JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 20/2007

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

COURTNEY SAMUELS
v
REGINA

Everton Bird for the applicant.

Miss Deneve Barnett for the Crown.

1st, 2nd July and 5th December, 2008

DUKHARAN, J.A.

1. The applicant Courtney Samuels was charged on an indictment for the offence of rape, that he on the 19th of June, 2005 in the parish of Kingston, had sexual intercourse with T. C. without her consent. He was convicted in the Home Circuit Court in Kingston before a jury on the 31st of January, 2007 and was sentenced to ten (10) years imprisonment at hard labour.

2. The matter first came before a single judge of this court who refused leave to appeal against conviction and sentence. This was a renewal of that application.

3. After hearing arguments on the 1st and 2nd of July, 2008 we refused leave to appeal and affirmed the conviction and sentence.

4. We promised to put our reasons in writing and this we now do.

The Prosecution's Case

5. The evidence advanced by the prosecution came mainly from the virtual complainant T. C. She is a young girl of 13 years who lives with her grandmother in Kingston, in what is known as a tenement yard. Her sister lives in another house on the premises while the applicant, his wife and children, lives in another house on the same premises.

6. The complainant said that on the 19th of June, 2005 at about 9:00 p.m. she had taken a bath from an outside bathroom. She then went to her sister Simone's house on the said premises. While putting on her clothes, the applicant came inside and asked her for sex and she refused. He left and she locked the door. Shortly afterwards she came out of the room and went outside. The applicant grabbed and dragged her into his house and pushed her down on the bed and closed the door. He pulled her skirt. She got up and he pushed her down again. He removed her clothes. She resisted by trying to fight him and by kicking him. He overpowered her and then inserted his penis into her vagina. She said his penis did not reach far into her vagina because she resisted him. She told the applicant that she was going to make a report to her father. On the 21st June, 2005 she was taken by her father to the Central Police Station where a report was made. On the 22nd of June she was medically examined.

7. Detective Corporal Carla Bucknor, the arresting officer received the report from the complainant. On the 30th of June, 2005 she went to the applicant's home where he was taken into custody. The applicant is alleged to have said, "Listen, mi neva put

nothing inside her. Mi jus fondle her breast and thing. She beg mi money an mi shouldn't feel her up". He was arrested and charged for rape.

Medical Evidence

8. Dr. Percival Henry examined the complainant on the 22nd of June 2005, some three days after the incident. He found no abrasions or lacerations but the vagina was tender and admitted a gloved finger. Significantly, the hymen appeared to have been ruptured within a 3-4 day period. He opined that sexual intercourse could have accounted for the hymen being ruptured and that one inch or less of an erect penis in the vagina was sufficient to rupture the hymen. His findings were consistent with sexual intercourse causing it, but he could not say it was sexual intercourse because the rupturing of the hymen could be caused by other objects.

The Defence

9. The applicant made an unsworn statement. His defence was one of alibi. He said he knew the complainant for many years and he does not know why she would bring him in front of the court. He said if his witnesses were not enough to free him then he was willing to do time if the jury found him guilty, but he did not do it. He called three witnesses in his defence.

10. His first witness was Sushana Brown. She said the applicant picked her up after 7:00 p.m. at the Ward Theatre in Kingston on the night of the incident. They stopped at several places and he eventually dropped her home at about 8:10 – 8:15 p.m. She was unable to speak of his whereabouts after 8:20 p.m.

11. Verona Samuels, the applicant's wife gave evidence on his behalf. She said that the date of the incident was 'father's day' and the applicant, herself and their three sons went to church that morning. In the evening she again went to church and called the applicant to pick her up. They reached home between 9:30 -10:00 p.m. She accounted for the applicant's movements between 8:30 -10:00 p.m. that night.

12. Marcia Hewitt, the sister-in-law of the applicant said that on the night of the incident she was at home. The complainant was in her room. She left her with small children to purchase pampers at a nearby shop. This was between 8:00 - 9:00 p.m. When she returned she did not see the complainant.

Grounds of Appeal

13. Mr. Everton Bird, Counsel for the applicants was granted leave to argue the following supplemental grounds of appeal:

> "1. (a) The verdict arrived at by the jury was unreasonable and cannot be supported having regard to the medical evidence adduced by Dr. P.J. Henry and T. C.
>
> (b) In the alternative, that the learned trial judge misdirected the jury with regard to the manner in which they ought to have treated the expert medical evidence of Dr. P.J. Henry.
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> 2. The learned trial judge erred on the facts and was wrong in law in withdrawing from the jury's consideration the issue whether or not the Defendant had been cautioned and whether he Had used the words alleged by Detective Corporal Bucknor at the time of his apprehension.

