JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 125/07

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag)

KEVIN BRYAN v R

Mr Robert Fletcher for the applicant

Mr Dirk Harrison, Deputy Director of Public Prosecutions (Ag), Mrs Nadine Atkinson - Flowers, Crown Counsel (Ag), for the Crown.

27 October, 28 November 2008

MORRISON, J.A.

1. This is an application for leave to appeal against a conviction and sentence for the offence of carnal abuse. The applicant was indicted and tried before Sinclair-Haynes J and a jury for the offence of rape. On 9 March 2007 the jury found him not guilty of rape, but guilty of carnal abuse, that verdict having been left to them as an alternative by the learned trial judge.

2. The applicant's sentencing was however delayed by an indication to the court from the jury after the verdict had been taken that they had not intended to return a verdict of guilty in respect of the alternative offence of carnal abuse. As a result, the learned trial judge on 30 March 2007 reserved a question for the consideration of this court, pursuant to

section 55 of the Criminal Justice (Administration) Act, in the following terms:

> "Where the foreman stated in answer to the Registrar that the accused was guilty of carnal abuse but the jury by a majority including the foreman almost immediately after their discharge indicated that they did not deliberate on the question of carnal abuse, should the verdict be allowed to stand or should there be a retrial?"

3. On 26 September 2007 this court determined that the verdict of the jury should stand and the case was accordingly remitted to the Home Circuit Court for sentencing. The matter was then dealt with by Sinclair-Haynes J on the following day, 27 September 2007, when the applicant was sentenced to imprisonment for three years.

4. The prosecution's case at trial was that on a day in August 2005 the complainant, who is the applicant's step daughter, was at home when the applicant, who had been sitting on her bed chatting with her, grabbed her by her hands, pulled her down on the bed and had sexual intercourse with her without her consent. At that time, she was 14 years of age (she was born on 28 April 1991). The applicant's defence was that he did not touch the complainant at any time and that her story was a complete fabrication. The complaint was motivated, he maintained, by the fact that there was tension between himself and the complainant's

mother, and also as a reaction to his own parental strictness with the complainant.

5. For the purposes of this judgment, it is only necessary to refer to one additional aspect of the evidence. The complainant's evidence was that after the incident she reported it to her boyfriend, her mother and to the guidance counsellor at her school. The guidance counsellor was not called as a witness for the prosecution at the trial, but the complainant's mother was allowed to testify to an occasion in October or November 2005 (that is, after the incident) when there was a meeting between the guidance counsellor, the applicant and herself. At that time, she testified, the guidance counsellor told her in the presence and hearing of the applicant, that the complainant had made a report to him that the applicant had "had sex with her". The guidance counsellor then turned to the applicant "and asked him and he said 'yes, he did it'". The applicant then said to the guidance counsellor, "I will deal with it".

6. It was put to the complainant's mother by the applicant's counsel in cross-examination that she was lying about this encounter and that the applicant had not told the guidance counsellor that he would take care of it, or that he "was not going to trouble" the complainant again, as she agreed that she had also stated to the police.

7. At the hearing of this application, Mr. Fletcher, who appeared for the applicant, sought and was given permission to argue the following grounds of appeal:

1) The learned trial judge erred in fact and law in leaving the alternative verdict of carnal abuse to the jury as there was no fact, combination or permutation of facts from which a jury, properly directed, could have found in this case that sexual intercourse took place with the complainant being a willing participant.

2) The verdict is unreasonable having regard to the evidence.

3) The learned trial judge erred in admitting evidence of the wife of the accused which was hearsay and more prejudicial than probative and in addition, having admitted such evidence, did not provide appropriate or adequate assistance to the jury in assessing the evidence.

8. Grounds 1 and 2, which were argued together by Mr. Fletcher, raise the question whether, on the evidence in the case, the alternative verdict of guilty of carnal abuse should have been left to the jury at all. A subsidiary question which naturally arises is whether, assuming that the verdict was properly left to the jury, the learned trial judge's directions to the jury were adequate in the circumstances.

