JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 37/2007

BEFORE: **THE HON. MR. JUSTICE COOKE, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

DERRICK TAYLOR v REGINA

Leroy Equiano for the Applicant.

Miss Dahlia Findley, Crown Counsel for the Crown

November 9 and 10, 2009

ORAL JUDGMENT

COOKE, J.A.

1. The applicant was convicted on the 15th February 2007 on two (2) counts, namely, carnal abuse and indecent assault. He was sentenced to serve five (5) years and two (2) years imprisonment respectively. The sentences were to run concurrently. The virtual complainant **S.C.**, a girl of thirteen years at the relevant time, gave evidence to the effect that on the 9th February 2007, the applicant had sexual intercourse with her and committed an act amounting to indecent assault. She swore that at about 11:00 a.m. on that day, the applicant who lives on the same

building, came to her room bringing her a present of a slice of cake, chocolate and a peanut punch. He then proceeded to push her on the bed, took off her panties and inserted his penis in her vagina.

2. The applicant, who was some forty five (45) years old at the time of the incident, described himself as a computer graphic artist. He lives on the same building as the complainant, from where he operates a shop. He admitted giving **S.C.** the goodies set out previously, but asserted that they were her birthday present; her birthday apparently was two days prior to the date of the incident. There was no other evidence against the applicant, save for the oral testimony of **S.C.** Accordingly, the issue of credibility was the critical aspect for the determination of the jury. This was recognized by the learned trial judge who at page 20 of the summing up said:

> "So it is a case that rests on the credibility of the witnesses; that is, who you believe. Simply so."

3. Three supplemental grounds of appeal were filed, and permission was granted to the applicant to argue these grounds. They were:

> "1. The Learned Trial Judge erred in law, in exercising her decision (sic) not to recall the Complainant/witness for further cross examination by defence counsel on an issue that goes to the credibility of the witness and could impeach the complainant's testimony.

2. The Learned Trial Judge failed to give the jury adequate direction on how they should approach inconsistencies and discrepancies.

3. The Learned Trial Judge failed in her summation, to give a good character direction, in respect to the Applicant."

4. The last ground was argued first, and the Court will deal with that ground at this juncture. In **Teeluck and John v. The State of Trinidad and Tobago** [2005] 66 WIR 319, at page 329, Lord Carswell summarized the principles that have emerged from the authorities which have dealt with the question of character directions:

"(i) When a defendant is of good character, ie has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: ***Thompson v The Queen*** [1998] AC 811, following **R v Aziz** [1996] AC 41 and ***R v Vye*** [1993] 1 WLR 471.

(ii) The direction should be given as a matter of course, not of direction. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: ***R v Fulcher*** [1995] 2 Cr App R 251, 260. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial: ***R v Kamar*** The Times, 14 May 1999.

(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue, a 'good character' direction is always relevant: **Berry v R** (1992) 41 WIR 244; **Barrow v The State** (1998) 52 WIR; **Sealey and Headley v the State** (2002) 61 WIR 491, para. 34.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: **Barrow v The State** (1998) 52 WIR following **Thompson v. R** [1998] AC 811 844. It is a necessary part of counsel's duty to his client to ensure that a good character' direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: **Thompson v R,** ibid."

5. Now the Court will first look to see if there was an evidential basis for the necessity of giving the good character directions, and this evidence is to be found at page 108 of the notes of evidence where the applicant said that on the morning of the day in question, he got up and had devotion with his wife and his children. Further, during the examination-in-chief of the mother of **S.C.**, at page 54, the following exchange took place:

Question: How you would describe your relationship with Mr. Taylor and yourself?

Answer: Somebody I could trust.

Question: Meaning what?

Answer: Meaning, when I go to work, I would ask him to give an eye on the children. When they come from school; he would assist, helping them with their homework.

Then there is also evidence from **S.C.** herself at page 23, where she gave evidence of how the applicant was almost like a mentor to her: he encouraged her to do her homework, and not to be distracted with boyfriends. So, there was an evidential basis for the giving of the good character directions.

6. Now, the judge at page 46, summed up in these terms: -

> "Basically, he is telling you, you know, that yes, on the day in question, he was at his shop. He saw S., and during the course of the day he went and he got things for S. He told you too that before he did that, when he woke up in the morning he had his devotion. I don't know why Crown counsel is harping on it. Perhaps he want to show to you that he is a man who has his devotion. He is obviously a religious person. You can say, because of that he is a man likely to do that. Maybe you could say, is he likely to do that? It is before you. It is for you to make what you want."

