[2015] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 45/2013

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE WILLIAMS JA (AG)

ROHAN SQUIRE v R

E P DeLisser for the applicant

Mrs Karen Seymour-Johnson and Ms Cheryl-Lee Bolton for the Crown

6, 9 and 23 October 2015

MORRISON P (AG)

[1] On 13 May 2013, after a trial before Harris J (Ag) (as she then was) and a jury in the Circuit Court for the parish of St Catherine, the applicant was found guilty of the offences of abduction and rape. On 24 May 2013, he was sentenced to seven years and 12 years' imprisonment respectively on each count and the court ordered that these sentences should run concurrently. The applicant's application for leave to appeal against conviction and sentence was considered on paper and refused by a single judge of this court on 29 November 2013. As is his right, the applicant renewed his

application for leave to appeal before the court itself and the matter was heard on 6 October 2015.

[2] On 9 October 2015, we granted the application for leave to appeal, treated the hearing of the application as the hearing of the appeal and allowed the appeal. The applicant's conviction was quashed and the sentences were set aside. However, in the interests of justice, the court ordered a new trial at the next sitting of the Circuit Court for the parish of St Catherine. These are the reasons for that decision.

[3] In the light of the manner in which the matter has been disposed of, we will give no more than a brief outline of the facts. At about 7:00 pm on 17 June 2010, the complainant, who was then 14 years old, was walking by herself at Junction, heading in the direction of Point Hill in the parish of St Catherine. She had in her possession a $500.00 bill, which she wished to change. The case for the prosecution was that the applicant, who was well known to the complainant, drove up to her from the Point Hill direction in the car which he operated as a taxicab. The vehicle having come to stop at "[her] foot", as the complainant put it, she asked the applicant what he wanted. When the applicant did not answer her, the complainant asked him if he could change her $500.00 bill. The applicant answered yes and then proceeded to open the passenger door of his car. When the complainant went back to the passenger door, the applicant pulled her into the car, turned it around and drove off towards Point Hill. Without saying anything, the applicant then turned off into a community known as Gordon Hill, as a result of which the complainant told him that she was not going to Gordon Hill.

Upon arriving at what the complainant described as "a lonely spot", the applicant brought the car to a halt and turned off the engine.

[4] The complainant testified that the applicant then proceeded to have sexual intercourse with her without her consent, despite her attempting to push him off of her, and her telling him that he "cannot do this". While this was going on, the complainant's cellular telephone rang, but it went dead before she could get to it. In answer to the applicant's enquiry as to who had called, the complainant told him that it was her friend and that she wanted to go home. The applicant then got off of her, pulled up his clothes and drove back towards Junction, where he let her out of the car.

[5] After the applicant had driven off, the complainant went to choir practice at her church. While there, she said, she was too scared to make any report to anyone. After choir practice, she went home, where her grandmother and her cousins were, all asleep. She did not make a report to her grandmother, she said, as her grandmother did not like to be awakened from her sleep. So she too went to sleep. The following morning, the complainant said, she got dressed and went to school. While there, she fell ill and started vomiting. She then went to the student counselor and told her what had happened the evening before. The student counselor took the complainant to her form teacher, who was also told what had happened, as were the school's nurse and the complainant's father. The complainant's father then took her to her mother's workplace. By the time they got there, they had been joined by the applicant, to whom the complainant's father had placed a telephone call upon hearing what the complainant had said. The applicant was also well-known to the complainant's mother

and father. The complainant spoke to her mother alone, while her father and the applicant remained outside. The complainant and her parents then went to the police station, where a report was made, and to the Spanish Town Hospital, where the applicant was medically examined. In due course, a police investigation commenced and the applicant was ultimately arrested and charged for the offences of abduction and rape. His response upon being cautioned was, "not guilty".

