[2011] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 88/2008

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE DUKHARAN JA
THE HON. MRS JUSTICE MCINTOSH JA

JAMES SMITH v R

Cecil J Mitchell for the applicant/appellant

Kathy-Ann Pyke, for the Crown

27 and 29 June 2011

ORAL JUDGMENT

MCINTOSH, JA

[1] Mr James Smith was convicted in the Home Circuit Court on 29 July 2008 for the offences of buggery and indecent assault. He was sentenced that same day to serve terms of imprisonment of seven and three years, respectively. Aggrieved by this outcome of his trial, he applied for leave to appeal against his conviction and sentence on grounds that there was a lack of evidence to link him to the crime, that his trial was

unfair, that the identification evidence was defective and that the conflicts in the evidence rendered the verdict and the conviction unsound.

[2] The single judge of appeal who first dealt with his application refused him leave to appeal against his conviction but granted him leave to appeal against his sentence resulting in the renewal of his application before us with respect to his conviction and the pursuit of his appeal against sentence. His attorney Mr C J Mitchell sought and was granted leave to abandon the original grounds filed by Mr Smith and to argue in their stead four supplemental grounds. However, only two, relating to his conviction, were pursued and they are summarized as follows:

1. That the learned trial judge erred in failing to direct the jury adequately or at all on the requisite standard of proof.

2. That the verdict was unreasonable having regard to the evidence and to the inconsistencies that arose in the testimony of the complainant.

He urged the court, on these grounds, to quash the convictions and set aside the sentences imposed.

[3] The evidence adduced by the prosecution disclosed that the young complainant was intellectually challenged and attended a special school for the intellectually disabled, in the parish of Saint Andrew. It was his sworn testimony that on a date which he was not himself able to recall (but which came from other testimony) he was on his way home from school, walking with three of his friends, when he saw the applicant whom he knew before. He was accustomed to seeing the applicant every day

after school when he and his friends were going home. The applicant would blow the horn of his vehicle calling out some destinations such as Duhaney Park, Boulevard, Portmore and so on. His friends would stop him and they would go into the back of the van while he would go into the front. He would talk to the applicant, sometimes having long conversations with him about girls. On the afternoon in question he saw the applicant in his blue van at "UC" gate and his friends stopped him and spoke to him. They went into the back of the van and he went into the front. At some point in that journey that afternoon the complainant said that the applicant touched his bottom and his penis and told him to touch his (the applicant's) penis. The complainant further testified that the applicant pushed his penis into his (that is, the complainant's) bottom and gave details on how the applicant effected his purpose. On more than one occasion the complainant demonstrated to the court and the jury aspects of how the incident occurred.

[4] He subsequently made a report to the vice principal of his school and to the police. The vice principal, Miss Sylvestina Reid, testified that she received the complainant's report and turned over the matter to the guidance counsellor. The prosecution also led evidence from Dr Clyde Morrison who examined the complainant on 25 January 2007 and his significant finding was an area of increased redness at the left side of the complainant's anal opening. The doctor said that, in his opinion, there was evidence of possible anal penetration. He was not permitted to say if this may have been consistent with penile penetration but in cross examination he was asked whether his observation could have been caused by hard stool and he admitted that

that was a possibility. It was also his evidence that the area of redness could have been caused by moderate to severe force.

[5] The investigating officer Corporal Stacey-Ann Powell testified that after taking the complainant's report and commencing her investigations she apprehended the applicant with the assistance of the complainant who waited at a bus stop and was approached by the applicant. When the applicant stopped and picked up the complainant the officer intercepted the vehicle and asked the applicant who the young man was who was sitting beside him. It was her evidence that he replied that he did not know him. The officer advised the applicant that she had warrants for his arrest for offences committed against the said young man and cautioned him, whereupon he said "him nuh nuttin to mi, a ride him beg more time mi carry him to Papine and ah nuh him alone Other youth beg ride to". When the officer executed the warrants, arresting and charging him for the offences of indecent assault and buggery and cautioned him, he said "Mi nah goh tell yu sey mi neva touch him. A lie mi would a tell if mi sey mi neva touch him".

[6] The vehicle which the applicant was driving at the time of his apprehension was a white van but the complainant had spoken of a blue van so the investigating officer took the complainant to the applicant's place of employment where he pointed out the blue van as the vehicle the applicant was driving at the time of the commission of the offences. In cross examination it was suggested to her that what she had asked the

applicant on his apprehension was whether the young man was related to him hence his response "him nuh nuttin to me" and not that he did not know him.

[7] The applicant gave sworn evidence. He gave his age as 51 with an unblemished record and spoke of living with two of his three daughters and their mother. He spoke also of his many years of employment with the Ministry of Agriculture. He denied the incident which the complainant related to the court and the jury and, when asked by his attorney if he had told the officer that he touched the complainant, he said "yes sir". He said, "To be exact, what she said, I did said". Defence attorney asked why it was necessary for him to touch the complainant and he then explained that he had had a small radio in his vehicle and he discovered it missing when the complainant came out of the vehicle so he had asked the complainant for the radio and he ran. He had grabbed his hand held on to his bag and that was how he touched him. That was some time in January though he did not remember the date. He went on to explain that when the lady came and said something about buggery and said "how mi buggery the little boy and why I do it that's why I respond to her and said 'I am not going to say I didn't touch him but I didn't have sex with him' ". He admitted to picking up the boys in his vehicle on occasions and taking some of them to Papine, some to Duhaney Park and some to the Boulevard, depending upon where he was going and he admitted to dropping the complainant at the Boulevard on one occasion. In cross examination he agreed that he usually drove a blue van and said that it was only on one occasion that the complainant was the last person to be dropped off.

