[2011] JMCA Crim 28

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 42/2010**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MRS JUSTICE McINTOSH JA**
**THE HON MR JUSTICE HIBBERT JA (Ag)**

**MICHAEL REID v R**

**Leroy Equiano for the appellant**

**Mrs Caroline Hay and Miss Kerri-Ann Kemble for the Crown**

**3 May and 30 June 2011**

**HIBBERT JA (Ag)**

[1] The appellant was on 19 February 2010 convicted in the Home Circuit Court for the offence of rape and was on 26 February sentenced to be imprisoned and kept at hard labour for a period of four years.

[2] On 3 May 2011, we heard and dismissed his appeal against his conviction and sentence. We now, as promised, give the reasons for our decision.

[3] The appellant was a regular visitor to a store where the complainant N.G. worked as a supervisor. In about November 2005, a friendship began between them during which they had many telephone conversations as well as meetings when he visited the store. N.G. who was then preparing to sit the C.X.C examination in mathematics gave evidence that the appellant offered to help her with her preparation. Consequently, two morning meetings were arranged but never materialized.

[4] On 27 January 2006, N.G. was scheduled to leave work at 11:00 pm. During the course of the day the appellant telephoned her and offered to take her home. She declined his offer, stating that arrangement had been made for her to be transported by taxi. Later, however, she learnt that the taxi would be arriving late so she telephoned the appellant and accepted his offer which still stood.

[5] Together they left the store near midnight. On the way the appellant diverted from what would be the normal route and when asked about the diversion he said he was going to his home to see if there was light at his house as there had been a power outage earlier. When they arrived at the appellant's home they discovered that power had not yet been restored. N.G. walked with the appellant to the door of his apartment where she urged him to quickly light a lamp and leave as she was in a hurry to get home. Instead, she said, he pushed her into the apartment and closed the door.

[6] In the apartment, the appellant put his hand under her shirt whereupon she told him that she was not inclined to intimacy and wanted to go home. He then embraced her and, when she tried to push him away, he pushed her down on a bed and started

to take off her clothes. She begged him not to but he continued so she started to yell. He got angry and started to choke her then placed a pillow over her face. She pleaded with him and he said, "It a go happen whether you like it or not". Having received a glass of water which she had requested in order to be released from the bed, she went to a sink as ordered to put down the glass. She felt in the sink for a knife or some other instrument but the appellant, apparently realizing what she was doing, grabbed her from behind and told her to lie on the bed. She, instead, sat on the floor and the appellant again grabbed her by the throat and forced her onto the bed.

[7] The appellant then took off her pants and underwear and performed oral sex on her. He then got on top of her and tried to insert his penis into her vagina but was unable to do so as she crossed her legs. He again choked her saying "Is either mi get it the hard way or the easy way". She then uncrossed her legs and he inserted his penis into her vagina. After he had sex with her he told her to put on her clothes then he took her to an address some distance from where she lived, as she had directed him, because she did not want him to know where she lived. Later that morning she made a report to the police and, in the afternoon, accompanied the police to the appellant's address. On a subsequent date she again went back to the appellant's address where he was later taken into custody.

[8] During cross examination, N.G. denied that she had previously enquired of the appellant whether or not she could stay at his apartment when she worked late. She also denied that she had agreed to have sexual intercourse with the appellant or that

she made the report to the police because the appellant did not give her certain reassurances.

[9] Detective Sergeant David Long also gave evidence on behalf of the prosecution. He spoke of receiving a complaint from N.G. who later took him to the appellant's address. He subsequently on 4 February 2006, arrested and charged the appellant for the offence of rape. When the appellant was cautioned he said, "Mr Long, I did not rape her, ask her again".

[10] The appellant gave evidence on his own behalf. He spoke of the friendship that developed between N.G. and himself. He stated that on two occasions prior to 27 January 2006, he had given N.G. a ride to Half Way Tree and on one of those occasions he stopped at his apartment to collect a bill for payment. He further stated that on 25 January 2006 N.G. and himself had made arrangements to be together at his apartment. He, however, had to cancel the arrangement whereupon N.G. suggested that they meet, instead, on 27 January 2006 after she left work. He said that, as arranged, he picked her up after she left work after 11:00 p.m. He took her to his apartment where she initially sat on a bed. She later disrobed and they had consensual sexual intercourse. He later took her home. He denied that he used threats and force in order to have sexual intercourse with her.

[11] Clayton Byfield, a security guard at the apartment complex where the appellant lived, gave evidence of opening the gate to the complex to allow the appellant and a

visitor to enter, and later to allow them to exit. He further stated that he heard no yelling coming from the appellant's apartment while he was there with the visitor.

[12] After witnesses gave evidence of the appellant's good character, Dr Clive Morrison stated that he examined N.G. on 28 February 2006 and found no signs of violence or forced entry into her vagina. In cross examination he, however, admitted that a previous childbirth by N.G. as well as lubrication of the vagina which could be caused by oral sex could cause him not to find signs of forced entry into N.G.'s vagina.

[13] Having obtained leave to appeal from a single judge, Mr Equiano, on behalf of the appellant, argued the following grounds of appeal:

> "1. The learned trial judge's directions to the jury on mistake were inadequate, taking into consideration the nature of the case and the defence. The directions did not offer the jury the necessary assistance on how to approach the issue of honest mistake, who had the burden to prove and the importance of the defendant's state of mind.
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> 2. The verdict of the jury is unreasonable."