3. That the learned trial judge throughout her summation exhibited a high degree of bias in favour of the prosecution resulting in her failure to adequately put the case of the defence to the jury, in the process making certain comments designed to cast aspersions at, and, disparaging to the defence case which resulted in the denial of the opportunity of a fair trial to the Appellant.

4. The learned trial judge was wrong in law and erred on the facts in refusing the submission of no case to answer made by the defence counsel at the close of the case for the prosecution.

5. A procedural error occurred during course of the trial in that, whereas the Appellant was indicted on a single charge of rape, the learned trial judge left alternate verdicts of attempted rape and indecent assault to the jury without warning defence counsel before hand, thereby giving counsel the opportunity of making representations as to the propriety or otherwise of such a course.

6. There was a material irregularity in the proceedings in which the appellant was prosecuted as a vital piece of evidence adduced at the preliminary enquiry by T. C. which was capable of absolving the Defendant of the charge of rape if the jury were to have adopted a certain view of the facts, and which went to the root of the allegation of rape against the defendant, was omitted from, or not included in the deposition, but was a part of the notes taken by the Resident Magistrate both of which were sent from the Magistrate's Court to the High Court.

7. The learned trial judge erred on the facts and was wrong in law by failing to advise the jury that the action of T. C. in concealing the injury for a considerable length of time after she had the opportunity to complain and that by making no outcry when the fact was supposed to be done and where it was probable she might have been heard by others, carried a strong presumption that her testimony was false or feigned.

The learned trial judge failed to definitively advise the jury that since the defendant of his own volition discontinued the alleged sexual assault immediately after T. C. mentioned that she was going to tell her father and that since and (sic) he made no further efforts in the alleged sexual assault thereafter, a verdict of attempted rape was not lawfully open to them.

9. That the sentence imposed on the Applicant was manifestly excessive in the circumstances of the case".

Ground 1 A and B

14. Counsel for the applicant submitted that where the allegation was one of rape, the evidence adduced by the complainant led away from the issue of penetration rather than towards it. He sought support for this from the evidence of the Doctor who examined the complainant. Counsel further submitted that the complainant's evidence as to penetration was at most inconclusive and that rape was not proven. He said that it was at most a strong case of indecent assault.

15. Counsel was also critical of the learned trial judge's summation as to how the jury ought to have treated expert medical evidence, and in particular when she said that: - "jury are not bound to accept evidence of an expert, he is just another witness and his evidence, or opinion may be rejected on certain grounds".

16. In respect of ground 2 counsel for the applicant said that the learned trial judge erred on the facts and was wrong in law in withdrawing from the jury's consideration, the issue – whether or not the applicant had been cautioned, and whether he used the words alleged by Detective Corporal Bucknor at the time of his apprehension. The officer said that the applicant on being informed of the report against him said, "Officer

mi neva put nothing inside her, mi just fondle her breast and thing. She beg mi money and mi shouldn't feel her up". The officer said she immediately cautioned the applicant. In cross examination the officer admitted that it was after that statement, and not before that he was cautioned. The gravamen of Counsel's complaint was that the issue of whether or not the jury found Corporal Bucknor to be a witness of truth in regard to the assertion made in her statement and evidence in chief was a matter of fact for the jury. Counsel submitted that the learned trial judge erred in withdrawing that issue from the jury.

17. On ground 3 it was submitted by Counsel that the learned trial judge in making comments, in referring to the defence of the applicant as the "Shaggy Defence" was disparaging to the defence case. This, counsel submitted, resulted in the denial of the opportunity of a fair trial to the applicant. Counsel further submitted that it was unfortunate that the learned trial judge chose such an analogy, as the essence of Shaggy's song "It wasn't me", was its undisguised insincerity as the singer was simultaneously admitting that he had actually done what he was denying he had done. Counsel contended that the song needed no introduction from the learned trial judge to the jury, as knowledge of this singer and song was presumed. He said that such a characterization of the defence prejudiced a fair trial of the applicant.

18. On ground 6 Counsel for the applicant complained that a vital piece of evidence adduced at the preliminary enquiry by the complainant was omitted from or not included in the deposition, but was a part of the notes taken by the Resident Magistrate.

