[2014] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL
SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 96/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

DENJAH BLAKE v R

Trevor Ho Lyn and Miss Ashley-Ann Foster for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Mrs Lori-Ann Cole-Montague for the Crown

9 December 2013 and 29 April 2014

MORRISON JA

[1] On 6 October 2011, after a trial before Evan Brown J and a jury in the Home Circuit Court, the appellant was found guilty on an indictment charging him with the offences of rape and indecent assault. On 25 November 2011, the learned trial judge sentenced the appellant to 15 years' imprisonment for rape and three years' imprisonment for indecent assault. The court ordered that these sentences should run concurrently.

[2] Pursuant to leave to appeal granted by a single judge of this court on 5 November 2012, the appellant challenged his conviction and, on 9 December 2013, we

allowed the appeal, quashed the conviction and set aside the sentences. However, in the interest of justice, the court ordered that the appellant should stand his trial anew as soon as possible. These are the reasons which were then promised for the court's decision.

[3] Because of the outcome of the appeal, we propose to give no more than a basic outline of the facts upon which the prosecution relied at the trial. At some time after 6:00 am on 19 April 2008, the complainant, then a young woman of 21 years, left her home in Denham Town in the parish of Kingston. On foot, she was on her way to work, dressed in her uniform, at the Total Service Station on Heroes Circle, a journey that would normally take her half an hour. At about 6:40 am, as she walked up Orange Street, she saw what appeared to be an abandoned building to her right. The building was, she said, "poorly fenced" with zinc. She then heard a male voice calling out to her from the direction of the building. At first, she ignored the voice, but, after the calling continued, becoming more aggressive, she finally looked over at the building, where she saw the appellant standing on a step of the building behind the zinc fence.

[4] The appellant then called out to the complainant, "…come here, mi strap", by which she understood him to mean that he was armed with a gun. As he said this, his hand was at his waist. Feeling "extremely scared", the complainant approached the appellant, who took her by the hand and pulled her to the side of the building. The appellant then told her to "gi mi a quick 'backers' right yah soh". By this, she understood the appellant to want her to have sexual intercourse with him. Afraid and shocked, the complainant said, she saw the appellant remove something from his waist

and place it underneath the cellar of the building. The appellant then had sexual intercourse with her without her consent more than once and also forced her to perform oral sex on him. At a point during this "ordeal", as the complainant described it, the appellant was interrupted by a man who, having observed what was taking place, directed the appellant to another location inside the building. The complainant was taken by the appellant to this location, where the sexual assault on her continued. During all of this, the complainant testified that she was compliant because, she said, "I was afraid and I was scared". Despite the complainant having thought that the appellant may have been armed, no firearm was found at the scene when the police finally arrived, after a report had been made (it was not clear by whom) and the appellant had been apprehended.

[5] In an unsworn statement from the dock, the appellant did not deny having sexual intercourse with the complainant on the morning in question. However, he maintained that the encounter was entirely consensual and that no force was used by him at any point. He denied saying anything about "no strap" and stated that "I did not had [sic] no weapon on mi, not even a pin…". Further, he said, "Anyone know mi would tell yuh that I am not a violent person and I don't walk with weapon".

[6] Mr Trevor Ho Lyn, who represented the appellant on the appeal with admirable economy and clarity, challenged the appellant's conviction on three grounds:

> "1. That the summing up of the Learned Trial Judge was poorly structured and as a result the defence of the Appellant was undermined to the extent that his defence

> was not properly put [to] the jury for their consideration and in particular that the Learned Trial Judge failed in his summing-up to properly direct the jury with regard to the mens rea required for rape and specifically the effect of the appellant's honest belief that the complainant was consenting and how it would affect his mens rea and his failure resulted in the Appellant's defence not being properly considered by the jury and the Appellant was therefore deprived of the possibility of an acquittal.
>
> 2. That in the course of his unsworn statement the Appellant raised his good character but the Learned Trial Judge in his summing-up made no mention of this fact and as a result gave the jury no assistance on the relevance of a good character direction.
>
> 3. The Learned Trial Judge failed in his consideration of the appropriate sentence to balance the mitigating factors against the aggravating factors and thereby did not consider properly the context in which the incident occurred so that the resulting sentence imposed was manifestly excessive."