[6] In addition to the complainant, her mother gave evidence at the applicant's trial. She confirmed that the complainant, her father and the applicant had come to see her at her workplace on the morning of 18 June 2010. After the complainant spoke to her, she determined that she should take the complainant to see a doctor. Thereafter, the complainant, her parents and the applicant all travelled together in the applicant's car to the office of a doctor in Spanish Town. Then, with the applicant no longer in tow, the complainant and her parents went to the police station and later to the hospital.

[7] At the end of the Crown's case, a question arose as to whether it was proposed to call as a witness the doctor who had examined the complainant at the hospital. Notice to adduce the doctor's evidence at the trial had been served on the defence on 8 May 2013, the day on which the trial begun. However, as it turned out, the prosecution's efforts to locate the doctor in time proved futile. So counsel for the prosecution indicated his intention to close his case without calling the doctor. The applicant's counsel, Miss Janetta Campbell, who had seen the doctor's report and obviously considered the doctor's evidence potentially favourable to the applicant, then expressed her concern at this turn of events. However, upon being assured by the

learned trial judge that it was entirely open to the defence to call any doctor it wished to give evidence as part of its case, Miss Campbell did not persist with the point.

[8] In his defence, the applicant made a very long unsworn statement from the dock, occupying a full 21 pages of the transcript. In essence, while he agreed that he had transported the complainant in his car on the evening of 17 June 2010, he strongly denied abducting, raping or having sexual contact with her. It suffices to say at this stage that, apart from his denial of having committed the offences with which he was charged, the larger part of the contents of his unusually detailed unsworn statement was not put to the complainant when she was cross-examined by Miss Campbell.

[9] At the end of the applicant's unsworn statement, some further exchanges ensued between Miss Campbell and the learned trial judge on the issue of the medical evidence. With the assistance of counsel for the prosecution and the investigating officer, efforts to locate the doctor upon whose evidence the prosecution had initially sought to rely resumed. But, in the end, these efforts also proved unsuccessful and the defence therefore closed its case. The learned trial judge next summed-up the case to the jury, pointing out in some detail some of the matters recounted by the applicant in his unsworn statement which were not put to the complainant in cross-examination. At the end of this exercise, the learned trial judge said this to the jury:

> "So these are examples of some of the things that were not put to the prosecution's witnesses and as I have said before, you did not have the opportunity to see their responses or to hear their responses and to decide what you make of these matters and determine the weight and value you will attach

> to them. It is a matter for you, Madam Foreman and your members, right."

[10] At the conclusion of the summing-up, the jury returned a majority verdict of guilty on both counts. The matter was then adjourned for a few days, during which a social enquiry report on the applicant was obtained. On 24 May 2013, the applicant called a character witness to give evidence on his behalf. His antecedents and the social enquiry report were then read to the court and he was sentenced in the manner already described at para. [1] above.

[11] In his application for leave to appeal against conviction and sentence dated 17 September 2013, the applicant complained that his trial was unfair and that there had been insufficient evidence to warrant his conviction. On 24 April 2014, after his application had been considered by the single judge on the basis of the judge's summing up alone (as is the practice in cases other than murder and offences under the Firearms Act), the applicant filed an affidavit in which he was severely critical of the quality of the representation which he had been given by his counsel at the trial. Among other things, the applicant stated:

> " …
>
> 5. That prior to my trial my Attorney-at-Law did not take any statement from me as to my defence except that on one occasion after leaving court one morning she spoke to me for about five minutes by her car and I gave her a brief verbal account.
>
> 6. That my Attorney-at-Law had no further discussion with me so much so that I do not even know the location of her

office and I was never invited there for any further discussion.

7. That the decision of my Attorney-at-Law to proceed without any medical or forensic evidence from the Crown was never discussed with me and I have now been advised by my present Attorney-at-Law that that evidence could confirm my innocence as I was always willing to give a DNA sample.

8. That a visit to the spot where the complainant said the incident occurred by my trial Attorney-at-Law would have shown that the area is well lit with many houses nearby.

