JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 20/96

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

REGINA vs. LEONARD FLETCHER

Bert Samuels for the appellant

Miss Audrey Clarke for the Crown

September 25 and November 25, 1996

BINGHAM, J.A.:

The appellant was convicted in the Home Circuit Court on January 30, 1996, for carnal abuse before Harris, J. and a jury. He was indicted for rape but was found guilty of the lesser offence and sentenced to a term of imprisonment of four years at hard labour. He subsequently applied for leave to appeal against conviction and this was granted by a single judge.

Before us, having heard the arguments of counsel, we reserved our decision to consider the matter. The grounds for our decision are now set out herein.

The facts

The complainant, a young girl, lived with her aunt and the appellant who were husband and wife at a dwelling house in the parish of St. Andrew. At the time of the incident, out of which the charge arose, her aunt was away in the United States of America and she was left under the care and protection of the appellant who was then acting as her guardian. She had gone to live with this couple after the death of her mother. The relationship between the complainant and the appellant seemed to have been, up to the time of the incident, a harmonious one.

It was alleged that on a Saturday night in early April 1995 around 10:00 o'clock while the complainant was sleeping the appellant came into her room and had sexual intercourse with her for about ten minutes. During the incident the appellant was armed with a knife which he used to threaten her with the words that "if I talk him a go kill mi."

Following the incident, the complainant left her room and went to the house of her friend, one Lorraine, which is situated in the same premises as her aunt's house. She made a report to Lorraine and spent the remainder of the night with her.

The following Monday she went to school and made a report to her form teacher, a lady. The teacher took her to Dr. Jephthah Ford, a medical practitioner, who examined the complainant in the presence of the teacher. He observed no injury to her private parts and was of the opinion that she had not been sexually assaulted.

A further report was later made by the complainant to her sister one Sylvia Bowland about three weeks later, on 1st May. As a consequence of this report, her sister went with her to the Constant Spring Police Station where a report was made. Following this report the complainant was taken to the Rape Unit where she was examined by a doctor.

The result of this later examination is not known. One is left to speculate and ponder as to this doctor's findings as there was no attempt on the part of the prosecution to adduce any evidence from this person, either at the stage of the Preliminary Examination into the charge preferred against the appellant or at the subsequent trial in the Circuit Court. This omission has also to be examined in the light of the provisions of the Evidence Act, as amended, which allows for a medical report or a medical certificate to be tendered in evidence where the doctor is not available to be called to give viva voce evidence (vide sections 31B & 31F(2) & (3) of the Act). This doctor's findings at the trial were allowed to be left unexplained.

The appellant, on being accused of sexually interfering with the young girl, denied the charge and has protested his innocence from the outset of this matter. He stated that this charge has been brought as a result of malice on the part of the complainant's family.

Before us, Mr. Samuels for the appellant advanced some four grounds of appeal in challenging the conviction. These were as follows:

> "**1.** The verdict of the Jury is unreasonable and cannot be supported having regard to the unchallenged evidence of Doctor Jephthah Ford that his examination of the genital area days after the

"alleged rape revealed that the Complainant was never sexually assaulted.

2. The Learned Trial Judge failed to:

(a) Adequately assist the Jury regarding the unchallenged findings of Dr. Ford that the Complainant was not sexually assaulted;

(b) Direct the Jury that Doctor Ford was in the circumstance of the case an independent witness whose testimony if believed destroyed the Crown's case entirely;

(c) Sufficiently and/or adequately assess the impact of the medical evidence on the case as it challenged the testimony of the Complainant that she was raped for ten (10) minutes.

3. The Learned Trial Judge failed to direct the Jury as she was duty bound to do that even if they rejected the Accused's Defence in his statement from the Dock they could not convict unless they went back to the Prosecution's case and find that it made them feel sure that the Accused committed the offence of Rape or Carnal Abuse.

4. The summing up taken as a whole was unhelpful as it failed to adequately examine the issues in the case and how these issues were to be treated by the Jury in coming to their verdict."

Most of counsel's time in advancing his submissions was spent on grounds 1 and 2. He submitted that the authorities made it clear that an expert witness is entitled in giving evidence to state his opinion on matters relating to a material fact in the case, as here on the issue, whether proof of sexual intercourse had taken place. That where such an opinion is not challenged by the Crown and

no evidence is called by the Crown to rebut it then the resulting verdict can be challenged as being unreasonable having regard to the evidence.