[8] In his oral submissions on supplemental ground one, Mr Mitchell drew the court's attention to the learned trial judge's direction to the jury on the burden and standard of proof submitting that she was not entirely clear in dealing with this critical area. Counsel said it was not that there was no substance in her direction but the complaint was that it was convoluted and could have caused confusion in the minds of the jurors. This submission is entirely without merit. The words used by the learned trial judge were simple and, in our view, adequately conveyed to the jury where the burden of proof rested and the standard which the prosecution had to meet in proof of its case. She began with the presumption of innocence using language about which counsel said there could be no complaint. At page 7 of the transcript she said:

> "In every criminal case the accused is presumed to be innocent until you by your verdict says (sic) he is guilty. There is no burden on Mr Smith to prove his innocence. No burden on him at all to prove his innocence. The burden is on the prosecution...The burden rests on the prosecution throughout the case and before you can convict the accused it is the prosecution who must satisfy you by the evidence so that you can feel sure of the guilt of the accused man, Mr Smith."

This, in our view, was an adequate direction, delivered with commendable simplicity which the jury could not fail to understand and apply. Ground one therefore fails.

[9] Mr Mitchell highlighted several areas in the summation of the learned trial judge dealing with discrepancies and inconsistencies, in support of his submissions on Ground two. It was his contention that these demonstrate that the verdict was unreasonable as they related to material aspects of the prosecution's case which could not be

resolved in the prosecution's favour and ought not to have resulted in a verdict adverse to the applicant. The learned trial judge, he said, dealt with these discrepancies and inconsistencies with great care and cannot be faulted for the meticulous manner in which she drew the jury's attention to them. For example she reminded them of the complainant's evidence as to the presence of his friends in the vehicle when the incident he related occurred at one point saying that they had left the vehicle in Papine and at another point that they were in the vehicle. There was also his evidence in chief as to where the applicant had taken him after the incident - to Half-Way-Tree, then to Old Hope Road and Town - before he went home and, in cross examination, denying that he had been taken down town and his evidence as to whether he had seen the applicant's underpants drawn down and whether he was inside or outside of the van at the time of the incident.

[10] It was Mr Mitchell's submission that in looking at the central issue regard must be had to the surrounding circumstances. Apart from the central factum alleged by the complainant, Mr Mitchell said, all the other areas of the complainant's evidence are open to challenge. No doubt, he submitted, the learned trial judge recognized this difficulty and was careful in dealing with the matter, giving good guidance and direction, but at the end of the day, the verdict was unreasonable having regard to the evidence.

[11] We are unable to agree with the submissions challenging the verdict returned by the jury after such a careful summation which counsel himself accepted as containing

good guidance and directions. Apart from the complaint relating to the burden and standard of proof (which we have already disposed of) there is generally no complaint about the learned trial judge's summation and we agree with counsel for the Crown that her directions were fair and balanced including adequate directions on lies and on evidence of good character.

[12] Essentially this was a matter of credibility. The jurors had the opportunity of observing both the complainant and the applicant in the witness box and they would no doubt have recalled the learned trial judge's directions on how to treat with the evidence of the witnesses. Of the complainant she said "you have seen his level of intelligence, you have seen him, you judge him and then you arrive at an assessment in respect of him and any other witness as to whether you can regard a particular witness as a witness of truth." She told them that it was for them to decide what evidence to believe and what to disbelieve and also that it was open to them to believe a part of a witness's testimony and reject what they did not believe. There were many interruptions during the course of the complainant's evidence and given his intellectual challenges the jury would no doubt have keenly observed how questions were dealt with by him and observed his demonstrations, forming their own conclusions as to whether he could be relied on in relation to the main event. In assessing his credibility the jurors were charged with the responsibility to consider all of the evidence presented in the trial and there were several aspects of the evidence which could have assisted them in their determination as to whether he was a witness upon whose word they could rely. For instance, his evidence of the frequent presence of the applicant in the

area where he would pick up the complainant and his friends was similar to the applicant's as also the evidence of the areas where he said the applicant would take them, the observation of the investigating officer when the applicant picked up the complainant and the blue van which the applicant admitted was the vehicle he would usually drive. There was the applicant's admission with regard to touching the complainant as well as the doctor's evidence from which it was open to the jury to conclude that something had happened to the complainant. It was for them to decide whether they accepted the applicant's explanation as to how the touching occurred especially when he does not deny that he said the words when told of the allegations of buggery and the assault and his admission that he had not told the police what he told the court about the circumstances in which he said the touching took place.

[13] In dealing with the complainant's evidence the learned trial judge said, at page 20 of her summation:

> "If you find that there is a conflict on the evidence given, you are entitled to take it into account and determine whether the evidence is to be rejected as unreliable. It is for you to decide whether you believe him."

The jurors clearly believed him and returned a verdict of guilty accordingly. In our view on the evidence before them they were entitled so to do and this ground also fails as being without substance.

[14] Although leave was given by the single judge to appeal against sentence Mr Mitchell candidly told us that he could find nothing to advance on ground three which complained that the sentence of seven years imprisonment for the offence of buggery and three years for the offence of indecent assault were manifestly excessive in all the circumstances. Ground three was therefore not pursued.

[15] In the final analysis, the decision of the court is that the applicant's application for leave to appeal against his convictions is refused and his convictions are affirmed. His appeal against sentence is dismissed and his sentences are confirmed. They are to run from 10 August 2008.