[2010]JMCA Crim 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 67/2008

BEFORE: THE HON. MR JUSTICE HARRISON, J. A.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE McINTOSH, J.A. (Ag)

SHELDON BROWN v R

Ernest Smith instructed by Ernest A Smith & Co. for the applicant

Miss Sanchia Burrell for the Crown

9 March and 2 July 2010

PHILLIPS, JA

[1] The applicant was tried on 12, 13, 14, and 21 May 2008 in the Manchester Circuit Court, before Mr. Justice Pusey and a jury for the offences of abduction and rape. He was convicted on both counts and sentenced to 10 years imprisonment at hard labour and 20 years imprisonment at hard labour respectively, with the sentences to run concurrently. His application for leave to appeal against conviction and sentence was considered by a single judge of this court and was refused and he has accordingly renewed his application before the court itself.

[2] The learned trial judge at the beginning of the summation to the jury advised them that although there were other matters for them to decide, the main issue in the case was one of identification. He said they would have to decide not only whether all the things that the complainant said had happened to her had in fact occurred but whether the person who did those things to her was the applicant Sheldon Brown.

The case for the prosecution

[3] The main witness for the prosecution testified that she had gone to bed on the night of 19 September 2007 and at about midnight she was awakened by someone (later identified as the applicant) who kicked off the door, entered her room, and attempted to choke her. He was naked, except for "something" around his neck. He told her that he had come to kill her as he had been paid to do so. He forced her to leave the house in her nightgown only. She was not even allowed to put on shoes. She was taken to various places: the side of the road, an old bathroom and then a particular room where the applicant told her that her boyfriend was involved in "something" and as a consequence he had been sent to kill her. He even spoke to someone on the phone indicating that he had "the girl now" and that the person should make sure he/she had the rest of the money.

[4] The complainant gave evidence that the applicant had sexual intercourse with her without her consent several times and then the applicant took her home and had sex with her yet again. Eventually the ordeal came to an end, and the applicant left her at home in the morning. After he left, she made a report to the police and at a later date pointed out the applicant at an identification parade.

[5] The complainant was challenged on cross-examination which attacked her credibility as to whether she had called out to her neighbours with any force, why she had not been able to identify an alleged scar on the applicant's forehead and why since she testified that she knew the applicant's brother, she had not said so to the police. She was also challenged about why she had not said before giving evidence at the trial, that the first time that she saw the applicant's face so that she knew who he was, was when she went outside the house and he was under the streetlight. The challenge by the defence was that if she had known these persons before then why had she not said so.

[6] In this case, there was expert medical evidence which stated that there were bruises on the vulva which seemed, by the doctor's observation, to have been of recent origin. It was suggested that on this evidence there may not have been any penetration of the vagina but there was no specific evidence that there was no penetration so this

evidence would not necessarily have had any effect on the credibility of the virtual complainant.

[7] There was also evidence given in this case by the investigating officer, Mrs Chambers-Bertram and the officer who conducted the identification parade. Although she was the officer in charge of the case, Mrs Chambers-Bertram indicated she had informed the accused and the witnesses when the parade was to be held, (which the trial judge said was in breach of the spirit of the "rules", referring to the Rules for the Guidance and General Direction of the Jamaica Constabulary Force, in relation to the conduct of identification parades). Mrs. Chambers-Bertram did not conduct the identification parade however, and the evidence was that the applicant was given the opportunity to choose the persons in the line-up. These persons had their heads tied and any particular scars covered with toothpaste. The applicant was told that he could stand at any spot that he wanted to, and he stood under the number seven, and was readily identified by the complainant.

The case for the defence

[8] The applicant gave an unsworn statement from the dock. His statement was short and simple. He did not know the complainant and he did not know anything about what had happened to her at all and could not say anything about her circumstances.

