[2015] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 56/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)

LEONARD WARREN v R

Delano Harrison QC for the appellant

Leighton Morris for the Crown

2, 3 March and 15 May 2015

PANTON P

[1] On 3 March 2015, we ordered as follows:

> "Appeal against conviction dismissed.
> Appeal against sentence is allowed in that the sentence of 15 years imprisonment on count two is set aside and a sentence of five years imprisonment substituted. Sentences are to commence from 24 April 2008."

These are our reasons.

[2] The appellant Leonard Warren was convicted on 24 April 2008, in the Circuit Court for the parish of Kingston after a trial that lasted three days before Beckford J and a jury for the offences of indecent assault (count one), incest (count two) and assault (count

three). The learned trial judge sentenced the appellant to two years imprisonment on count one, 15 years on count two and one year on count three. The sentences on counts one and two were ordered to run consecutively. On 19 January 2009, a single judge of this court granted leave to appeal, and granted the appellant legal aid. .

[3] Mr Delano Harrison, QC appearing for the appellant, asked for and was granted permission to abandon the original grounds as well as two supplementary grounds of appeal that had been filed. Instead, he argued the following two "further supplementary grounds":

> "1. The learned trial judge permitted the reception into evidence of material which was not merely unadvisable hearsay, but, also, adversely prejudicial to the appellant's cause. It is submitted that the trial judge's apparent attempt to disabuse the jury's collective mind of the vice complained of was wholly inadequate. The appellant was, it is submitted, thereby deprived of the substance of a fair trial (see **EVIDENCE:** page 12, line 15 to page 14 line 1.)
>
> 2. In sentencing the appellant to fifteen (15) years imprisonment with hard labour in relation to count if [sic] the indictment, charging him with the offence of incest, the learned trial judge erred in law in that the sentence imposed exceeded the maximum sentence of five (5) years imprisonment with hard labour prescribed for incest (in certain particular circumstances) by s. 2 (1) of the Incest (Punishment) Act (see **SUMMING-UP**: PAGE 72)"

[4] The prosecution, represented by Mr Leighton Morris, readily conceded that the learned trial judge erred in imposing a sentence of 15 years imprisonment in respect of

count two, the charge for incest. The learned trial judge had said that the Child Care Protection Act of 2004 had increased the penalty for incest and so she purported to act under that Act. However, even if that Act has increased the penalty, the learned trial judge ought to have borne in mind that the appellant was charged under the Incest (Punishment) Act, and not the Child Care Protection Act. The maximum penalty provided by the Incest (Punishment) Act for the crime committed by the appellant is five years imprisonment. Consequently, the appeal against sentence was allowed, with the consequences stated earlier.

The evidence

[5] The appellant, according to the evidence that the jury accepted, not only fondled and kissed intimately a female person who falls in the forbidden category listed in section 2(1) of the Incest (Punishment) Act, but also had sexual intercourse with her. According to the complainant, she was fondled and kissed on her breasts and vagina on a date unknown in October 2006, as well as on another date between October 2006 and 23 June 2007. On the latter date, the appellant had sexual intercourse with her. Finally, according to the complainant, the appellant beat her with his hands on 23 June 2007 after she had attended a party in her community.

[6] The appellant, although he pleaded not guilty to the charges, admitted in his unsworn statement that on the night of the party he did beat the complainant, causing her to run out of the house. In the light of that admission, the jury's verdict on count three was clearly correct and so no valid challenge could have been mounted against it.

That meant that in relation to the convictions, the appeal had to be confined to counts one and two.

[7] The complainant was born in November 1993. At the time of the incident referred to in the first count, she was 12 years old, and at the time of the trial, she was 14. During examination-in-chief, in respect of the first count in the indictment, she gave evidence as to the indecent acts committed on her by the appellant. Thereafter, the transcript reveals the following dialogue:

> "Q. What's the last thing he did to you that night?
>
> A. He threatened me, ma'am.
>
> Q. Threaten you, all right. Now, you need to tell me exactly what he said to you.
>
> A. He said that if he end up like Bryan…
>
> HER LADYSHIP: Sorry, he said …?
>
> THE WITNESS: He said that if he end up like Bryan he would kill me.
>
> Q. You said he said if he end up like Bryan, did you know who Bryan was?
>
> A. Yes, ma'am.
>
> Q. Who was Bryan?
>
> A. A next door neighbour who molest his [relative].
>
> HER LADYSHIP: A next door …?
>
> THE WITNESS: Neighbour, who molest his [relative]
>
> HER LADYSHIP: Just a minute, just a minute.

Q. Now, you said he told you he will kill you if he ends up like Bryan?

A. Yes, ma'am.

Q. What happened to Bryan?

A. He got two years in prison.

Q. For the same molestation?

HER LADYSHIP: No, no, I am sorry, I am sorry, please strike that, strike that from the record. Please do not go there.

MRS. C. HAY: Very well, m'Lady, I won't go back.

HER LADYSHIP: I am not allowing it. That is struck."

The submissions

[8] Mr Harrison submitted that the question "[f]or the same molestation?" "constituted inadmissible hearsay" evidence and in that connection, "there was a grave risk that the lay jury might have accepted that evidence from the complainant, thus finding that the applicant was guilty of "**the same molestation**" of her as was "Bryan" with respect to his [relative]". Mr Harrison submitted that the learned trial judge's effort to cure the vice was wholly inadequate, and that "the prejudicial inadmissible hearsay matter ought to have been judicially nipped in the bud". The learned trial judge, he submitted, ought to have "then and there disabused the jury's minds of the evidence in relation to Bryan". Further, he said, the learned trial judge ought to have dealt with the matter in her summation to the jury. That, she did not do. On that basis, therefore, he submitted that the verdict ought to be interfered with. In other words, he felt that the conviction on count one should be quashed.

[9] Mr Leighton Morris for the prosecution agreed with learned Queen's Counsel that the question "[f]or the same molestation?" ought not to have been asked. However, he was quick to point out that there was no recorded response thereto. The judge, he said, stepped in at the right time. Mr Morris submitted that the context in which the statements complained of were made had to be examined carefully. Such examination reveals, he said, that the answers by the complainant had nothing to do with the appellant so there was nothing prejudicial to his interest. In his view, the impact of the offending evidence on the trial would have been minimal, and the outcome would have been the same.

Judgment

[10] In our judgment, there was ample credible evidence to support the convictions that were recorded consequent on the jury's verdict. The evidence from the complainant to the effect that the appellant threatened her was part of the res gestae so there was nothing improper in its admission into evidence. We noted that there was no challenge to that evidence. What was challenged was the subsequent evidence that the neighbour had been convicted and imprisoned for similar molestation of a relative.

[11] In looking at the sequence of events, it was necessary for the prosecution to elicit the nature of the threat that had been issued by the appellant. The complainant stated that the appellant said he would kill her if he, the appellant, were to end up like Bryan. It was therefore logical, if the threat was to be understood, to inquire what had happened to Bryan. The revelation of what had happened to Bryan was not something of the complainant's making. It was the appellant who introduced Bryan into the picture. The

complainant was merely stating what had been said to her after the appellant had sexually assaulted her. This complaint by the appellant on appeal was clearly unmeritorious. It was a question of a drowning man clutching at straws. It was for these reasons that we made the order in paragraph [1] above.