9. That by not taking full instructions from me my Attorney-at-Law could not and did not put to the complainant my account of the events on the night of the incident so much so that the Learned Trial Judge at the trial pointed out several issues which I raised in my statement from the dock which were never put to the complainant which gave the jury the impression that I was lying.

10. That the cell phone record of the complainant would have shown that shortly after I dropped her off she mad [sic] a telephone call to someone and that would have contradicted her evidence that her cell I phone wend [sic] dead at the time of the incident.

11. That I was asked by my trial Attorney-at-Law to sign that I agreed to make a statement from the dock after she advised me that this was an opportunity to tell everything as against giving sworn evidence where I could only answer questions which were asked and I could be prevented from telling all.

12. That in all the circumstances I was not properly defended and a great injustice has been meted out to me."

[12] When the applicant's renewed application for leave came on for hearing before the court on 3 June 2014, he was represented by Mr Earle DeLisser. On Mr DeLisser's

application, the matter was adjourned for a date to be fixed, primarily to (i) enable a comment to be sought from the applicant's counsel at trial on the contents of the applicant's affidavit; and (ii) facilitate the obtaining of a full transcript of the proceedings at the trial.

[13] On 29 July 2014, Miss Campbell filed an affidavit in response to the applicant's affidavit. In so far as is now relevant, the affidavit stated the following:

> " …
>
> 6. That paragraphs 5 and 6 of the said Affidavit are categorically denied. The Applicant gave me written instructions on 22nd May 2012 and his trial began on 8th May 2013, almost one year later. Between May 2012 and May 2013, the Applicant and I spoke from time to time as there were 9 court appearances, including mention dates and trial dates on which the trial did not commence for one reason or another. At no time did the Applicant indicate that he wanted to provide further instructions. Additionally, the Applicant was in possession of my telephone contact information and could have used this medium to advise me of his wish to give further instructions. Exhibited hereto is a copy of the said instructions marked "**JEC-1**" for identification and sworn on the 9th day of July, 2014.
>
> 7. That paragraph 7 of the said Affidavit is denied. The Crown provided medical and forensic evidence which was discussed with the Applicant and copies are exhibited hereto as "**JEC-2**" and "**JEC-3**" respectively for identification and sworn on the 9th day of July, 2014. My examination of the Depositions served on me on or about 22 May 2012 revealed that the Medical Certificate had been personally served on the Applicant on or about 16 November 2010 by the Investigating Officer. The Forensic Certificate reported that no semen was detected and no spermatozoa were found in the vaginal swabs and smears taken from the complainant. I

recall advising the Applicant accordingly. There was therefore nothing with which to compare his DNA and at the time the Applicant led me to believe he understood the situation.

8. That paragraph 8 of the said Affidavit is also categorically denied as a visit to the locus which shows the place as now being well lit would not necessarily prove that it was lit at the relevant time.

9. That I deny paragraph 9 of the said Affidavit and repeat paragraph 6 herein.

10. That I deny paragraph 10 of the said Affidavit on the grounds that if the Complainant left the Applicant's taxi what prima facie evidence did he have that she made a telephone call. Furthermore, in his instructions exhibited as **JEC-1**, the Applicant did not instruct that he was aware that the Complainant received a telephone call after leaving his taxi and I therefore did not cross examine the Complainant on that issue.

11. That I deny paragraph 11 of the said Affidavit and exhibited hereto is "**JEC-4**" being a copy of the statement signed by the Applicant indicating his decision to speak from the dock.

12. That I deny paragraph 12 of the said Affidavit and categorically state that the Applicant was properly defended. The transcript of the Trial, when received, will show the thoroughness of my cross-examination of the prosecution witnesses."