As set out, this ground calls into consideration the jurisdiction conferred on this court by section 14(1) of the Judicature (Appellate Jurisdiction) Act which reads:

> "14(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, ..."

For this ground to succeed, the court must be satisfied that under all circumstances the verdict was unreasonable.

Learned counsel for the appellant relied in support on the following authorities:

1. ***Mears vs. Reginam*** [1993] 97 Cr. App. R. 239 at 243
2. ***R. vs. Matheson*** [1958] 2 All E.R. 87
3. ***R. vs. Rodney William Bailey*** [1961]66 Cr. App. R. 31.

Miss Clarke for the Crown submitted that when examined the directions of the learned trial judge in relation to the expert witness cannot be faulted. She contended that the verdict cannot be attacked as unreasonable as the summing-up being adequate it was open to the jury to accept the complainant's account in preference to that of the appellant. The medical evidence of the doctor had to be looked at as against the well known life

situation. Having been given the necessary warnings the jury were entitled to come to the verdict they came to.

A careful examination of Dr. Ford's testimony revealed that from his notes, on refreshing his memory, he testified to examining the complainant on 7th April, 1995. Given the complainant's account, this could have been the Friday following the report made to the teacher. There was an area of uncertainty in her evidence as to just how long after the incident that the report was made to the teacher. On the complainant's account, the incident would have taken place on Saturday 1st April.

The uncontroverted evidence of Dr. Ford, who testified for the defence, was that, based upon his examination of the young girl, in his opinion she was never sexually assaulted. He formed this opinion as, on his examination, he found that her hymen was intact; there was no vaginal abrasion; also no evidence of vaginal penetration. If sexual intercourse had taken place, even the slightest penetration, the complainant would have lost her hymen. Based on what he saw, he opined that the complainant was neither raped nor sexually assaulted. Although cross-examined at some length by learned Crown Counsel, the testimony of Dr. Ford, at the end of his evidence, remained unshaken. The effect of this evidence, when juxtaposed against the testimony of the young and sexually inexperienced complainant, brought her accusation against the appellant, which was the very foundation of fact on which the indictment for rape was based, into sharp focus.

The learned trial judge at the close of the Crown's case, in our view, quite correctly ruled that there was a case fit to be left to the jury as up to that stage the evidence of Dr. Ford had not yet emerged, the credibility of the complainant being a matter yet to be resolved by the jury as the sole arbiters of the facts. When Dr. Ford testified, however, his uncontroverted evidence went towards supporting the appellant's denial of the charge and the effect of the doctor's expert opinion which remained uncontroverted and unshaken, was to cast grave doubt on the credibility of the young girl as to the fact that sexual intercourse had taken place. It is in this respect that the complaint made in ground 2 has to be looked at and examined.

Ground 2

The manner in which the doctor's evidence was treated by the learned trial judge in her summing-up was of extreme importance, having regard to his status as an independent expert witness. Irrespective as to whether he testified for the Crown or the defence his testimony had to be regarded as one who brought his special knowledge as a medical person and one experienced in such matter as the court was determining and whose sole function was to assist the court in arriving at a correct verdict. His testimony, therefore, had to be dealt with as:

> 1. That of an expert witness and he was entitled to be treated as such.
>
> 2. His evidence had to be considered as that of an independent witness with all the consequences which flowed from one whose testimony fell into that category.

How did the learned trial judge deal with his testimony? Having reviewed the doctor's evidence she remarked that (page 10):

> "You are not bound to accept his evidence, he is just another witness as anyone else. His evidence maybe accepted or rejected. You should weigh his evidence against what Erica has told you. If you accept his evidence, you should acquit the accused. If you have any doubts as to whether or not his findings are correct or whether or not his opinion is correct, then you should acquit the accused. If you disbelieve him and you reject his opinion, then it is open for you to convict."

Given the fact that the evidence of Dr. Jephthah Ford, at the end of his testimony stood alone and uncontroverted, in our view, there was no rational basis arising for any disbelief as to his testimony. His evidence in this regard can be equated with that of the evidence of the three doctors-psychiatrists whose evidence fell for review by the English Court of Criminal Appeal in ***R. v. Matheson*** [1958] 2 All E.R. 87, one of the authorities relied on in support by learned counsel for the appellant, and which is sufficient authority for the statement that (per Lord Goddard, C.J.):

> "If there are facts which would entitle a jury to reject or differ from the opinions of medical men, this court would not and indeed could not disturb their verdict but <u>if the doctor's evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence'</u>." [Emphasis supplied]

What may possibly have challenged the opinion canvassed by Dr. Ford were the findings of the doctor who examined the complainant, albeit some three weeks later at the Rape Unit. This, of course, would be dependent on

whether his findings were supportive of the complainant's story. The unexplained absence of that doctor or his medical report, as a result cannot be regarded as adding to the evidence in support of the prosecution's case. Neither could the evidence of this inexperienced young girl destroy it.

