JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 132/96

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

COURTNEY GORDON vs. REGINA

George Soutar and Peter Champagnie for the appellant

Kent Pantry, Q.C. and Lisa Palmer for the Crown

July 6 and 7, 1998 and March 1, 1999

BINGHAM, J.A.:

The appellant was tried and convicted in the St. Ann Circuit Court on 18th September, 1996, on an indictment for the offence of rape. He was sentenced to a term of seven years imprisonment at hard labour. From his conviction and sentence he sought and was granted leave to appeal by the single judge. Having heard submissions from counsel, we dismissed the appeal and affirmed the conviction and sentence. We promised then to put our reasons into writing at a later date. This is a fulfilment of that promise.

The Facts

The complainant J.M., at the time of the incident, lived with her older sister H.M. at a shop owned and occupied by the appellant at Clarksonville District in St. Ann. This was a two-storey building with the shop on the ground floor and the living quarters on the second floor, which consisted of three bedrooms. The appellant and the complainant's sister, H.M., occupied one bedroom, the other two rooms being occupied by the complainant and a woman named Maureen.

On the morning in question H.M. left the premises to Browns Town to do some shopping leaving her brother, "Son Son", the appellant and the complainant at the premises. The brother was assisting in selling in the shop.

Around mid-day the complainant was engaged in carrying out domestic chores cleaning her sister's room and the room she occupied. The appellant was playing dominoes with other persons on the shop piazza. Sometime in the early afternoon, around 2:00 p.m., while the complainant was spreading the bed in her sister's room, the appellant came upstairs on two occasions and made sexual advances to her. On the first occasion she succeeded in pushing him off. On the second occasion he managed to push her down onto the bed. She resisted by kicking him on his private parts. On each of these two occasions the appellant left and went back downstairs for a short while before returning to continue his advances.

After the second incident the complainant left her sister's room and went into her room. She then armed herself with a knife in anticipation of any further attacks on her person by the appellant.

About fifteen minutes later the appellant came back upstairs, went into the complainant's room and approached her. Despite her attempts to ward him off with the knife he managed to overcome her resistance and had sexual intercourse with her from behind.

Following the incident the complainant made a report to her friend Sanaka Cole, one Racquel and a lady, Elizabeth Edwards, who gave her some advice. She did not see her sister H.M. that day. She did not return to the premises until the following Saturday. The complainant then made a report to her sister who sent her off to Nine Miles District to her other sisters. Following this the complainant was taken to the Alexandria Police Station where she made a report. She was then sent to the Cave Valley Police Station where she also made a report. The complainant was then taken by the police to a doctor who examined her. Following investigations by the police, the appellant was arrested on a charge of carnal abuse. Upon caution he said, "Is me girlfriend set me up."

The appellant's defence was a denial of any act of intercourse with the complainant. He stated that he was playing dominoes for beers on the shop piazza from the morning around 9:00 and into the late afternoon hours around 6:00 before leaving to go upstairs to have a bath and to change his

clothing. At that time the complainant and a friend of hers, one Sanaka Cole, who lived nearby with his mother, had left with the complainant to take yams for an elderly lady, one "Auntie" (Miss Linda Christie) from shortly after mid-day. He called three witnesses to support his alibi. According to Sanaka Cole the complainant and herself did not return to the shop until after 2:00 o'clock in the afternoon. This account, however, conflicted with that of another defence witness, Leon Ingram, who testified to seeing the complainant behind the counter of the shop at 2:00 p.m. when he went into the shop to buy cigarettes. This was while dominoes was still being played and before the appellant had left to have a bath, prior to leaving the premises for Alexandria.

Upon arrest and caution, the appellant said that the whole incident was a set up by the complainant's sister, H.M., who as a result of an earlier incident involving the sister's child and the appellant she had threatened the appellant to either kill him or to send him to prison.

Arising out of these facts, leave was granted to argue the following supplementary grounds of appeal, viz.:

> " **USE OF THE OBJECTIVE TEST:**
>
> **1.** The Learned Trial Judge misdirected the Jury by his failure to direct that where there is a honest belief that the Complainant was consenting to sexual intercourse that there should be a verdict of Acquittal.
>
> The Learned trial Judge in this regard erred in directing that the offence of rape is committed:

> 'WHERE a man has sexual intercourse with a woman or female without her consent and with intention of so doing without her consent or is indifferent or reckless as to whether she had consented or not' - Page 123 - Summation.

That in the premises the Learned Trial Judge omitted the vital direction as to honest belief.