[14] Miss Campbell exhibited to her affidavit a copy of the document which she referred to at paragraph 6 of her affidavit as the instructions given to her by the applicant. Handwritten on a single sheet of paper signed "R. Squire", it indicated (i) his age (37 years); (ii) his address; (iii) his occupation ("Run taxi"); (iv) that the

complainant and her family were well known to him and they had a good relationship; (v) that the complainant knew his telephone number; (vi) that he had picked her up at Junction, taken her to Nash, then back to Junction for "church practice" at about 7:00 pm (presumably, though this was not stated, on 17 June 2010); (vii) that they had spent "about 4/5 minutes @ Nash"; and that (viii) the complainant "got a phone call".

[15] Miss Campbell also exhibited to her affidavit copies of the "medical and forensic evidence" to which she referred at paragraph 7, *viz*, (i) a medical certificate dated 18 June 2010, signed by Dr Kerry-Ann Wright; and (ii) a forensic certificate dated 9 October 2012, signed by the Government Analyst, which related to vaginal swabs, smears and items of clothing retrieved from the complainant.

[16] At the adjourned hearing of the application for leave to appeal on 6 October 2015, Mr DeLisser sought and was given leave to argue (without objection from Mrs Seymour-Johnson for the prosecution) the following supplementary grounds of appeal:

> "1. That Counsel for the Appellant at his trial did not adequately present the defence in that:
>
> > (a) She failed to take proper instructions from the Appellant as to his defence and in presenting and exhibiting the Appellant's instructions to her (Exhibit 'JEC1') in her affidavit sworn to on the 9th day of July 2014, confirmed a lack of adequate instructions.
> >
> > (b) She failed to put the Appellant's Case to the Complainant given from his Statement from the dock, which was so inadequate which the learned Trial judge in her charge to the jury commented throughout to the jury that this was not done, which must have

given the jury an adverse view of the Appellant's defence.

2. That the Learned Trial Judge in dealing with the issue of corroboration:-

(a) Should have dealt with the fact that although the complainant was examined by a medical practitioner and items taken from the Complainant that there was scope for possible corroboration.

(b) Gave the Jury an inadequate direction in an example which was too limited.

3. That the Learned Trial Judge failed to give any direction on the Legal issue of the 'recent complaint' which on the facts of the case was essential.

4. That the verdict is unreasonable having regard to the evidence in that the conduct of the complainant during and after the alleged assault did not fit the profile of someone who is violated.

5. That the Learned Counsel who appeared for the Appellant although having in her possession medical and forensic evidence which supported the Case the Appellant failed to proper make use of this which might have led to the acquittal of the Appellant."

[17] Grounds one and five related to what Mr DeLisser described in his submissions as "the shortcomings" of the applicant's counsel at trial. It may therefore be convenient to treat with them together. Mr DeLisser submitted that, on the basis of the material provided by Miss Campbell herself, she failed to take proper instructions from the applicant. Further, that she also failed to put the applicant's case to the complainant, so much so as to draw adverse comment from the learned trial judge on the applicant's defence. And further still, that, given that Miss Campbell had in her possession medical

and forensic material which did not support the prosecution's case, she should have taken the necessary steps to secure whatever evidence she considered it necessary to call in support of the applicant's defence before the trial, rather than to leave it, as she did, to a point after the applicant had given his unsworn statement.

[18] In responding to these grounds, counsel for the prosecution were initially at somewhat of a disadvantage, in that, for reasons which are not clear, Miss Campbell's affidavit was not served on the Director of Public Prosecutions. However, with the benefit of a short adjournment, counsel were able to consider the affidavit and to make submissions on grounds one and five. Mrs Seymour-Johnson submitted that the document exhibited by Miss Campbell as the applicant's instructions was adequate for the purpose, as it spoke to his version of what had taken place during his encounter with the complainant on the evening of 17 June 2010. Further, that as the essential question in the case was one of credibility, the material in respect of which complaint was made in ground five would have been of no benefit to the applicant. By their verdict, it was submitted, the jury clearly rejected the applicant's unsworn statement and therefore the result would inevitably have been the same even if counsel for the applicant had deployed that material at the trial.

