[2012] JMCA Crim 46

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 24/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

DAMION ANDERSON v R

Cecil J. Mitchell for the appellant

Miss Keri–Ann Kemble for the Crown

4 July and 28 September 2012

BROOKS JA

[1] The appellant, Mr Damion Anderson, was convicted in the High Court Division of the Gun Court, held at King Street in Kingston, on 6 February 2009, of the offences of illegal possession of firearm, abduction and rape. He was sentenced to 10, two and 12 years respectively, for the offences. Whereas the sentence on the first two counts were ordered to run concurrently, the sentence on the third count was ordered to run consecutively to the first two.

[2] A single judge of this court gave the appellant permission to appeal against conviction and sentence. Mr Mitchell, on his behalf, abandoned the grounds originally

filed and succinctly argued three grounds of appeal. This was done with the permission of the court. The grounds are:

> "1. That the Learned Trial Judge erred in rejecting the evidence contained in the statement of Kaddian Robinson. Further that if the evidence of Kaddian Robinson had been accepted then the evidence of the complainant would have been rendered unreliable.
>
> 2. That in the circumstances of this case the Learned Trail [sic] Judge ought to have demonstrated that he had the matter of corroboration in his approach to the case as he assessed the evidence. That at no time in his summation did the Learned Trial Judge demonstrated [sic] or indicated [sic] that he considered the matter of corroboration.
>
> 3. That the sentence was manifestly excessive. That a consecutive sentence was not appropriate in all the circumstances."

[3] The evidence adduced by the Crown at the trial was that on 23 January 2007, at about 2:30 am, the appellant accosted the complainant (whose name, for the sake of her privacy, will not be disclosed in this judgment) at the door of a house at which she had been staying and, at that time, was just exiting. He was with a number of other men and she saw the handle of a firearm secured at the waist-band of his trousers. He held on to her and took her to an abandoned house nearby. There he demanded sex from her, but on enquiring of her and discovering that she did not have a condom, he sent one of the other men to fetch a condom for him while he waited with the complainant.

[4] When the condom was produced, he took off his clothes, put the firearm under the bed and had sexual intercourse with her without her consent. He then allowed her

to leave the room but when she went outside, she was held, against her will, by one of the other men. That man engaged her in conversation while the appellant looked on and laughed. She was eventually allowed to leave. She met with her boyfriend and later that morning they went together to the police station where she made a report about her ordeal.

[5] On 18 June 2007, she pointed out the appellant at an identification parade on which he was the suspect. She said that, before the incident, she had seen the appellant in her area, from time to time, over the course of about a month. She, however, had never spoken to him.

[6] The defence, at the trial, was that the appellant did not have sexual intercourse with her on the night in question. The appellant made an unsworn statement in which he categorised the complainant's story as a malicious lie. He said that he had previously been intimate with her and had promised her some money. It was his account that, on his failing to produce the money and declining to take her to his mother's home to stay there (she was staying at a friend's house), the complainant had, out of spite, told this lie on him.

[7] At the trial, the defence secured the admission into evidence of a statement given to the police by Mr Kaddian Robinson. Mr Robinson was the complainant's boyfriend with whom she was going to meet when she was accosted by the appellant. Mr Robinson did not testify at the trial as his whereabouts could not have been ascertained, at that time, by the police. According to the defence, Mr Robinson's

statement sharply differed from the complainant's evidence. It was argued that the contents of the statement should have been accepted by the learned trial judge or, at least, have placed the complainant's credibility in serious doubt.

[8] That is the gravamen of ground one, which was argued by Mr Mitchell.

Ground One: The effect of the evidence contained in Kaddian Robinson's statement.

[9] The essence of the difference between the complainant's testimony and the contents of Mr Robinson's statement, is that whereas she asserted that she met with Mr Robinson during the evening of 22 January 2007 and only parted company with him some minutes before she went to the house from which she was abducted, Mr Robinson's statement gives the impression that they did not meet at all, prior to the time that the incident, which she described, had occurred.

[10] On both accounts, however:

1. they had agreed to meet at a certain place;
2. she did not turn up at the appointed time;
3. he was calling her telephone and got no answer;
4. she called him some time later and recounted her ordeal; and
5. they went to the police station together to report the matter.

[11] Apart from the difference concerning whether there was a previous meeting, the complainant's evidence, as to the time that she and Mr Robinson met and the duration of their meeting, itself contained some inconsistency. In examination in chief, she stated that she was with her friend at a gas station until Mr Robinson arrived. It was when Mr Robinson arrived, she then said, that the friend left the gas station (see page 4 of the transcript). She did not state the time at which he arrived.

[12] At one portion of her cross-examination she said that her friend had left her by herself at the gas station (see pages 50 – 51 of the transcript). The complainant, at that point of the cross-examination, said, "[The friend left me] because I was waiting on someone." When the cross-examination resumed on a later date, the complainant testified that it was after Mr Robinson had arrived that her friend left. She then said (at page 62 of the transcript), "[Mr Robinson] was out there, that is why [the friend] left."

