[2015] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 34/2013

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

DELROY BENT v R

Cecil J Mitchell for the applicant

Mrs Tracy-Ann Johnson and David McLennon for the Crown

29 June and 3 July 2015

ORAL JUDGMENT

SINCLAIR-HAYNES JA (AG)

[1] Delroy Bent was convicted by a jury in the St James Circuit Court for the offence of rape contrary to section 3(1) of the Sexual Offences Act. He was sentenced by Sykes J to 15 years imprisonment. He, being aggrieved by his conviction, filed the following grounds of appeal:

a. Unfair trial.
b. Insufficient evidence to warrant a conviction.

[2] His application for leave to appeal was refused by the single judge who identified the main issues as identification and credibility. He ruled that the trial judge had given

adequate directions to the jury and found that the sentence was not manifestly excessive. (A legal aid certificate was however granted.) As is his right, the applicant has renewed his application before the court itself. We heard his application on 29 June 2013 and reserved our decision. This is the decision of the court.

The Crown's case

[3] The complainant visited her father on 9 July 2011. At about 2:00 pm that day, he left her at "clock" (the bus stop). She boarded a white bus which she said was driven by the applicant whom she knew as Ian. Her evidence was that she and her brother took the bus driven by the applicant in the evenings after school. She began taking that bus in 2011. She, however, was unable to recall the month. She knew his name was Ian because she heard him respond to that name. The applicant has not denied that he is also known as Ian.

[4] Her intended destination was her home in Trelawny. The bus drove the normal route and stopped to allow two male passengers to exit the bus. She was the only passenger left on the bus. After the two males disembarked, the applicant continued on the regular route. Upon reaching Sommerton, the bus deviated from its usual route. Whereupon she asked him where he was taking her and he told her that she was "lucky".

[5] The applicant stopped at a house, got out of the bus and spoke to an old man whom she did not know. The music in the bus prevented her from hearing their conversation. That conversation lasted minutes. The applicant then drove into an area

that was unknown to her. The area was in her words "bushy, bushy", which means that it was extremely bushy. All around, she said was only bush. There was no sight of a building anywhere. She began bawling loudly but the applicant continued to drive.

[6] He stopped the bus and came to the back of the bus where she sat. She testified that he picked a switch which he used to beat her on her left hand. She shook her right hand because the blows from the switch were extremely painful and caused her hand to swell. Whilst she was being beaten, she was seated on the back seat crying. The applicant stood over her with his head bent.

[7] He pushed her to lie on the seat and unbuckled her belt. As she attempted to get up he used both his hands to push her down. She was however unable to say how long each episode lasted. He pulled down her shorts and underwear; pulled down his pants and inserted his penis into her vagina without her consent. She was afraid and uncertain what he was going to do so apart from crying she did not do anything. She could not say if he wore a condom because she did not know what a condom was.

[8] After he forcibly pushed his penis into her vagina, he went outside of the bus. She then put on her clothes. She returned into the bus and he drove to Mount Salem where he left her. Upon arriving home, she saw her stepfather but she did not tell him what happened to her. At 10:00 pm her mother came home and she told her mother who took her to the Wakefield Police Station.

[9] She was taken by female police officer to the Falmouth Hospital where she was examined by a doctor. There she observed that blood was on her underwear. There was no evidence of swabs and smears being taken for forensic analysis.

[10] Sometime after, as she was seated in the back seat of her father's car, she spotted the applicant crossing a road. He was about 25 to 30 feet from her. She was however unable to provide any inkling as to how long after the incident he was seen. Upon seeing him, she pointed him out to her father. He was consequently taken into custody. An identification parade was held and he was positively identified by the complainant.

The defence

[11] The defence was one of alibi. The applicant denied the complainant's allegations that he drove her into bushes and raped her. The applicant said that on 9 July 2011, he was neither driving a white bus nor did he have two male passengers whom he drove to Sudbury. His evidence was that the bus he operated was green and on that day he and the bus were at a garage where the bus was being repaired.

Submissions

[12] Counsel, Mr Cecil J Mitchell, however told the court that he was unable to impugn the learned judge's summation. Mrs Tracy-Ann Johnson, acting deputy director of public prosecutions, submitted that the learned judge's directions were adequate.

Ground 1

Unfair trial

[13] The single judge of appeal rightly pinpointed identification and credibility as the main issues. The determining issue is that of credibility. Examination of the learned trial judge's treatment of the evidence on identification is necessary. The learned judge rightly explained to the jury that the holding of an identification parade in the circumstances of this case "added no value" because it was the complainant who pointed out the applicant to her father and caused him to be apprehended. Had it been someone else, an identification parade would have been necessary to test her reliability. The learned judge was indeed correct. The holding of an identification parade was otiose.