[7] On the first ground, Mr Ho Lyn focused primarily on the trial judge's directions on the possibility of the appellant having had an honest belief that the complainant was consenting to sexual intercourse with him. It was submitted that in the circumstances of the case specific directions were required on this point to ensure fairness to the appellant. Mr Ho Lyn observed that, although the judge did tell the jury that if the appellant honestly believed that the complainant was consenting to sexual intercourse he was entitled to an acquittal, no attempt was made to relate this direction to the evidence in the case. Additionally, Mr Ho Lyn complained, the learned judge did not tell the jury what should be the consequence of their disbelieving the appellant's unsworn statement. On the second ground, Mr Ho Lyn pointed out that, despite the appellant

having raised the issue of his good character in his unsworn statement, the judge did not give appropriate directions to the jury on the issue.

[8] In a response in the highest traditions of her office, the learned Director of Public Prosecutions quite properly conceded that this was "a troubling case", on both the first and the second ground. On the first ground, the director agreed that the issue of honest belief had not been sufficiently addressed by the judge in the summing-up; and, on the second, she accepted that the judge ought to have directed the jury on the impact of the appellant's good character on his propensity to commit the offences for which he was charged.

[9] The first ground goes to the issue of consent, which lay at the heart of the appellant's defence. In the landmark case of ***Director of Public Prosecutions v Morgan*** [1976] AC 182, the House of Lords confirmed that if a defendant accused of rape believes that the complainant has consented, whether or not that belief is based on reasonable grounds, he cannot be found guilty of rape. This is how Lord Fraser of Tullybelton stated the position (at page 237):

> "…If the effect of the evidence as a whole is that the defendant believed, or may have believed, that the woman was consenting, then the Crown has not discharged the onus of proving commission of the offence as fully defined and, as it seems to me, no question can arise as to whether the belief was reasonable or not. Of course the reasonableness or otherwise of the belief will be important as evidence tending to show whether it was truly held by the defendant, but that is all."

[10] In this case, it is clear that the learned trial judge had this decision in mind when, as part of his general directions to the jury, he told them the following:

> "Now, if the accused man honestly believed that the complainant was consenting, it doesn't matter if his belief was based on reasonable ground [sic]. If he honestly believed that she was consenting, you cannot find him guilty of the offences."

[11] That, so far as it went, was an accurate direction, by which the judge gave effect to his obligation to draw the jury's attention to any possible defences available on the evidence, even if not specifically raised by the defence. But in ***Regina v Chester Gayle*** (1978) 25 JLR 317, a decision of this court to which we were referred by Mr Ho Lyn, a substantially similar direction by the trial judge was successfully impugned on appeal, on the ground that the judge had failed to relate his directions to the evidence in the case. Speaking for a strong court (Kerr, Wright and Downer JJA) Downer JA commented (at page 320) that the trial judge's "general directions early in his summing-up, impeccable though they were, were not co-related to the evidence raising the issue of honest belief that must be negatived by the prosecution".

[12] The same criticism can, in our view, fairly be made of the judge's summing-up in this case. For, although he did tell the jury that "the essential question in the case is whether or not the complainant was consenting", and that "you must examine her conduct to see if you are satisfied that she was not consenting", the learned judge did not invite them to take the crucial further step: that is, to consider what impact, if any,

the "conduct" to which he referred might have had on the question of the appellant's honest belief as to the complainant's consent. In this regard, among the points which arose on the evidence was whether, given the complainant's apparent compliance and her failure to avail herself of such opportunities as may have presented themselves for her to raise an alarm, the appellant may have been encouraged in the belief that she was consenting. This was, of course, a matter for the jury's determination and, although they may ultimately have come to the conclusion that the appellant did not in fact have any such honest belief, he was plainly entitled to the jury's fair consideration of all aspects of his defence, including this possibility.

[13] The learned judge therefore left the case to the jury purely on the basis of whose account they believed:

> "If you believe the complainant had sexual intercourse with this accused man, at all times consenting and also had oral sex with him, consenting, then that is the end of the case. But if you believe, the complainant, the crown has made you feel sure. If the complainant was not consenting…then you have but one option and that is to just return verdicts of guilty on each count of the indictment."