What, however, was required was the obvious need for the jury to be told in a clear and unequivocal manner that as an expert witness Dr. Ford's evidence was of the nature of an expert witness having no axe to grind nor interest to serve and one whose testimony was based on his expertise as a medical doctor of several years experience and whose evidence was intended to assist the jury to arrive at a correct verdict according to the evidence.

The learned trial judge in her directions, in dealing with the evidence of the complainant and how her evidence fell to be weighed and assessed, did give the requisite warnings in sex cases and in particular in relation to complainants of tender age. When the learned judge came to her directions in relation to the doctor, however, regrettably there was a total absence of any direction seeking to place his evidence and its import in its proper context, which meant that this omission left her direction in these terms not equally balanced nor what, in our judgment, may be considered fair and adequate. This, in our view, amounted to a non-direction. Had the jury been directed in terms, as adverted to before, it may be that they would have reached a different conclusion.

What has been expressed so far, in our view, would have been sufficient to dispose of the appeal. There were, however, other unsatisfactory areas in the

summing-up which, although not forming the subject-matter of a complaint by counsel for the appellant, were matters which the court, in exercise of its powers under section 14(1) of the Judicature (Appellate Jurisdiction) Act, may quash a conviction in order to prevent a miscarriage of justice.

These areas were two-fold:

1. The directions in relation to reports made by the complainant.

The complainant testified that following the incident she made a report to her friend Lorraine who lived at the same premises as herself. She spent the rest of the night with Lorraine. The following Monday at school she made a report to her teacher who took her to Dr. Ford who examined her. Three weeks later on 1st May she made a further report to her sister Sylvia who took her to the Constant Spring Police Station where a report was made. She was then taken by the police to the Rape Unit where she was examined by a doctor.

The law relating to complaints made in sex cases is that a recent complaint made to someone by the alleged victim of a sexual offence is admissible in evidence at the subsequent trial of an accused person, if the person to whom the complaint was made gives evidence, not as in proof of the truth of the facts forming the subject-matter of the complaint but as evidence of the consistency of the conduct of the complainant as told from the witness box that she did not consent to the act of sexual intercourse.

Had Lorraine been called as a witness for the Crown at the trial her evidence as to what she was told by the complainant shortly after the alleged

incident would have been admissible as being in the nature of a recent complaint subject to its value as evidence, and as going towards the consistency of the complainant's story, as told from the witness box, and towards negativing her consent to the act of sexual intercourse. Lorraine, however, did not give evidence, hence there was no evidence which could be regarded as falling within the category of a recent complaint and being made at the first reasonable opportunity which offered itself. The other two reports to the teacher and her sister, apart from being merely reports made to these persons, could on no basis be regarded as being "recent complaints". They were of no evidential value whatsoever.

On examination of the summation, it is clear from the directions that followed that, apart from advancing the Crown's case, what emerged went a far way towards placing the complainant's testimony in a most favourable light, while having a most damaging and prejudicial effect on the case for the appellant. These directions are to be found at page 5 of the record. There the learned judge said:

> "I must at this juncture point out that Erica told you that after the incident she made several reports to certain persons. This is not corroboration, the complaints made by her is not evidence of the facts complained of, <u>but if you accept it, it is evidence of her consistency. Evidence of the consistency of the conduct of the complainant in respect of the story that she had told you here in court; and that is likely that she has consistently told the same story from the beginning and maintained negative consent on her part.</u>" [Emphasis supplied]

As both Lorraine and the teacher were not called to give evidence, the report made to them could not be regarded as being in the nature of complaints. As regards the report made to the sister Sylvia three weeks after the incident, it could not have been considered as "recent" even if it could be regarded as being in the nature of a complaint. These directions by the learned trial judge, in our view, were erroneous and amounted to a grave misdirection on the law, which went to the very root of the Crown's case, based as it was entirely upon the credibility of the complainant. For the learned judge, in treating these reports, to have suggested that this was evidence of the consistency in the complainant's conduct throughout, going towards negativing consent, would equally be suggesting a likelihood that she was a truthful and reliable witness.