[19] There is no question on the authorities that, as Rougier J said in **Regina v Clinton** [1993] 1 WLR 1181, 1187, "… cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional." However, section 14(1) of the Judicature (Appellate Jurisdiction) Act empowers this court to allow an appeal against conviction on the ground of, among other things, a miscarriage of justice. In

Leslie McLeod v R [2012] JMCA Crim 59, at para. [57], the court concluded, after a review of several of the modern authorities, that "it is open to this court to allow an appeal in an appropriate case in which complaint is made of the conduct of defence counsel on the ground that there has been a miscarriage of justice". In that case the court considered (at para. [64]) that the correct approach to cases in which a complaint is made as to the conduct of trial counsel was —

> "… to consider (i) the impact which the alleged faulty conduct of the case had on the trial and the verdict; and/or (ii) whether the misconduct alleged on the part of counsel was so extreme as to result in a denial of due process to the applicant."

[20] In this case, it is clear that by far the larger part of the contents of the applicant's unsworn statement had not been foreshadowed by counsel in her cross-examination of the complainant. In these circumstances, the learned trial judge was plainly obliged to point this out to the jury as a balancing factor in their consideration of what value they should attribute to the applicant's unsworn statement. Accordingly, Mr DeLisser quite sensibly took no point about the judge having done so (indeed, he remarked that the judge was simply "doing her job").

[21] However, it seems to us that there is considerable merit in Mr DeLisser's further point that one possible effect of the judge's doing so would have been to taint the applicant as a liar in the jurors' minds. We naturally accept that there might be a possibility that the applicant, having given his counsel the instructions produced by Miss Campbell, proceeded to launch off into an entirely different narrative of his own. But, in

our view, those "instructions", which gave absolutely no indication of the stance which the applicant wished to take in response to the allegations made against him by the complainant, can hardly qualify as such. We therefore cannot with any confidence dismiss the applicant's assertion that Miss Campbell "did not take any statement from me as to my defence except that one occasion after leaving court one morning she spoke to me for about five minutes by her car and I gave her a brief verbal account". Indeed, the very fact that this is the document proffered by Miss Campbell as her instructions tends to support the applicant's account.

[22] It therefore seems to us that it is either that Miss Campbell took no, or no proper, instructions from the applicant. For, if she did, we would consider it inconceivable that she would have failed to recognise the cardinal importance of putting her client's case in full to the complainant and her mother. Instead, the applicant was effectively at large when he came to give his unsworn statement. Thus he was inescapably vulnerable to the judge's unexceptionable comment to the jury that, "as I told you … none of this was put to [the complainant] or her mother in cross-examination, therefore you did not have the opportunity to see how [the complainant] or her mother would have responded to these suggestions".

[23] So what then should be the effect of counsel's default on the applicant's conviction? In **Bethel (Christopher) v The State (No 2)** (2000) 59 WIR 451, 459-460, in a formulation subsequently approved by the Privy Council in **Boodram (Ann Marie) v The State** (2001) 59 WIR 493, de la Bastide CJ (as he then was) explained that, generally speaking, when the conduct of a case by counsel is made a ground of

appeal, the focus on appeal should be on the impact which the faulty conduct of the case has had on the trial and the verdict, rather than to "attempt to rate counsel's conduct of the case according to some scale of ineptitude". However, the learned Chief Justice went on to add what he described as "one important proviso" to this approach:

> "It is conceivable that counsel's misconduct may have become so extreme as to result in a denial of due process to his client. In such a case, the question of the impact of counsel's conduct on the result of the case is no longer of any relevance for, whenever a person is convicted, without having enjoyed the benefit of due process, there is a miscarriage of justice regardless of his guilt or innocence. In such circumstances the conviction must be quashed. It is not difficult to give hypothetical examples of how such a situation might occur. An obvious example would be if the accused had the misfortune to be represented by counsel whose judgment was proved to have been impaired by senility, drugs or some mental disease. Another example, closer to the facts of this case, is if counsel conducted the defence without having taken his client's instructions. This is simply another application of the basic principle that, if there is a fundamental flaw in the conduct of a trial, the conviction which results from it cannot be allowed in any circumstances to stand."