[13] These are matters which the tribunal of fact had to take into account. The learned judge considered the fact that Mr Robinson's statement had not been tested by cross-examination. He found that the untested evidence contained in the statement was not sufficient for him to disbelieve the complainant. This he was, as the tribunal of fact, entitled to do. He also, in accordance with the guidance given by the Privy Council in **Barnes and Others v R** (1989) 37 WIR 330 at page 340, identified the features of the statement which differed from the complainant's testimony. The learned trial judge also dealt with the inconsistencies in her testimony. Having done so, he said, at pages 138 – 139 of the transcript:

> "And so the question then would be, has this statement coming in from Mr. Robinson caused me to have doubts about the credibility of [the complainant]? Now, as I indicated, when it was being said that there was this inconsistency about her evidence, about the meeting of [sic] Mr. Robinson it was not an inconsistency at all. **I found overall that [the complainant] was a truthful witness, that she was endeavouring to speak the truth,** not that her evidence was perfect in every respect. It had inconsistencies but in my view those inconsistencies are not such as to let me say that she is a lying witness." (Emphasis supplied)

[14] It is a well-established principle that this court will not interfere with a trial judge's finding of fact, where the judge sits as judge and jury, unless the judge has made that finding on an incorrect principle or without an evidential foundation. The reason behind this principle is that the trial judge has had the opportunity to see and hear the witnesses and is in a better position, to assess credibility, than this court, which has only had the benefit of the transcript.

[15] In **R v Horace Willock** SCCA No 76/1986 (delivered 15 May 1987), Bingham JA (Ag) (as he then was) in giving the judgment of the court, said at page 5:

> "…the absence of reasons or findings in the summation would not necessarily provide a basis for disturbing the verdict of the learned trial judge, who as the tribunal of fact, had the clear and distinct advantage of seeing and hearing the witnesses at the trial and of weighing and assessing the demeanour of the witnesses….**Provided therefore, that on an examination of the printed record, there existed material evidence upon which there was a sufficient basis for the learned trial judge to come to the decision at which he arrived, there should be no reason for this court to interfere with the decision at which he arrived**." (Emphasis supplied)

[16] Based on these principles, this court would be loath to interfere with the findings of fact made by the learned trial judge. He was entitled to prefer the complainant's evidence over Mr Robinson's untested statement, he was entitled to accept the complainant's testimony as truthful and there was an evidential basis in her testimony to find that the charges against the appellant had been made out. For these reasons, this count must fail.

Ground Two: The necessity of a corroboration warning.

[17] Mr Mitchell argued that the circumstances of the instant case required the learned trial judge to demonstrate that he was aware of the need for corroboration of the complainant's testimony. Learned counsel argued that although there was no longer any mandatory requirement for a corroboration warning, it was still incumbent on the learned trial judge to give such a warning in exceptional circumstances. The instant case, he submitted, was an exceptional case because of the difference between the complainant's evidence and the contents of the statement given by Mr Robinson. Learned counsel argued that the learned trial judge fell into error when he failed to demonstrate that he addressed his mind to the issue of corroboration.

[18] There was no difference in opinion between counsel appearing before us, that the law regarding the requirement for a direction as to corroboration, had undergone major changes in the past 10 years. In **R v Duncan and Ellis** SCCA Nos 147 & 148/2003 (delivered 1 February 2008), F.A. Smith JA, after making a review of the

relevant cases concerning the establishment and banishing of the mandatory nature of the rule, cited with approval, a passage from the judgment in **R v Makanjuola** [1995] 1 WLR 1348 at page 1351 - 1352. In that passage, the court made it clear that it is now a matter for the discretion of a trial judge, whether or not to give a warning of the need to look for corroboration. That exercise of discretion, the court said, would "depend on the content and manner of the witness's [sic] evidence, the circumstances of the case and the issues raised". Their Lordships made other important statements of principle including, firstly, that there was no need for the trial judge to conform to any formula in giving the directions and, secondly, that it may be best for the trial judge to give any warning he deems appropriate, "as part of the judge's review of the evidence and his comments as to how the jury should evaluate it".

[19] Smith JA, in delivering the judgment of this court, also acknowledged that the Privy Council had, in **R v Rennie Gilbert** PCA No 10/2001 (delivered 21 March 2002), approved the rules of practice which had been set out in **Makanjuola**. In **Gilbert**, their Lordships, having stated that "the question whether to give a corroboration warning in sexual cases is a matter for the discretion of the trial judge", went on to say that "[i]t will only be in clear and exceptional cases that an appellate court will feel justified in interfering with the trial judge's exercise of his discretion".

