waited by the door. "Boy Boy" arrived shortly after. He is the appellant McKenzie. According to the complainant, McKenzie placed a gun at her head and instructed her to remain silent and to walk to the side of the house, on the outside. She obeyed. Both appellants were with her as she walked to the back of the house. She said they forced her at gunpoint to go into the house through a window at the back.

[11] There was an electric light bulb shining in the room. The appellant Richards was then holding the gun. He told her that he wanted "some of this pussy". Her pleas and

tears were to no avail as he used the hand that was free to pull her pants' button; he then used a knife to cut the pants, and pulled it below her vagina. He also used the knife to cut the side of her underwear. He ordered her to remove the pants and lie on her back on a bed in the room. Without removing his pants, he proceeded to have sexual intercourse with her. After completing the act, he went back through the window that he had forced her to enter through.

[12] The appellant McKenzie then came into the room. He had a lotion bottle which he told the complainant contained acid which he would throw in her face if she made any noise. He ordered her to undo his zipper, kneel, and perform oral sex on him. She obliged as he had the gun at her head. After the completion of this act, he then proceeded to have sexual intercourse with her from the rear. He then left through the same window. A third man, "Steppa", who was known to the complainant, came into the room. He and others had been on the outside waiting for their opportunity to extend the complainant's ordeal. However, when he realized who she was, he had a change of heart and rescued her instead. Eventually, the complainant made a report to the police and was examined by a doctor.

[13] As stated earlier, the complainant had known the appellant Richards prior to this incident. She pointed him out on an identification parade held on 10 October 2008 at the Freeport Police Station. When pointed out, the appellant Richards made no statement. In respect of the appellant McKenzie, the complainant next saw him in a restaurant in Montego Bay. She immediately left the restaurant and summoned the police who held him on the street some distance from the restaurant. He was taken to

the police station in Montego Bay. When told of the allegations against him, he denied committing the acts and stated that he had never owned a gun. When arrested and cautioned, he repeated the denial.

The defence

[14] Both appellants who said that they know each other gave evidence. They swore that they did not perform the acts described by the complainant. The appellant McKenzie, who said he operated a stall at Railway Lane, Montego Bay, said that he did not know the complainant. However, the appellant Richards, a scrap metal dealer, admitted knowing her for several years but said he had not seen her since May of that year. He denied having any transaction with her in respect of a phone.

The arguments

Intervention by the judge

[15] The main argument advanced by learned Queen's Counsel, Mr Atkinson, for the appellant McKenzie, and by Mr Fletcher, for the appellant Richards, was that the trial process was fundamentally flawed as there was unfairness in the manner in which the main witness for the prosecution was examined in chief. Their contention was that even if there was no unfairness in fact, there was in appearance. Consequently, they submitted, the convictions should be quashed and verdicts of acquittal entered.

[16] Mr Fletcher complained that the learned judge "took over the examination-in-chief" by being responsible for 267 of the 304 questions asked. The judge, he said, "managed the prosecution's narrative" in a way that "distorted the separation of

functions”, and the magnitude and extent of it cannot be discerned by looking at the quality of the questions. Mr Fletcher submitted that the judge’s intervention was so thorough that we should find that he crossed the bar. “It is an aggravated case which has crossed the boundary,” he said.

Identification

[17] Mr Atkinson criticized the evidence of identification in respect of the appellant McKenzie. He said that the complainant had never seen her attacker prior to the night of the incident and that she had later said that it was “Steppa” who had told her who it was. He said that the police had not done anything for more than two months after the report was made to them. He submitted that the circumstances of the identification of McKenzie were unconvincing, given the fact that the witness had not had sufficient opportunity to make a proper identification on the night of the incident. On the totality of the evidence, he said that there was a “ghastly risk” that the complainant made a mistake in identifying the appellant McKenzie.