[24] The rule then is that, in general, not every departure by counsel from standards of proper conduct will necessarily result in a conviction being quashed on appeal: if the court is of the view that, counsel's default notwithstanding, the trial was not affected and the verdict would inevitably have been the same, the conviction may be allowed to stand. However, where the conduct complained of is particularly egregious or extreme, the court may well take the view that there has been a denial of due process and therefore a miscarriage of justice, irrespective of the question of guilt or innocence. In such cases, as Lord Steyn put it in **Boodram (Ann Marie) v The State** (at para.

[39]), "the conclusion must be that there has not been a fair trial or the appearance of a fair trial."

[25] Mrs Seymour-Johnson urged us to say that, as the case turned on the outcome of a contest of credibility between the complainant and the applicant, the jury's verdict would inevitably have been the same, regardless of any omission by defence counsel at the trial. And this could well be so. But we are clearly of the view that counsel's undertaking of the applicant's defence without proper instructions in this case fixes the case squarely within the second category of case identified in the foregoing paragraph. In the result, the applicant was denied the substance of a fair trial and we considered that the only acceptable outcome was to quash the conviction.

[26] This conclusion suffices to resolve ground one in the applicant's favour. But we cannot leave this aspect of the matter without an additional observation. The Privy Council has from time to time in recent years been moved to remind counsel in capital cases of the importance of taking a proper witness statement from the defendant, or making some other memorandum of his instructions (see, for instance, **Bethel (Christopher) v The State** (1998) 55 WIR 394, 398 and **Muirhead v R** [2008] UKPC 40, para. 27). But the requirement of a proper statement is no less applicable in relation to other offences, such as rape, convictions for which can expose defendants to long periods of imprisonment. In such circumstances, it seems to us that the taking by counsel of a proper statement from the defendant not only places counsel in the best possible position to provide effective representation to her client, but also provides

counsel with the best possible protection when called upon, as in this case, to justify the steps taken by her in the conduct of her client's case.

[27] As regards ground five, we were also of the view that counsel's conduct of the case fell below acceptable standards in relation to the medical and forensic evidence. Counsel was aware, certainly no later than the first day of the trial when she was served by the prosecution with a notice to adduce the evidence of the doctor and the analyst, that the material upon which she would later seek to rely existed. Yet, she left it virtually until the end of the trial, after it emerged that the prosecution no longer intended to call the doctor, to start to take frantic steps of her own to see whether the doctor— or a doctor— could be found to speak to that material. It is no doubt true that, as Mrs Seymour-Johnson pointed out, counsel obviously hoped to be able to direct her questions in cross-examination to the doctor when called to give evidence for the prosecution. But it seems to us that, provided that on her instructions the medical evidence was important to her case, it was counsel's clear duty to take steps to ensure that her client was not left stranded when, as it turned out, the prosecution decided to proceed without calling the doctor.

[28] Because our conclusion on grounds one and five was sufficient to dispose of the appeal in the applicant's favour, we did not consider it necessary to consider the very able and interesting submissions which were made to us by both Mr DeLisser and Mrs Seymour-Johnson on the other grounds. As regards the order for a new trial, both counsel were agreed that, should the appeal succeed, this was the appropriate order for the court to make. It suffices to say that, in our view, despite a concern about the

time which has elapsed since the happening of the events to which the matter relates, the order of a new trial in the interests of justice in this case is in accordance with the criteria laid down by the Privy Council in **Reid v R** (1978) 27 WIR 254.