9. Towards the end of her summing up to the jury, the learned judge, having given directions on the ingredients of the offence of rape, also left to them the alternative verdict of carnal abuse, prompting the submission from Mr Fletcher that "an alternative verdict never arises ***ex nihilo***" and that there needed to have been a basis in the evidence for the judge to have left carnal abuse to the jury. This is how counsel put it in his written submissions:

> "In the instant matter the facts reveal diametrically opposed cases for the defence and the crown and it will be argued that none of the facts adduced in evidence admits of this third possibility. Consequently, the verdict ought not to have been left to the jury in the first place or if left, the trial judge was duty bound to assist the jury as to what permutation of the evidence might amount to the alternative, if they so found. The judge was also under a duty to assist the jury more as to the consequences of rejecting the credibility of the complainant."

10. Mr Harrison for the Crown submitted that it was open on the evidence for the judge to have left the alternative verdict of guilty of carnal abuse to the jury and that her directions in this regard were adequate.

11. The offence of rape is a common law offence of great antiquity. The offence of carnal knowledge is, however, created by sections 48 (relating to a girl under 12 years of age) and 50 (relating to a girl over 12, but under 16) of the Offences Against the Person Act ("the Act"). Section 50 is the relevant section in this case:

> "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age or sixteen years shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to imprisonment for a term not exceeding seven years."

12. The availability of a verdict of guilty of carnal abuse as an alternative to a verdict of guilty of rape in certain circumstances is the result of the operation of section 49(1) of the Act, which is in the following terms:

> " (1) If upon the trial of any indictment for rape, the jury are satisfied that the defendant is guilty of an offence under section 48 or 50, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in an indictment or of an attempt to commit the same, the jury may acquit the defendant of such felony and find him guilty of an offence under section 48 or 50 or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault."

13. Both the common law and the statutory offence share the common ingredient of unlawful sexual intercourse with a female. However, while absence of consent is an essential element of rape, it is otherwise in the case of carnal abuse where "consent is immaterial, that is, it matters not if the girl consented to the act" (per Duffus P in ***R v Lewis*** (1966) 9 WIR 333, 335). Thus, although in some cases of unlawful sexual intercourse the evidence will disclose commission of both offences, it can also be the

case that a conviction can only be secured for the statutory offence and not for the common law offence, as for instance in the case of a girl under the statutory age who might have consented.

14. None of this is controversial or new and the relevant history is fully dealt with in the interesting judgment of Duffus P in ***R v Lewis***, to which we were very helpfully referred by Mr Harrison. That was a case in which it was held that, although the evidence clearly supported the verdicts of guilty in respect of the two separate counts of rape and carnal abuse, the trial judge had erred in allowing verdicts to be taken from the jury in respect of both counts, as if they were separate substantive counts and not in fact alternative counts. The procedure which ought to have been followed was that on the return of the verdict of guilty on the first count, the jury should have been discharged from giving a verdict on the second, and clearly alternative, count.

15. In the instant case, the applicant was indicted on a single count of rape and the question posed by Mr Fletcher's thoughtful submission is, therefore, in what circumstances on a charge of rape should the alternative offence of carnal abuse be left to the jury?

16. Alternative verdicts generally were recently revisited by the House of Lords in ***R v Coutts*** [2006] 4 All ER 353, in which the following dictum of Mustill LJ (as he then was) in ***R v Fairbanks*** [1986]1WLR 1202, 1205-6, was expressly approved:

"These cases bear out the conclusion, which we should in any event have reached, that the judge is obliged to leave the lesser alternative only if this is necessary in the interests of justice. Such interests will never be served in a situation where the lesser verdict simply does not arise on the way in which the case had been presented to the court: for example if the defence has never sought to deny that the full offence charged has been committed, but challenges that it was committed by the defendant. Again there may be instances where there was at one stage a question which would, if pursued, have left open the possibility of a lesser verdict, but which, in the light of the way the trial has developed, has simply ceased to be a live issue. In these and other situations it would only be harmful to confuse the jury by advising them of the possibility of a verdict which could make no sense.

We can also envisage cases where the principal offence is so grave and the alternative so trifling, that the judge thinks it best not to distract the jury by forcing them to consider something which is remote from the real point of the case; and this may be so particularly where there are already a series of realistic alternatives which call for careful handling by judge and jury, and where the possibility of conviction for a trivial offence would be an unnecessary further complication.

On the other hand the interests of justice will sometimes demand that the lesser alternatives are left to the jury. It must be remembered that justice serves the interests of the public as well as those of the defendant, and if the evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be acquitted altogether merely because the jury cannot be sure that he was guilty of the greater."