There, perhaps not as elegantly as it could possibly have been done, is the judge giving a propensity warning, but the Court is of no doubt that in the circumstances, the credibility limb should be utilized in directing the jury. Therefore, as counsel for the Crown has conceded, this ground has merit.

7. The next ground which the Court will address is that the learned judge failed to give adequate directions to the jury on how they should approach inconsistencies and discrepancies. In this case, there are no discrepancies of any note, or at all. However, there was one inconsistency and it is this: in her evidence in chief the complainant said that the applicant inserted his penis in her vagina, but later on, curiously enough, during the re-examination by counsel for the Crown, she said "he tried to rape me". Now, because it is clear that this is a significant inconsistency, the next question concerns how the learned judge dealt with it. At pages 28 -29 of her summation, she said:-

> "Remember I told you how you would treat a witness, if you accept that she lied on this that doesn't mean you can't accept her at all. Do you mean he might have said that, or is she truthful on something else? We can't say that, but that is a matter for you.
>
> She said when he tried to rape me that is the correct thing. She said it to Crown Counsel. Then she say when I say he raped me, I mean he pushed his penis inside my vagina. Remember I told you what sex is. Does she mean when he was there and this is a comment I am making

> and she is trying to wriggle away, she is saying he was trying to rape her? Or she is saying he pushed his penis in her vagina? It is a question for you. Do you accept that? If the penis was never in the vagina at all, that means the act of sex would not have made out at all. The accused is saying he did not do anything at all. So it is either sex or no sex at all, on that count."

8. In our view, the difference in the evidence given by **S.C.** is stark and it needed for the judge to direct the jury that in coming to their decision, they had to take into consideration the divergence for which no explanation apparently had been forthcoming. Merely to provide a gloss, as was done in this case, is certainly insufficient. Accordingly, as Crown Counsel also conceded, there is merit in this ground of appeal.

9. The first ground which had been adverted to earlier, pertains to the refusal of the judge to allow the recall of a witness. An application was made to recall the complainant for further cross-examination. Defence Counsel wished to put to the witness that in her evidence in chief, she had said the incident took place at 11:00 a.m., after which she had called her mother. Yet in her depositions, she said it took place at 8:00 o'clock in the morning, and she had called her mother at 9:00 a.m. An examination of the exchanges which took place between the defence counsel and the judge would seem to indicate two factors which weighed in the judge's mind:

1. That defence counsel had ample opportunity, that he had the depositions and it is not every omission that if made would permit a witness to be recalled.
2. More importantly, the learned judge was of the view that whether it was 8 o'clock or 9 o'clock or 11 o'clock, time did not matter.

10. We fully recognize that it is the duty of the trial judge to control the proceedings so that they do not become interminably long, and that counsel must not be allowed the facility to pursue areas of cross-examination which are not probative of the issues before the court. In an instance like this, it would be for the judge to determine firstly, what was the matter on which the witness was being recalled, and secondly, to determine whether such investigation of that matter would be probative of the issues for determination by the jury.

11. In this case, where credibility was the critical issue, it cannot be said that such a great divergence in time as between 8 o'clock and 11 o'clock was not a matter of some significance, and therefore we are of the view that if the judge had not short-circuited the intellectual process, then her decision might well have been otherwise. And in the circumstances, there are no exigencies that precluded the physical recall

of **S.C.** Regrettably, we must say, the learned judge was in error in the particular circumstance of this case, in not allowing the witness to be recalled. Therefore, there is merit also in this ground, as also was conceded by counsel for the Crown.

12. We come now to the matter that has given us pause for anxious consideration and that is whether or not we should order a retrial. Mr. Equiano has put forward two submissions: (1) that the applicant was given a sentence of five years and in four months he would be entitled to enjoy the benefit of the regulations whereby he would only serve two thirds of the sentence imposed. Therefore, he is just four months away from completing his sentence. Subsidiary to that, he relied on **Reid v The Queen**, (1978) 16 JLR 246, especially at page 251 which speaks about the aspect of the accused being condemned to go through a retrial through no fault of his own, and he highlighted the trauma that this particular applicant has undergone, and will undergo further if a retrial is ordered.

13. The second submission was that this was not a case where the case for the prosecution was particularly strong, and to support this, he highlighted the inconsistency, which we have already averted to, and further, the potential inconsistency between 8 o'clock and 11 o'clock.

14. On the other hand, we cannot be oblivious to the fact that there has been a victim. However, when we take all of the factors which

have been enumerated, into consideration, we are of the view and I now pronounce finally as follows:

15. The application for leave to appeal is treated as the hearing of the appeal. The appeal is allowed, the convictions are quashed, the sentences are set aside, and a verdict of acquittal is entered.