DEFENCE NOT FAIRLY PUT:

2. The case for the Defence was not fairly left to the Jury in that the Learned trial Judge Denigrated the Defence and did not identify what was the essence of the Defence.

PARTICULARS

(a) After directions on the law and a review of the case for the prosecution the following was said;

> 'Members of the Jury it is now 1:00 o'clock. I think I can finish this so you don't have to come back here. You make one thing and finish and you just go about your business.' Page 134. Summation.

(b) 'Then again he told you the domino table was there, and you must remember they were playing dominoes for beers, and you must remember, or ask yourselves, what is the consequences of drinking beer from nine in the morning to six o'clock.' Page 138.

(c) 'All he is saying, "This thing is a set up." And remember I had to ask him if he saw any lizard run across the place. He was talking all sort of things in his statement.' Page 139.

(d) The Learned trial Judge in dealing with the Defence further said the following:

> 'All they have told you is that yes, we were playing dominoes. So what?' Page 136.
>
> And again:
>
> 'Members of the Jury, that is the evidence of these two gentlemen, they speak to nothing more, I make bold to say that dominoes were being played on that day, nobody can deny that, country shops not only there, any place you have a little shop the people are always playing dominoes' - Page 139.

In contradistinction the essence of the defence was that because he was playing dominoes at all material times he could not possibly have committed the offence as the Complainant stated.

INADMISSIBLE EVIDENCE

3. That evidence which was INADMISSIBLE and/or grossly prejudicial was left to the Jury by the Learned trial Judge and/or not withdrawn: and that such evidence may have been treated by the Jury as supportive of the Complainant's story, not withstanding that there was no corroboration of the said story. To wit;

> '**Question:** Mrs. Malcolm when you saw the Doctor, called you in and showed you the girl's private parts did you look at it?
>
> **Answer:** Yes your Honour.
>
> **Question:** You saw anything untoward?
>
> **Answer:** Yes I saw a white colour discharge there.'

DIRECTION INADEQUATE AND WRONG:

4. That the definition of corroboration (Page 125 Summation) given by the Learned trial Judge

was inadequate and wrong in that it did not include all the elements which the 'Material Particular' must confirm namely;

A. That intercourse has taken place without the woman's consent.

B. That the Appellant was the man who committed the crime.

ERODING OF THE DEFENCE:

5. The Learned trial Judge stated the following:

> 'Corroboration means simply, Members of the Jury evidence from some independent source which source which connects all the allegation or supports the allegation that the offence has been committed. In this case a sexual offence has been committed and also it is the accused who committed the offence.' Page 125.

The effect of this direction would be to totally erode his warning as to the danger of relying on uncorroborated evidence of the Complainant; further that the Appellant has no burden to give evidence and the prosecution must prove it's case beyond a reasonable doubt."

Ground 1

The complaint here was as to the omission by the learned trial judge in his directions of honest belief as an ingredient in the definition of rape, based on the guidelines laid down in ***D.P.P. v. Morgan*** [1976] A.C. 182.

Given the facts in this case, this argument is untenable. The appellant's defence here was a denial of the charge of rape and of the act of sexual intercourse, an essential ingredient of the offence. The appellant

sought by means of his statement from the dock and by evidence from supporting witnesses to raise an alibi in his defence by placing himself, at the time of the sexual assault on the complainant, downstairs on the piazza of the shop playing dominoes. The evidence adduced by the defence called for a definition of rape, tailored to the facts of the case. It was against this background that the learned trial judge, in his directions to the jury, was led to express himself in the following manner (page 135):

> "Now, members of the jury, the indictment speaks of rape, rape members of the jury, is where a man has sexual intercourse with a woman or a female without her consent and with the intention of so doing without her consent or is indifferent or reckless as to whether she has consented or not. Also rape is committed when a man in addition to those, acts with force or forces the complainant into having sexual intercourse or by putting her in fear."

This direction would have brought home to the minds of the jury the material facts necessary to be established in proof of the offence charged in the indictment. The alibi defence advanced by the appellant to meet the charge of rape left no room for any further direction based on honest belief. In our view, this direction, when carefully examined, went much too far and was in the circumstances very favourable to the appellant. This ground accordingly fails.

Ground 2

The complaint here was that the defence of alibi was not fairly and adequately left to the jury. The gravamen of the complaint was that the learned trial judge sought to deal with the defence in an undue haste.