[20] It was some time after those cases were decided that our legislature reduced the new practice, into statutory law. In fact the instant case was tried before the statutory framework was promulgated. For the future, it should be noted that section 26 of the Sexual Offences Act specifically deals with the matter of corroboration. It does not,

however, change the effect of the decisions in **Makanjuola**, **Gilbert** and **Duncan and Ellis**. The section states:

> "(1) Subject to subsection (2), where a person is tried for the offence of rape or any other sexual offence under this Act, **it shall not be necessary for the trial judge to give a warning** to the jury as to the danger of convicting the accused in the absence of corroboration of the complainant's evidence.
>
> (2) Notwithstanding the provisions of subsection (1), the **trial judge may, where he considers it appropriate to do so, give a warning** to the jury to exercise caution in determining-
>
> (a) whether to accept the complainant's uncorroborated evidence; and
> (b) the weight to be given to such evidence." (Emphasis supplied)

The portions emphasised show that the mandatory nature of the previous practice has been abolished. There remains, however, a discretion in the trial judge whether or not to emphasise the need for caution in assessing the complainant's uncorroborated evidence.

[21] In the instant case, the learned trial judge identified, almost at the beginning of his summation, that the defence was that the complainant's testimony was a "false story" and that the testimony had to be dealt with in that context. He said at page 108 of the transcript:

> "And so to that extent, the question of identification either in its pure sense, in the Turnbull sense that identification [sic], whether the witness is making up a false story on someone known to her but it would still need to be dealt with."

[22] The learned trial judge also addressed, not only the difference between the complainant's testimony and the contents of Mr Robinson's statement but also the inconsistencies in the complainant's testimony. Having identified them and assessed them, the learned trial judge dealt with the issue of her credibility. The learned trial judge found the complainant to be a witness of truth. It is in this context that he made the statement, at pages 138 - 139 of the transcript, which was quoted above at paragraph [13].

[23] On the critical issue of whether the defence caused the tribunal of fact any doubt as to the veracity of the complainant's testimony, the learned trial judge, in rejecting the unsworn statement, said at page 142:

> "And I do not accept the [appellant's] unsworn statement where he says that they were having this discussion earlier in the night and she is saying to him that since you can't get the money if she can come and stay up at his yard. Which makes no sense because she already have [sic] a place to stay up at [her friend's] house, so what is the point of all of this. Makes no sense at all. And so I reject the unsworn statement totally and completely."

[24] This is an experienced judge, sitting without a jury. Those quotations show that he considered the issue of the complainant's credibility and made a decision in respect of it. Ms Kemble for the Crown is correct in her submission that "the instant case is not a clear and exceptional one [to use the words in **Gilbert**] in which this court should seek to interfere with the discretion of the learned trial judge in not giving himself a corroboration warning". This ground should also fail.

Ground Three: Was the sentence was manifestly excessive?

[25] The learned trial judge, in passing a sentence of 12 years for the offence of rape, to run consecutively to the 10 year sentence for the illegal possession of firearm, spoke to the issue of deterrence. He said at pages 150 – 151 of the transcript:

> "So I don't believe that slave masters of your variety should be walking the face of the earth as a free man soon. I believe that persons like you should be locked up for a very, very long time and that is exactly what I am going to do. Sentences are going to be consecutive sentences….So that I don't claim that suddenly we are going to have no rapists and gunmen in Jamaica but we are going to have one less to worry about for 22 years."

[26] Mr Mitchell submitted that the learned trial judge failed to specifically consider that the offences were committed during the same transaction. This situation would normally attract concurrent sentences. He relied on the judgment in **Kirk Mitchell v R** [2011] JMCA Crim 1 in support of his submissions.

[27] This court has in recent times had many occasions to address the matter of consecutive sentences and has reminded trial judges of the need to consider the totality principle. Mr Mitchell's submissions are therefore well founded.

[28] Mr Mitchell is also correct in his observation concerning the norm where offences arise out of the same transaction. The consecutive element of the sentence results in a total sentence of 22 years. In the instant case, that sentence is excessive. The consecutive element thereof, must therefore, be set aside and a concurrent sentence substituted therefor.

Conclusion

[29] In conclusion, we find that the learned trial judge was entitled to prefer the testimony of the complainant where it differed from the untested statement of Mr Robinson. The learned trial judge, having seen the complainant and had an opportunity to observe her demeanour, was also entitled to find her to be a witness of truth, as he in fact did.

[30] The mandatory aspect of a direction concerning corroboration, having been abolished, the instant case was not one which was so "clear and exceptional" as to deserve a specific reminder to himself, by the learned trial judge, that there was no evidence supporting the complainant's testimony and that special caution was required. His failure to specifically so remind himself cannot therefore be fatal to this conviction.

[31] The consecutive element in the sentences imposed on the appellant has resulted in a sentence which is excessive in the circumstances. Accordingly, that element of the sentence must be set aside and an order that the sentences shall run concurrently be substituted therefor.

[32] Based on all of the above, the appeal against conviction is dismissed, the appeal against sentence is allowed in part, in that, the consecutive element in the sentence is set aside, and, instead, all sentences shall run concurrently and shall run from 6 May 2009.