2. The offences finally left to the jury

Finally, on a careful scrutiny of the record, our attention was directed to the manner in which the case was eventually left to the jury. At the end of the summing-up the jury were directed to consider two possible verdicts, namely, guilty of rape or not guilty of any offence. The learned trial judge had also been requested by learned Crown counsel, who possibly may have been influenced by the evidence of Dr. Ford, to consider a direction of an alternative verdict of indecent assault. This request was, however, declined by the learned judge. After retiring for over one hour (11:56 a.m. to 1:08 p.m.), the jury returned from the jury room and the following dialogue then ensued:

"**REGISTRAR:** Mr. Foreman please stand. Mr. Foreman and members of the jury have you arrived at a verdict.

MR. FOREMAN: We would like to clarify between rape and carnal abuse before we can arrive at the verdict.

HER LADYSHIP: When you say clarify?

MR. FOREMAN: Would you like to tell me what the law amounts to rape?

HER LADYSHIP: Male person having sexual intercourse without her consent by force fear or fraud or with indifference as to whether or not she consents.

Now, carnal abuse is committed where a male person has sexual intercourse with a female person under the age of sixteen. Now, it is immaterial whether or not the female consents so far as carnal abuse is concerned, but rape consent is material.

HER LADYSHIP: Is there anything else you want to know further? In rape consent is a material factor; consent is not material so far as carnal abuse is concerned.

MR. FOREMAN: Does penetration takes place during carnal abuse?

HER LADYSHIP: Rape - sexual intercourse takes place - penetration of the sexual organ of the female. Full penetration is not needed and the same thing applies in carnal abuse. In the case of carnal abuse, the prosecution must prove that sexual intercourse took place and the sexual organ of the male penetrated the sexual organ of the female; full penetration is not necessary; the slightest penetration will suffice. The prosecution must prove in both cases that the alleged thing was done by the accused.

MR. FOREMAN: My Lady, could we deliberate for five minutes more?

"HER LADYSHIP: The matter of consent is an important issue.

MR. FOREMAN: We are now clear."

Following the further directions requested by the foreman, the jury again retired for a further period of nineteen minutes before returning a verdict of guilty of carnal abuse. This verdict was clearly not one open to the jury to return on the evidence in the case. On the evidence, the only other possible alternative verdicts were, in the circumstances:

1. Attempt at rape
2. Indecent assault.

Carnal abuse, as an alternative verdict, did not arise on the evidence as no evidence had been led by the Crown in proof of the age of the complainant and this fact was an essential ingredient required in proof of such an offence. The verdict of not guilty of rape can only be interpreted to mean that the jury were in some doubt in relation to one of the essential ingredients of that offence, not having to do with the identity of the appellant. When the foreman made his enquiry, therefore, the jury ought to have been told by the learned trial judge that carnal abuse as an alternative offence clearly did not arise on the evidence and that the two possible verdicts on the evidence were guilty or not guilty of rape which was the charge preferred on the indictment against the appellant. In the result, the conviction for these reasons cannot stand.

Conclusion

When this case is considered in its entirety what is clear is that the case for the prosecution was left to the jury for their consideration based entirely on the evidence of the complainant, a young girl, who it can be said was someone, given her age, lacking in the experience of the ways of the world. Although there may have been other evidence from potential witnesses which, if made available, could have gone towards bolstering or supporting her story, these witnesses were not called and their absence remained unexplained and unaccounted for at the trial. This left many gaps in the Crown's case which when to this was added the uncontroverted testimony of Dr. Ford, had the jury been properly directed as to how to regard the unchallenged testimony of the doctor in so far as his testimony affected the credibility of the complainant, when coupled with the material misdirections as to the reports made to Lorraine, the teacher and her sister Sylvia, the jury would in all probability have reached a different conclusion.

The only other question which falls to be considered, therefore, having regard to the conclusion reached as to the conviction, is as to whether a new trial ought to be ordered. Such a course could only be taken on the basis that, having regard to the testimony of the complainant, had the jury been properly directed a verdict of guilty of rape may have been arrived at. After careful consideration, we are not minded to take that course. To do so would merely result in the Crown being afforded an opportunity which was available to them in the first place to fill the several gaps in their case. From the outset of the

matter, with a proper approach to their task, they could have sought to make available to a trial court, as is their duty in their role as ministers of justice, all the evidence leaving it to the tribunal of fact to come to a correct verdict according to the evidence.

In the result and for the reasons which we have set out, the appeal is allowed, the conviction quashed and the sentence is set aside. A judgment and verdict of acquittal is hereby entered.