[14] Ground one calls into question the correctness of the learned trial judge's directions to the jury as it relates to the issue of honest belief which might have been held by the appellant at the time of the incident. In defining the offence of rape, the learned trial judge correctly directed the jury as follows:

> "Rape is when a male person has sexual intercourse with a female person without her consent with the intention to have sex with her without her consent or with indifference

> or recklessness, meaning, not caring whether or not she consents …"

[15] Later in her directions to the jury, the learned trial judge at page 2005, said:

> "Now, Madam Foreman and Members of the Jury, I have told you that the prosecution must also prove that the accused man had sexual intercourse without her consent, with the intention to have sexual intercourse with her without her consent or not caring whether or not she consented. If the accused man in this case, Michael Reid, in fact honestly believed that the complainant … was having sex with him, having sexual intercourse and was consenting to the sexual intercourse even though his belief was not based on reasonable grounds, then you will have to say he is not guilty because it would mean that in his mind she was consenting to have sexual intercourse with him because the law says if he had an honest belief that she was consenting, then he would not be guilty of the crime charged …"

[16] At the beginning of her directions to the jury, the learned trial judge correctly directed them as to the burden and standard of proof and after reviewing the evidence said:

> "If you look and say well, I reject the accused man's evidence, if you do and say he is not speaking the truth or you don't believe any of his witnesses …, it is not at all the end of the matter, because the law says you must go back and look at all the evidence both from the Defence and the Prosecution to see whether you are satisfied so that you feel sure of the accused man's guilt, nothing less than that will do.
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> If at the end of this weighing exercise you are not satisfied so that you feel sure, then the accused man is entitled to be, and must be acquitted or found not guilty, because as I told you, the burden of proving his guilt rests on the Prosecution …"

[17] The learned trial judge clearly and adequately directed the jury on the issue of honest belief and the burden of proof.

[18] Was it, however, necessary for the learned trial judge to embark on the issue of honest belief? This question arose in the case of **Regina v Aggrey Coombs** SCCA No No 9/1994 delivered on 20 March 1995. In that case the applicant was convicted for the offence of rape. The applicant and the complainant were well known to each other. He admitted having sexual intercourse with the complainant but said he did so with her consent and that sexual intercourse took place by arrangement. In delivering the judgment of the court, Wolfe JA (as he then was) stated:

> "This clearly was not an honest belief situation, consequently no direction on honest belief was required. While it is incumbent on a trial judge to leave for the consideration of the jury every defence which properly arises on the evidence, there is no obligation on a trial judge to leave to the jury fanciful defences for which there is no evidential support and a trial judge should not indulge in this kind of patronage.
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> The question of honest belief in a case of rape only arises where the man misreads or misunderstands the signals emanating from the woman. What the defence of honest belief amounts to is really this: I had sexual intercourse but I did so under the mistaken belief that she was consenting. That plainly was not what the applicant put forward as his defence."

[19] The question of honest belief also arose in the case of **Regina v Clement Jones** SCCA No 5/1997 delivered on 27 April 1998. In that case the appellant and the complainant were members of the same church and the appellant was accustomed to

taking the complainant to church on Fridays. On the day of the offence, the appellant told the complainant that he wanted them to have an intimate relationship. She declined his offer and he reacted by taking her away to a secluded area where he slapped and punched her several times, threatened to kill her and then forcefully had sexual intercourse with her. The appellant's account was that they had indulged in regular acts of consensual sexual intercourse, and on the day in question they had consensual sexual intercourse by arrangement.

[20] The judgment of the court was delivered by Bingham JA who stated at page 4:

> "Given these two diametrically opposite accounts, the matter resolved itself down to a credibility issue as to which of the two accounts, viz., that of the complainant or the appellant was to be believed."

Bingham JA later stated at page 6-7:

> "On these facts there was no room here for any suggestion that the appellant, based on the complainant's conduct, may either have obtained mixed signals or got his signals all wrong and had indulged in sexual intercourse with the complainant in the mistaken belief that she was consenting when in fact she was not.
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> In light of the defence put forward by the appellant there was no room for any direction based on honest belief."

The passages from the judgment of Wolfe JA (as he then was) were also cited with approval.

[21] The instant case bears great similarities to the circumstances which existed in the cases of **Coombs** and **Jones**. It is clear, therefore, that the issue of honest belief

did not really arise. Nevertheless, the learned trial judge, as stated before, gave correct and adequate directions to the jury.

[22] Relative to ground two2, Mr Equiano placed reliance on the judgment of Widgery LJ in **Regina v Cooper** (Sean) [1969] 1 QBD 267. At page 271 of the judgment Widgery LJ stated:

> "It has been said over and over again throughout the years that this court must recognize the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed until the passing of the Criminal Appeal Act 1966 - provisions which are now to be found in section 2 of the Criminal Appeal Act, 1968 – it was almost unheard of for this court to interfere in such a case.
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> However, now our powers are somewhat different and we are indeed charged to allow an appeal against conviction if we think the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is some lurking doubt in our mind which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

[23] Using this judgment, Mr Equiano urged this court to apply the 'lurking doubt' test and say that we find the conviction to be unsafe. The statutory provisions must, however, be examined. Section 2 (1) of the English Criminal Appeal Act 1968 states:

> "… the court … shall allow an appeal against conviction if they think - (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory …"

On the other hand section 14(1) of the Judicature (Appellate Jurisdiction) Act of Jamaica states:

> "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 …"

[24] The statutory provisions clearly show a difference in the powers exercisable by the Courts of Appeal in England and Jamaica and that the lurking doubt test is not applicable in Jamaica. Neither can it be said in the instant case, that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence.

[25] We found no merit in either of the grounds argued before us and consequently dismissed the appeal as indicated at paragraph above. The sentence of four years imprisonment at hard labour imposed in the court below is to commence on 26 May 2010.