The identification evidence

[14] On the issue of identification, the learned judge followed the guidelines and strictures outlined in **Turnbull** [1976] 3 All E R 549. He directed them as follows:

> "…You don't stop there. You go and examine her evidence carefully to see whether she is also reliable, accurate and so her evidence can convince you that it is really Mr. Bent who was the person in the white van on the 9th of July, 2011, up in the bush, taking off her clothes and having sex with her without her consent. So you need to be sure about that. You have to look at the circumstances under which the identification is made and to see whether or not the identification made by Miss Stewart can be regarded as accurate, reliable, and trustworthy and so on.
>
> Now, for ease of analysis, we can divide identification evidence into two parts. Part one, is that we call prior knowledge. That is evidence of

> whether the witness knew the defendant before and Part two would be identification evidence by the witness of the defendant at the time when the incident occurred. But why is it that we divide identification evidence into these two parts? It is one, to assist with analysis, and to, hopefully, more accurate and reliable decision making process. What do we mean by prior knowledge? When we are dealing with prior knowledge, the relevant questions at that time are, did the witness know the defendant before the time of the alleged crime [?] If so, for how long [?] Under what circumstance would the witness be seeing the defendant before the time of the alleged crime? So those are the types of questions that you ask in relation to the prior knowledge part of the identification."

Corroboration

[15] The complainant had not yet attained her 12th birthday. She was therefore a young child. The learned trial judge pointed out the danger of acting on the uncorroborated evidence of a young child and gave the reasons. He however omitted to explain two of the reasons for the specific warnings. Those were the danger that the child may be susceptible to adult influence and also that the child might be subject to fallibility of memory. Credibility was the primary consideration for the jury. Although the explanation was omitted, the jury was entitled to act on the complainant's evidence if they believed her. That was made plain to the jury by the learned judge who addressed the issue of corroboration thus:

> "So you would have to be sure that when she [sic], what she described as sexual intercourse was, in fact, true – that is if you are going to accept her evidence – and that it is accurate and that it is reliable. So this is why when it comes to young children, while giving

evidence, it is desirable – not necessarily now – to have corroboration.

What does corroboration [mean]?

Corroboration is simply independent evidence; that is, evidence apart from the complainant's that would tend to show that; 1, it was the defendant who committed the act; 2 that it was done without her consent.

So there is no corroboration in this case. So there is really a double warning here. You have what you called, the child of tender years warning where, because it's a young child relating an incident --- young child now, and a young child then --- you need to examine the evidence with great care. It is desirable to have corroboration because experience has shown that young children sometimes are unable to put into words exactly what happened to them. Sometimes they describe things as sexual intercourse when it's not really sexual intercourse.

It is also said that sometimes young children have hyperactive imagination, so they dream up these things. So for all these reasons, it is desirable to look for corroboration.

In addition to that, this is a case of a sexual offence against a young child, so the corroboration would be desirable from the standpoint of assisting you to be clear in your mind that she is speaking the truth about the incident; that it was, indeed, Mr. Bent; that he had sexual intercourse with her and that she was not consenting, but as I said, there is no corroboration here.

So you may ask yourselves then, if corroboration is so important and there is none, why has this case not stopped? An important question. The reason why it has not stopped -- and you are to consider it -- is this. The law says that you, members of the jury, can still use the witness's evidence, the uncorroborated witness's evidence to convict – in this

> case, Mr. Bent – if you believe that notwithstanding the age of the child, notwithstanding the lack of corroboration, she is speaking the truth, you see, because the law doesn't say that young child equals untruthful witness. What the law says is that young children produce or generate this issue of reliability.
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> So this is why you examine the evidence carefully, bearing in mind the absence of corroboration and then ask yourselves, is this child speaking the truth? Is this child accurate? Is this child reliable? And if the answer to all those questions is yes, yes, yes, and you are sure that she is speaking the truth in relation to the rape, it is open to you to convict Mr. Bent. So that is why the case is being left for your consideration, even though there is no corroboration for her or of her evidence …"

[16] Harrison JA (as he then was), in the unreported case of **R v George Dingwall** SCCA No 124/1996 judgment delivered 11 October 1999, on page 4 explained the need for the warning thus:

> "On the trial of a sexual offence the learned trial judge must warn the jury, that in practice it is dangerous and unsafe to convict the accused on the uncorroborated evidence of the complainant and the reasons for that warning. If the complainant is a child of tender years, the said judge as a matter of practice is obliged to give an additional warning of the danger of acting on such evidence unless it is corroborated, for the reason that such a child may be subject to, (a) flights of fantasy, (b) the influence of adults or (c) unreliability, due to fallibility of memory. However, the jury should be told that in each case, despite the warning if they believed the witness they may act on the evidence of such a child."