17. Mustill LJ commented further that the trial judge should ensure "that the issues left to the jury fairly reflect the issues which arise on the evidence" (page 1205) and in ***Coutts***, Lord Bingham referred to the judge's duty to leave to the jury "any obvious alternative offence which there is evidence to support" (page 367 - and see also ***Von Starck v R*** [2000] 1WLR 1270,1275, a decision of the Privy Council on appeal from this court, in which Lord Clyde also spoke to the duty of the judge to leave an alternative verdict to the jury "...if there is evidence on which a jury could reasonably come to a particular conclusion").

18. These formulations of the relevant principle all derive from a context in which the question was whether the accused was entitled to the benefit of an alternative verdict in respect of a lesser offence being left to the jury (in ***Coutts*** and ***Von Starck***, it was the common case of manslaughter as an alternative to murder, while in ***Fairbanks*** it was driving without due care and attention as an alternative to causing death by reckless driving). However, it seems to us that the obverse side of the principle must also apply, with result that the alternative verdict of carnal abuse should only be left to the jury on a charge of rape where there is evidence upon which they might reasonably conclude that the defendant is guilty of that offence, that is, some evidence from which an inference of consensual sexual intercourse could be drawn to the requisite standard in the case of a complainant under 16. Any other

approach would in effect be, as Mr Fletcher submitted, in our view correctly, an invitation to the jury to speculate.

19. However, before getting to the further question, which is whether Mr Fletcher was also correct in his submission that there was no evidence in this case to support the leaving of the alternative verdict of carnal abuse to the jury, it may be helpful to consider his complaint in ground 3, which is that the judge erred in admitting the evidence of the complainant's mother summarized in paragraphs 5 and 6 above.

20. Mr Fletcher submitted that this evidence was inadmissible hearsay and in any event more prejudicial than probative. Mr Harrison on the other hand submitted that it was admissible on the basis that it was evidence of an accusation made in the presence of the applicant, the truth of which he accepted.

21. We think that Mr Harrison is clearly correct on this point. A statement made in the presence of an accused person may become evidence against him to the extent that he accepts what has been said, and this he may do by "word or conduct, action or demeanour" (per Lord Atkinson in ***R v Christie*** [1914] AC 545, 554). It will be for the jury to determine whether the accused has in fact accepted what has been said and difficult questions can sometimes arise with respect to this; for instance, whether silence in the face of an accusation can ever give rise to an inference adverse to the accused (see, for example, the well known

case of ***Hall v R*** [1971] 1 All ER 322, where it was held that the silence of the accused on being informed by a police officer that someone else had made an accusation against him could not by itself give rise to an inference that he accepted the truth of the accusation). Where, however, the parties are speaking on even terms and an accusation is made which might reasonably be expected to be rebutted, then a failure to offer a rebuttal may give rise to an adverse inference (particularly where silence is accompanied by conduct, as in ***Parkes v R*** [1976] 3 ALL ER 380).

22. In the instant case, the important question was not whether what the guidance counsellor was reported to have said was true (in which case it would plainly have been hearsay and inadmissible), but whether there was any evidence that the applicant accepted as true the accusation conveyed by the guidance counsellor's statement. In this regard there was clear evidence from which the applicant's acceptance of the truth of the accusation might have been inferred by the jury, both in his statements that he "did it" and that he would "deal with it".

23. In these circumstances, we are of the view that this evidence was not only admissible on the basis contended for by Mr Harrison, but also carried strong probative force. We will return below to whether the learned trial judge's directions to the jury as to how to approach it were adequate.

24. But we come now to the question whether there was any evidence in the case to support the judge leaving carnal abuse to the jury. If the matter rested entirely on a contest of credibility between the complainant, who insisted that the applicant had sexual intercourse with her without her consent, and the applicant, who maintained that he had not had sexual intercourse with her at all, then there may well have been considerable force in Mr Fletcher's submission that "none of the facts adduced in evidence admits of this third possibility," that is, that the complainant and the applicant had consensual sexual intercourse.

25. However, the applicant's alleged admission to the guidance counsellor in the presence of the complainant's mother must also be taken into account on this point. The evidence was that the applicant stated that "I will deal with it", by which the witness said that she took him to mean that "he will take care of it in his way". What, if that evidence was believed, the applicant must be taken to have meant, was, of course, purely a matter for the jury. But it seems to us that what was attributed to the applicant in this exchange was sufficiently general to include the possibility on his own admission of consensual sexual intercourse, given that he was reportedly responding to the guidance counsellor's statement that he had been told by the complainant that the applicant "had sex with her". We have therefore come to the view that

this evidence did provide a basis, albeit slender, for Sinclair-Haynes J to have left the alternative verdict to the jury in this case.