This complaint is without merit. An examination of the summation reveals nothing more than an attempt by the learned trial judge to complete the trial of the case in good time at the jury's convenience. This he proceeded to do by enquiring from the jury at the time scheduled for the luncheon adjournment, whether they were desirous of breaking for lunch at that stage or continuing the trial. At the time of his enquiry, the learned trial judge was in the final stages of his summation and he was about to review the case for the defence. Having got the jury's agreement, he continued his summation by reviewing the unsworn statement of the appellant and the evidence of his witnesses, completing his directions to the jury by 1:25 in the afternoon. The jury spent over thirty minutes in their deliberations before arriving at their verdict. There is nothing to indicate, therefore, that the approach adopted by the learned judge prejudiced in the least the manner of the jury's deliberations in the matter. The direction to the jury commenced with the directions as to the burden of proof. There the learned judge said:

> "Members of the jury, this is a criminal case, and the burden of proof in a criminal case, rests on the Prosecution. The Prosecution must prove every allegation against the accused person. That is to say, the Prosecution must call evidence, credible evidence before you, before you - in order to satisfy that burden of proof. But that is not the

> end of it, members of the jury. In addition to putting credible evidence before you, that evidence must satisfy you, so that you feel sure. Satisfy you beyond a reasonable doubt, that what the Prosecution is saying against the accused is correct. If the evidence which the Prosecution calls does not satisfy you to that standard, then you cannot convict the accused person. If it leaves you in any reasonable doubt, equally you cannot convict, because the law says reasonable doubts must be decided in favour of the accused person.
>
> No burden is cast on an accused person to give evidence or to say anything in the establishment of his innocence. It is the Prosecution who has brought him here, and it is the Prosecution on whom the burden of proving rests, to satisfy you so that you feel sure."

This direction was followed by the learned judge's direction on the appellant's unsworn statement made in his defence. This was structured in keeping with the guidelines laid down by the Board of the Privy Council in ***D.P.P. v. Leary Walker*** [1974] 12 J.L.R. 1369 at 1375 (D-F).

The essence of the complaint on this ground, however, was directed at the learned judge's comments on the unsworn statement of the appellant and the evidence of the supporting defence witnesses. Given the fact that the learned judge is entitled to comment on the evidence given by witnesses at a trial and this would include the unsworn statement made by an accused person the question which naturally arises is as to whether the comments made in this case fell within what could be regarded as permissible bounds.

The passage in the summation which readily comes to mind is to be found at pages 139-140. There the learned judge, in dealing with the defence, said:

> "Then you look at what the accused man tells you in his statement, albeit, it is his statement, you have to consider it, because it is what he says. You have to look at it carefully - I am combing, lest I leave out anything - in my notes and I don't know if you heard anything. At no time did he tell you that he did not go upstairs and do anything, although, he has not got any obligation to so do. But in a circumstance like this, you would think he ought to say something. All he is saying, 'This thing is a set up.' And remember I had to ask him if he saw any lizard run across the place. He was talking all sort of things in his statement. You will have to give that statement the weight which you think it deserves, nothing more, nothing less. You look at what he says and give it the weight you think it deserves. He said, 'Hyacinth set up this thing.' Set him up, they are not married people, they live together. If you, members of the jury, think that somebody would have to go this length to set up something to leave, you just pack up and leave. Why you don't leave? You are going through all this, you don't do it yourself? Your sisters who got the report and took the child to the doctor would have to be an accomplice to this conspiracy. No evidence or suggestion of that, why Hyacinth would do this? All this is a matter for you.
>
> When you consider Gordon's evidence and the sworn evidence of his witnesses, Mr. Miller and Mr. Ingram, if it satisfies you as to the truth, you have to acquit him. If it leaves you in any reasonable doubt equally you have to acquit him. If you do not believe what he tells you, you cannot say he is guilty on that account alone. You have to act - look at the totality of the prosecution's evidence. See, if it satisfies you, so that you feel sure. If having looked at it particularly the

> evidence of Janet, if it doesn't so satisfy you you cannot convict either, you have to acquit. And if the prosecution's case leaves you in any reasonable doubt, equally you have to acquit. It is only when you are satisfied beyond a reasonable doubt on the evidence as put forward, then you can find the verdict adverse to the accused."

Although the enquiry made of the appellant by the learned judge at the conclusion of his unsworn statement from the dock as to, "Did you see any lizard?" was uncalled-for the learned judge, while referring to this in his summation, did not seek to comment on it in a manner unfavourable to the appellant. This matter, while giving us some cause for concern, did not, in our view, go far enough to impact adversely on the substance of the statement which sought to place the appellant at all material times playing dominoes. The learned trial judge's comments, in so far as it related to the other defence witnesses, sought to deal with the discrepancies arising out of their testimony. These were, in our view, quite justifiable and in keeping with the overriding duty of the judge by way of commenting on the evidence and rendering assistance to the jury in discharging their functions in keeping with their oath.