The application

[9] At the hearing of the application for leave to appeal against conviction and sentence, counsel for the applicant informed the court that he had perused the documentation before the court and was unable to formulate any challenge to the directions of the learned trial judge as he had outlined the offences in detail for the jury had dealt adequately with the issue of identification and had warned the jury of the dangers of relying on the evidence of the sole eye-witness without corroboration. Counsel was then invited by the court to address the directions of the judge on the question of alibi which at first blush appeared to be confusing.

[10] Counsel then filed the following supplemental grounds of appeal and sought leave of the court to argue the same which was granted.

Grounds of Appeal

> **"**1. That the learned trial Judge mis-directed the jury on the defence of alibi when at **Page 36 lines 7-16** he said:
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> > "I also say that in the circumstances, where he says he did not know this person at all, and he did not know what happened, then it is in a case such as this, you are in a position to find him guilty unless you definitely reject what he says. In other words, he

> is saying that I don't know this man, this lady. I was not there at all. You would have to totally reject what he is saying to come to a verdict of guilt on this matter."

2. That the effect of the direction at **Page 36 lines 7-16** was that once the Jury rejected the alibi of the Appellant they were entitled to find him Guilty without reference to the Burden and Standard of proof which the Crown must satisfy.

3. That the Learned Trial judge should have directed the Jury that even if they rejected the statement of the Appellant they had to be satisfied on the Crown's case before they return a verdict of guilty."

[11] Counsel for the applicant argued that the judge had mis-directed the jury on the burden of proof with regard to how they ought to treat the defence of alibi. He submitted that the direction given by the learned trial judge would have given the jury the impression that the verdict of guilty or not guilty depended on the view they took of the applicant's unsworn statement and the applicant had thereby been denied a fair trial and the opportunity of a not guilty verdict. Counsel further submitted that the direction set out in ground 1, was "confusion at its highest". The natural

interpretation to be given to the direction as worded, he said, was that once the alibi was rejected, the applicant must be guilty without any reference to the burden and standard of proof which always rest on the Crown. In fact, he submitted, the effect of the direction was that once the defence of alibi is raised, the burden of proof shifts which is bad in law and there was no attempt by the trial judge to correct this 'fundamental flaw' in the directions to the jury.

[12] Counsel for the Crown conceded that the particular direction stated above was confusing and amounted to a mis-direction but submitted that in the circumstances of this case, the court should apply the proviso to section 14 (1) of the Judicature (Appellate Jurisdiction) Act as no substantial miscarriage of justice would actually have occurred.

Analysis

[13] In this case, as indicated previously, the applicant gave an unsworn statement from the dock. His position was that he did not know the virtual complainant, nor did he know anything about what had happened on the night in question. At best, it could only be implicit in that statement that he was saying that he was not where the complainant had said he was.

[14] Lord Widgery, CJ in ***R v Turnbull,*** [1976] 3 All ER 549 has given clear guidelines with regard to the directions to be given to the jury in respect of

the support for identification which might be derived from the fact that they have rejected an alibi. He stated:

> "False alibis may be put forward for many reasons: an accused , for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

[15] The Privy Council considered this dictum in **Mills, *Mills, Mills and Mills v R*** (1995) 46 WIR 240, which was a case in which the appellants' alibi had been put forward in unsworn statements from the dock. The question was whether in such a case the judge was required to give a direction on the impact of the rejection of an alibi along the lines indicated by Lord Widgery C.J. In a judgment delivered by Lord Steyn, the Board held, (as this court had done) that no such direction was necessary and that such cases were governed by the guidelines given by the Board 20 years earlier in ***DPP v Walker,*** that is, that the jury should give the unsworn

statement "only" such weight as they think it deserves" (***DPP v Walker*** (1974) 21 WIR 406, 411).