26. The further question that therefore arises is whether the judge's directions to the jury in respect of the alleged admission and the alternative verdict were adequate in the circumstances.

27. To take the alleged admission first, Sinclair-Haynes J left the issue to the jury in the following terms:

> "Mrs. Bryan told this court that in the presence of the guidance counsellor, Mr. Bryan confessed that he committed the act, and he could deal with it and take care of it his way. In her statement to the police, she did not state that he said he would take care of it his way. She admitted that that would have been important to tell the police. Madam Foreman and your members, do you believe that Mr. Bryan admitted to the guidance counselor that he raped her? Why didn't the guidance counselor report the matter to the police? This would not only have been an allegation emanating from Anna-Kaye. We have had a confession from Mr. Bryan, why wouldn't a responsible guidance counselor report the matter to the police in light of the confession?
>
> Now, you have to ask yourselves, it is for you to determine the question. Has Mrs. Bryan concocted the story to spite Mr. Bryan for abusing her, it is for you."

28. Mr Fletcher submitted that this direction did not provide adequate assistance to the jury in assessing the evidence, while Mr Harrison submitted that the judge had not only dealt with the evidence

adequately but had been "most generous" to the applicant in the comments to the jury quoted above.

29. We would observe in passing that the learned judge may have overstated the evidence somewhat when she invited the jury to consider whether they believed that the applicant had admitted to the guidance counsellor "that he raped her", since her mother's evidence of what the applicant had said was not, as has already been observed, quite as pointed as this. However, given the jury's verdict, the applicant, not surprisingly, does not complain about this. Save for this, we agree with Mr Harrison that the overall tone of the directions was in fact quite generous to the applicant (for instance, might this evidence, if believed, not have been specifically left to the jury as being capable of providing some corroboration of the complainant's evidence?).

30. As regards carnal abuse, this is how the learned judge left the alternative verdict to the jury:

> "Ana-Kay was under sixteen years at the time and so in law, she could not have consented. Mr. Bryan was a man in his thirties, if you believe that sexual intercourse took place without her permission you must convict Mr. Bryan of carnal abuse. However, if you find that her evidence is unreliable that you do not trust or believe anything she says you cannot convict him of either rape or carnal abuse. If you are in doubt as to whether he committed the act you must also acquit because the law obliges you to give the benefit of any doubts to the accused. However, if you are sure that he had sex with her and she did not consent then you must convict

> him of rape. If you are convinced that he had sex with her but with her permission you must convict him of carnal abuse because she would have been unable to consent by virtue of her age."

31. Mr Fletcher submitted that these directions were inadequate in the circumstances. Mr Harrison, for his part, submitted that the directions were "adequate, but admittedly truncated". Although he accepted that the directions may have been "confusing to the jury," he contended that the judge had done enough to make the jury aware of the choices open to it and that the jury, by its verdict, obviously appreciated the distinction between the two offences.

32. In our view, the judge's summing up on carnal abuse unfortunately gives every indication that the decision to leave it to the jury was in fact an afterthought. The result of what appears to have been thus crafted in haste was one entirely wrong direction ("if you believe that sexual intercourse took place without her permission you must convict...of carnal abuse"), followed by a further direction which, though this time completely accurate so far as it went, failed entirely to explain to the jury the nature of the offence of carnal abuse and how it resembled, but differed from, rape. In these circumstances, it appears to us that it was necessary for the jury to be taken with care through the various alternatives open to them on the evidence, including in this context the evidence of the applicant's alleged admission. In particular, the impact

of a rejection by the jury of the complainant's evidence that sexual intercourse had taken place without her consent on her overall credibility, though briefly referred to by the judge, called for special emphasis, as on one view this might have entitled the applicant to a complete acquittal. In the end, the very diffidence with which the jury returned the verdict of guilty of carnal abuse, which led to the events recounted at paragraphs 2 and 3 above, suggests a degree of confusion on their part as to how the alternative verdict of carnal abuse fit into the overall picture that had been left to them for their consideration.

33. In the result, the application for leave to appeal is granted, the hearing of the application is treated as the hearing of the appeal and the appeal is allowed. However, in the interests of justice, a new trial is hereby ordered.