19. It is to be noted however that this bit of evidence was available at the trial and was in fact used by the defence. This ground therefore is without merit.

20. The other grounds of appeal were not argued by Mr. Bird. We saw no merit in those grounds.

21. Miss Barnett for the Crown was asked to respond to grounds 1-3.

22. In a brief response, Counsel submitted that in ground 1, there was evidence before the Court to find that there was penetration. It was sufficient that the complainant said 'it touch a little part of the inside of the vagina'. Counsel for the Crown further submitted that the Doctor's evidence indicated a rupture of the hymen 3-4 days prior to his examination and that went to confirm the complainant's evidence that penetration took place.

23. In response to ground 2, Counsel for the Crown submitted that the learned trial judge told the jury to ignore the evidence of Detective Corporal Bucknor as it related to what the applicant said in the absence of a caution. It was further submitted that the learned trial judge gave the jury possible verdicts including indecent assault which the jury rejected and that there was no prejudice to the applicant in this regard.

24. On ground 3 it was submitted by Counsel for the Crown that the use of the phrase "Shaggy Defence" as it related to the defence of alibi was not prejudicial to the applicant. It was Crown Counsel in address to the jury who used the phrase and it did not emanate from the learned trial judge.

Issues

25. The central issue in this case was one of credibility. The learned trial judge made that quite clear to the jury. With regard to ground 1, the evidence of the complainant T. C. was that the penis of the applicant – "go in but not really good ...it touch a little part of the inside of me (referring to the vagina) but it never get to go in good because I fight him". It is trite law that in a case of rape the slightest degree of penetration of the vagina will suffice. The medical evidence was that the hymen was ruptured and was consistent with a penis entering the vagina however slight. The learned trial judge at Page 46 of the record stated "And it is only if you are satisfied based on the evidence she has given, that the penis, even a little bit of it, went into her vagina, that you could find that penetration took place". The jury accepted the evidence of the complainant in this regard. The learned trial judge was careful to point out to the jury that the medical evidence given by Dr.Henry as an expert witness was only an opinion and it was a matter for them to consider what they made of the Doctor's evidence. We see no merit in this ground and it therefore fails.

26. With regard to ground 2, the learned trial judge withdrew from the jury's consideration, incriminating words spoken by the applicant without first being cautioned by Detective Corporal Bucknor. This is what the learned trial judge said: (at Page 23 of the record)

> "I am going to direct you to totally disregard what the police officer has told you that Mr. Samuels said to her, totally disregard it. Eradicate it from your mind. Do not use it when you are considering the evidence as to whether or not he is guilty...".

27. It is quite clear from the above passage that the learned trial judge told the jury to disregard an alleged admission by the applicant of an indecent assault on the complainant. It appears from the evidence of Detective Corporal Bucknor that when she informed the applicant of the allegations he replied, "Officer listen...". It was after he said that, he was immediately cautioned.

28. We are of the view that the learned trial judge ought to have left for the jury's consideration the evidence of Detective Corporal Bucknor as it related to the applicant's admission as to indecent assault of the complainant. It was upon informing the applicant of the report that he responded. However we see no prejudice to the applicant as the learned trial judge left possible verdicts to the jury which included indecent assault. We do not see any merit in this ground.

29. In ground 3 the use of the phrase "Shaggy" defence by the learned trial judge in referring to the applicant's defence of alibi was in our view not prejudicial to the applicant.

30. The learned trial judge said at Page 69 of the record;

> "Basically, Mr. Foreman and your members, an alibi is like the 'Shaggy' defence. It is called the 'Shaggy' defence, it wasn't me. I wasn't there. That is what an alibi is. Counsel called it the 'Shaggy' defence".

The word 'Shaggy' defence could in no way be interpreted to mean anything other than I was not there, it was not me. I did not commit the offence.

31. The learned trial judge went on to say that it was the prosecution who must disprove the alibi, as there was no burden on the applicant to prove that he was

elsewhere, as the burden remained with the prosecution. We do not see any merit in this ground.

32. In our view the learned trial judge dealt adequately with the issues in a careful analysis of the evidence in her summation to the jury. We see no reason to disturb the finding of the jury and the sentence of ten (10) years imprisonment imposed by the trial judge.

33. As stated, leave to appeal was refused with the conviction and sentence being affirmed. Sentence to commence from the 30th of April, 2007.