[17] In **Dingwall** it was suggested to the complainant that she was influenced by her aunt. The complainant denied the suggestion. The court however was of the view that although the learned judge had properly warned the jury of the danger of convicting on the complainant's uncorroborated evidence, he ought to have warned them of their need for caution because of the susceptibility of such a witness to influence by adults, flights of fantasy and general unreliability. Harrison JA opined that in the absence of corroboration, the judge's failure to warn the jury was a material misdirection which deprived "the applicant of a proper consideration of the evidence against him."

[18] The question is, whether the judge's failure in this case constituted a material misdirection which would have deprived the applicant of the opportunity of a proper consideration of the evidence. In **Dingwall** an important issue was whether the complainant's aunt had influenced her to concoct her evidence against the applicant. In the instant case there is no allegation of anyone influencing the complainant. If there were, it would have been incumbent on the learned judge to give the specific warning. Failure to do so would have been fatal to the prosecution's case.

[19] Despite the learned trial judge's failure to specifically warn the jury that young children are susceptible to influence and likely fallibility of memory, the tenor of his summation sufficiently drove home the need to be cautious in assessing the evidence of young children. The learned judge's summation underscored the necessity to determine whether the complainant was truthful, accurate and reliable. He made it plain that the answer to each had to be in the affirmative. He admonished the jury to

examine the evidence carefully in light of the absence of corroboration. Any complaint of material misdirection would be unjustified.

[20] The learned judge also carefully refreshed the jury's memory as to the complainant's evidence regarding the conditions under which she was able to view the applicant's features. The learned judge dealt fully with evidence which the defence called in support of his case as was required. This ground has no real prospect of succeeding.

Ground 2

Insufficient evidence

[21] There was a notable absence of medical or forensic evidence, although it was the complainant's evidence that she was taken to the doctor the night of the incident. It was her evidence that blood was seen on her underwear and on a tissue which she used to wipe herself. The tissue was flushed and the underwear washed in the presence of the police. In addressing the issue, the learned judge said:

> "… So this led now, to criticism of the police officer who investigated the case, to say that, well, here it is that she has received what by any measure is a serious report, a report about a serious offence and is being said to you that her efforts to find the perpetrator really was not good enough and that was being put forward to you, to suggest that the Prosecution's case is unreliable and, therefore, you ought to acquit.
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> Now, as I said to you yesterday, you can't decide on what you have not heard. The oath says,

return a true verdict according to the evidence. So even if you were to conclude that the efforts of the investigating officer were deficient, not what you would like to see, [the] fundamental question never goes away, it still is, is [the complainant] speaking the truth when she says she was taken away in this van, after the van came from Sommerton, get [sic] into this bushy area and raped by Mr. Bent. And you can't decide that question on what you have not heard. You have to decide that question on the evidence before you and the only evidence placed before you in that regard, concerning the incident, is from [the complainant].

…

Now there is no medical or forensic evidence before you.

You heard that Mr. Bent apparently gave samples in January 2013. That was what was put to him, or what he said and you have not – no evidence had been placed before you as to what became of that. Well, there is no evidence, so don't speculate and wonder, if suppose that. You have heard [the complainant] was examined by a doctor and you haven't heard anything beyond that. Don't speculate. You make the decision based on the evidence you have heard.

If you believe [the complainant] when she speaks about what happened in the back of the bus, so that you are sure about her account, then it is open to you to convict Mr. Bent of Rape, even though there is no medical or forensic evidence. In order to convict Mr. Bent, you must be sure his account is simply not true and conjunctive and here now, the account given by [the complainant] is, in fact, true. So what we don't want, or what can't happen if you are being rational, is double truth theories."

[22] The learned judge reiterated that the burden of proof rested solely with the prosecution. He made it abundantly clear to the jury that the defendant bore no burden of proof, it was on the prosecution that was to satisfy them to the extent that they were sure that the complainant was indeed raped and that it was the applicant who raped her.

> "So in assessing the evidence, looking at [the complainant]'s evidence, there is no corroboration. I told you about that. There is no forensic evidence to support her account and then she was between 11 and 12 at the time and I have told you about children of tender years, one, and children of tender years and sexual offences. So you take those two warnings into account. Examine all the evidence in the case, bearing in mind that the Prosecution has the duty to prove the case so that you feel sure. No burden [is] on the defendant to prove anything. So if you reject Mr. Bent and all of his witnesses, that does not translate into proof of the Prosecution case. All that it would mean is that you disbelieve Mr. Bent and his witnesses. If that is your position, then you examine [the complainant's] evidence, bearing in mind the warnings I have given to you and decide whether the Prosecution have made me feel sure."

[23] The absence of any medical or forensic evidence supportive of the complainant's claim is to be deplored. The trial judge, however, having properly discharged his duty, the responsibility of determining the credibility of the complainant was left entirely with the jury. This ground also has no prospect of succeeding. Accordingly, the application for leave to appeal is refused. Sentence is to be reckoned as having commenced on 2 May 2013.