Ground 3

The complaint here was that in allowing the complainant's sister to testify to what she saw in the complainant's vagina when she was examined by the doctor who attended on her was highly prejudicial and unfair to the appellant.

Learned counsel for the Crown in responding, submitted that the evidence elicited from the witness was limited to saying what she saw. We are of the view that the scientific nature of the evidence would be a matter for someone qualified as being an expert in the field of bacteriology, which the witness was not. In the circumstances, the evidence was valueless and did not add to or detract from the case for the Crown or that of the defence. As the jury had earlier been warned that there was no corroboration of the testimony of the complainant, there is no basis for any valid complaint on this ground; moreover, as the appellant's defence was a denial of the act of sexual intercourse and one in which he sought to raise the defence of alibi, viz., that he was playing dominoes at all material times on that day that the incident was alleged to have taken place. In the circumstances, there could hardly be any prejudice caused to the appellant by this evidence.

Ground 4

This complaint had to do with the learned judge's direction on corroboration. Learned counsel for the appellant contended that the direction did not conform to the definition required. In his directions in this area the learned judge said (page 125):

> "This is a case of sexual intercourse, an alleged sexual offence, members of the jury, and in addition to that, it is an allegation of a child and I must give you the warning members of the jury, as to a concept in law or an element in law called corroboration. Corroboration means simply, members of the jury, evidence from some independent source which connects the allegation or supports the allegation that the offence has

> been committed. In this case a sexual offence has been committed and also it is the accused who committed the offence." [Emphasis supplied]

From this definition the material ingredients which the Crown were required to establish were:

1. Some evidence from an independent source, viz., a source outside of the testimony of the complainant.

2. That the offence charged in the indictment of rape was committed.

3. That it was the appellant who committed the offence charged.

On any reading of the directions referred to (supra) there exists no basis for the complaint raised on this ground. Moreover, the learned judge did not stop there. Following the definition on corroboration, he then remarked:

> "The evidence as to that came from a child and I have to warn you, that the evidence of a child, she was sworn, albeit, is to be looked at carefully and if there is no corroboration, you have to be very very careful. There is no corroboration of Janet's testimony as to this sexual intercourse, but the law says even though there is no corroboration, nevertheless, if you are convinced that she is speaking the truth heed the danger that I adverted your minds to, the danger of convicting on uncorroborated evidence. If you heed that danger and you still believe the child that this offence took place, you may act on that evidence." [Emphasis supplied]

Given these directions this complaint was without merit.

Ground 5

This complaint can be considered along with ground 4. It has to be examined in the light of the directions in relation to the case for the Crown as it fell to be considered. There was no corroboration of the testimony of the complainant and the jury were so directed. Had there been evidence capable of supporting the complainant's testimony, that evidence would have had to satisfy the requirement as adverted to earlier in this judgment. This would have included the direction complained of on this ground, viz.:

> "In this case a sexual offence has been committed and also it is the accused who committed it."

This direction cannot be looked at in isolation. For it to be seen in the manner canvassed for by learned counsel for the appellant, one would have expected the learned judge to refer to some evidence as capable of lending support to the complainant's testimony. This he has not done but he went on at great pains by referring to the absence of any such corroborative testimony, hence his warning. In the light of this stance, for learned counsel for the appellant to contend, therefore, that this direction sought to erode the warning given by the learned judge was without foundation.

Conclusion

The outcome of the case turned on a credibility issue of fact as to which of the two diametrically opposite accounts, viz., that of the complainant or the appellant the jury believed. The jury convicted the appellant despite the strong warning from the learned trial judge as to the absence of

corroboration and the need for them to exercise extreme care, having regard to the age of the complainant, as well as the suggestion by the appellant that the charge was born out of malice on the part of the complainant's sister H.M. In coming to their verdict, they accepted the complainant as a truthful and reliable witness.

Having carefully examined the summation of the learned trial judge, although there were some imperfections, we are unable to say that the summing-up, when considered as a whole, the jury were not properly and adequately assisted in discharging their functions and in arriving at the verdict to which they came.

It is for these reasons we came to the conclusion as is set out at the commencement of this judgment.

The sentence is to commence as from 17th December, 1996.