[18] In response to the complaint relating to the interventions by the judge, Mrs Feurtado-Richards relied on the following propositions from the judgment of Purchas, LJ in ***R v Donald Matthews et al*** [1984] 78 Cr App R 23 at 32:

> “(1) Whilst a large number of interruptions must put this court on notice of the possibility of a denial of justice, mere statistics are not of themselves decisive.
>
> (2) The critical aspect of the investigation is the quality of the interventions as they relate to the attitude of the judges as might be observed by the jury and the effect that the interventions

> have either upon the orderly, proper and lucid deployment of the case for the defendant by his advocate or upon the efficacy of the attack to be made on the defendant's behalf upon vital prosecution witnesses by cross-examination administered by his advocate on his behalf.
>
> 3. In analyzing the overall effect of the interventions, quantity and quality cannot be considered in isolation, but will react the one upon the other; …"

Mrs Feurtado-Richards also referred to several judgments of this court on the conduct in question. She submitted that what was critical in the case was the quality of the interventions. She said that although the learned judge played an active part in the examination-in-chief of the complainant, he had conducted himself within the limits of propriety and did not in any way exceed the legitimate boundaries that have been set for judges in the trial of criminal cases.

[19] As far as the identification of the appellant McKenzie is concerned, she submitted that the complainant gave cogent evidence as to the circumstances in which she came to identify him. She added that in her view the learned trial judge dealt with the issue adequately in his summation.

Decision

[20] We noted that the learned judge did ask the complainant several questions during the examination-in-chief. However, he seemed to have been concerned that counsel for the Crown might not have been leading the witness in a manner that was beyond reproach. On a proper examination of the transcript, it was observed that

although the judge asked questions during the examination-in-chief, he did not interfere during the cross-examination. Neither did he do anything that could remotely be said to have interfered with the presentation of the defence. That is the court's main concern when consideration is being given to a complaint of improper intervention by a judge in the trial process. The accused person must be allowed to conduct his defence in an unfettered manner, within the rules of law and practice. In this case, the defence was allowed to present its case through cross-examination of the witnesses including the complainant, and the giving of evidence by the appellants. Both appellants gave evidence without any questions being asked of them by the learned judge, whether in examination-in-chief or during cross-examination.

[21] This court has had to deal with situations of this nature from time to time. In ***Christopher Belnavis v R*** SCCA No 101/2003 judgment delivered on 25 May 2005, the learned judge posed 112 questions to the complainant during cross-examination by the defence attorney, and 45 questions of the appellant during cross-examination by counsel for the Crown. The judge also posed 71 questions to the witness for the defence. In delivering its judgment, the court said:

> "It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in the context of the case. There are questions that are necessary for clarification of what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected

> to remain mute throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena."

In that case, the appeal was allowed, not due to the questioning by the judge; rather, it was due to the judge's manner towards defence counsel during the conduct of the defence.

[22] In the instant case, we found no fault with the judge's interventions. The defence was not impeded in any way.

[23] We examined the evidence of identification and the learned judge's treatment of it. This is what he said during his summation:

> "She makes a report, she says the Detective is saying well, I saw her on the first of August but what is common, it appears that on either dates if the evidence is to be believed from the police, that when the witness came to the station no one recorded a written statement from her. Absolutely sad state of affairs. So, in other words, before these persons were apprehended the police have a report that a serious offence had been committed, apparently whether it is true or not, but you have the victim and somehow the statement recording process goes off track so I can't blame that on the witness. It's a problem of the police officers own making. In fact, the officer goes on to say that no statement had been taken from her before the man was pointed out which means this, you know that if the incident took place on the fourteenth of July and Mr. Fagan in correct, that it is the 18th of September that he picks up Mr. McKenzie, then it means that you have this two month plus where the police have not recorded a statement, even if you use the police officers date as the first of August, you still have a two week plus period

> from the fourteenth of July to the first of August, where no statement is recorded from the witness."

[24] As regards the appellant McKenzie, the learned judge said:

> In respect of Mr. McKenzie, she said, I didn't know him before, but when in talking to her rescuer and Richards, calling the name 'Boy Boy', that is how she came by the name 'Boy Boy'. She didn't know him before but out of all of this and the gentleman who she said was familiar with her stepfather; so what this means, by the time the witness says she went down to the police she was able to say, it is 'Boy Boy' and Richards. And for some, well, strange reason, the police delayed in recording the statement from her. Anyway, the officer tell [sic] us that no warrant was prepared for "Boy Boy' and this is in spite of the fact because she said he got a report from another police officer and that police officer told her that the victim had given the names."

[25] In view of the evidence that:

> (1) the complainant did not know the appellant McKenzie before the incident;
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> (ii) the complainant was given a name which she passed on to the police; and
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> (iii) the police did not act on the information and thereby arrange for the apprehension of the suspect with a view to placing him on an identification parade

we thought it unsafe to allow the conviction to stand.

[26] In the circumstances as described above, we made the orders set out in paragraph [1].