[14] This direction, given close to the end of the summing-up, again correct so far as it went, elided the essential intermediate consideration of what would be the result of an honest belief by the appellant that the complainant was consenting, a finding which was available to the jury in the evidence. It is true that, right at the end of the summing-up, the judge did tell the jury that "if you find that the circumstances were such that the accused man believed that the complainant was consenting to the sexual

acts, whether they be per vagina or oral then your verdict must be not guilty too". But this was no more than a repetition of the only other explicit mention of honest belief in the summing-up (see para. [12] above). It too was deficient in detail as to the factors in the evidence which, if believed, could lead the jury to conclude that the appellant had, or may have had, such an honest belief that the complainant was consenting.

[15] Mr Ho Lyn made the additional point that the learned trial judge did not tell the jury what should be the consequence in the event of their disbelieving the appellant's unsworn statement. What the judge actually said was this:

> "Mr. Foreman and members of the jury, if you accept what the accused man has said to you, if you accept that the complainant was consenting to sexual intercourse…then your verdict would have to be not guilty. If what he said…has left you in doubt, then the prosecution would not have proven the case to the point where you feel sure so your verdict would still be not guilty."

[16] So the judge told the jury, correctly, that if they either accepted what the appellant said in his unsworn statement or were left in doubt by it, they should acquit. However, as Mr Ho Lyn correctly observed, the judge omitted to tell the jury that even if they rejected the unsworn statement in its entirety, they could not on that basis only convict the appellant, but were obliged to look back at the case for the prosecution to determine if they were so satisfied by it as to be sure of his guilt.

[17] As regards the second ground, it is clear that, as the director frankly conceded, the appellant put his character in issue by asserting his reputation for non-violence (see para. [8] above). Mr Ho Lyn did not contend for a direction on the relevance of the appellant's good character to his credibility, recognising, as is now generally accepted in the authorities, that the value of such a direction to the appellant would have been qualified by the fact that he had opted to make an unsworn statement in preference to giving evidence on oath (see, for instance, ***Michael Reid v R*** (SCCA No 113/2007, judgment delivered 3 April 2009, para. 44(iii); ***Bruce Golding & Damion Lowe v R***, SCCA Nos 4 & 7/2004, judgment delivered 18 December 2009, paras 91-92; and ***Horace Kirby v R*** [2012] JMCA Crim 10, para. [11]).

[18] But it is equally clear from the authorities that the appellant, who had no previous convictions, was entitled to the benefit of a direction as to the relevance of his good character to his propensity to commit the offences with which he was charged. The judge failed to give any such direction. This omission, when coupled with the inadequate directions on the issue of honest belief, left us in a position in which we were unable to say that, even had they been suitably directed, the jury would inevitably have convicted the appellant.

[19] These are the reasons for our decision to allow this appeal and order a new trial in the interest of justice. In the light of this decision, it was not necessary for us to consider the appellant's third ground, which related to the sentences imposed by the learned trial judge.

[20] We cannot leave this appeal without commenting, as both counsel did, on the learned judge's summing-up. Mr Ho Lyn characterised it, echoing the single judge who gave leave to appeal, as "unstructured", while the director's comment was that the summing-up was "not as tight as one would wish". We entirely agree. We have already drawn attention to the partial directions on honest belief and the correct approach to the unsworn statement, and the non-direction on the impact of good character. More generally, it must surely be highly unusual to find the first reference to the presumption of innocence and the burden and standard of proof, arguably the foremost considerations for the tribunal of fact in a criminal case, closer to the end, rather than to the beginning, of the judge's standard directions on the law. Then, after telling the jury what the prosecution was required to prove to establish each of the two counts, the judge invited them to "briefly review the case as it was presented by the prosecution and the defence", pointing out certain aspects of the evidence in that exercise. When that was done, the judge next told the jury that he was going "to go over the evidence line by line", which he then proceeded to do to an extent only, and not sequentially.

[21] All of this suggests to us that the judge's summing-up was essentially unplanned. Even in the simplest case (and this was not one of any surpassing difficulty), a summing-up will inevitably benefit from careful advance preparation. While it is true that no particular form of words or order of presentation is required of a judge in summing-up to a jury, it is always the case that, as Lord Hailsham LC observed in a well-known dictum in ***R v Lawrence*** [1982] AC 510, 519, "[a] direction to a jury

should be custom-built to make the jury understand their task in relation to a particular case". Had this simple prescription been adhered to by the trial judge in this case, it may not have been necessary to subject either the complainant or the appellant to the ordeal of a new trial.