[16] Additionally in the instant case, the applicant has not said anything about his whereabouts at all on the said night, he has not even said that he was not there because he was somewhere else. In ***Roberts & Wiltshire v R*** SCCA Nos. 37&38/2000 delivered 15 November 2001) Smith, JA (Ag), as he then was, made it clear what evidence is required by the applicant if it is to be said that he has raised the defence of alibi (at page 8):

> "Section 11 (8) of the Criminal Justice Act 1967 (UK) defines evidence in support of an alibi as evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time, he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. There can be no doubt that this statutory language embodies the common law and is the meaning of alibi evidence in this jurisdiction. We accordingly hold that a trial judge is only required to give a direction on the defence of alibi where there is evidence that the defendant was at some other particular place or area at the material time. Evidence which merely states that he was not at the place where the offence was committed does not raise the defence of alibi. We agree with counsel for the Crown that the judge in the instant case was not required to put the clothes of alibi on the appellant's defence and a direction on burden of proof was sufficient."

[17] In the case before us, since there is no information whatsoever of the applicant being at a particular place at a particular time, the learned trial judge was only required to give directions with regard to the burden of proof and to exhort the jury to give the unsworn statement such weight that they think it deserved. The duty to give the direction on the burden of proof has also been provided with clarity in this court. In ***R v Dean Nelson*** SCCA No. 138/2000 delivered 3 April 2003, Forte P, as he then was, in delivering the judgment of the court said:

> "In dealing with the defence of alibi, the trial judge has a duty to inform the jury that the burden of proving that the accused was present committing the crime rests on the prosecution, that the accused has no burden to prove that he was elsewhere, that the fact that they did not believe the alibi of the accused, was not by itself a sufficient basis for conviction, as in keeping with the burden of proof, they will have to examine the prosecution's case to determine whether it has proven that the accused was present committing the crime."

[18] The learned trial judge in the instant case had therefore complied with the guidance given by this court, as in his summation he had stated at page 35 of the transcript:

> "But again, as Counsel for the Defence said, if you believe him, you need to listen (sic) what he said. If you believe him, you find him not guilty. Even if you don't believe him, you need to again go back and look at the Crown's evidence and

> see whether or not they have proven their case beyond a reasonable doubt. In other words, have they made you sure in the circumstances."

[19] Earlier in the summation, the learned trial judge had this to say at pages 5-6 of the transcript:

> "Now, there is something which is very important in our system of justice. We speak about what we call a burden of proof, and what we say in relation to that, the prosecution who have brought Mr. Brown here, must prove that he is guilty. He doesn't have any responsibility to prove that he is innocent. And, I say all the time, we see on television people proving their innocence, that is not how it is. The law is that the prosecution must prove his guilt and that is why you have heard counsel say he comes in here with a presumption of innocence. We assume that he is innocent, and when you decide he is guilty we are going to change it, but you decide that as I said, only if they have proven the case and when we say they have proven the case, you might ask the question, how do they succeed in proving their case, and we answer by saying that they do by making you sure of his guilt, nothing less than being sure will do."

[20] These directions in our view ought therefore to address the complaint of counsel for the applicant with regard to the burden and standard of proof, as the learned trial judge stated quite clearly that it rested on the prosecution throughout the case. However these directions were somewhat weakened by the impugned words at page 36 of the transcript, as set out in ground 1 above. The directions at page 36,

however, were later followed by the statement which reads (at page 37 - 38):

> "And remember, I have said to you, very clearly, that you need to go through, look at the evidence, if you are sure, if you are satisfied on each charge, you can return a verdict of guilty, if you are not sure, or if you disbelieve the witness, especially in terms of the identification, then you must return a verdict of not guilty, in the circumstances."

[21] It is plain to us that, when looked at in its entirety, particularly as the defence did not raise a defence of alibi in law, and therefore no directions were required in that regard, the directions given by the learned trial judge were sufficient for the purposes of this case. The real issue in the case was identification and the directions were very clear in that regard. Further the jury returned a verdict within minutes of retiring as the evidence presented by the prosecution was strong. In our view, there was no miscarriage of justice.

Conclusion

[22] In light of the above, the application for leave to appeal against conviction and sentence is refused. The sentences are to commence on 21 August 2008.