[2021] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

PARISH COURT CRIMINAL APPEAL NO 5/2014

JOEL CAMPBELL v R

Mr Leroy Equiano for the appellant

Ms Donnette Henriques, Ms Sasha-Ann Boot and Ms Kelly Hamilton for the Crown

25, 31 July 2019 and 25 June 2021

F WILLIAMS JA

Background

[1] By this appeal, the appellant challenged his conviction and sentence in the then Resident Magistrate's Court (now Parish Court) for the Corporate Area, for the offence of indecent assault, contrary to section 13(a) of the Sexual Offences Act. He was convicted by a judge ('the trial judge') of that court on 28 August 2013; and on 30 September 2013, he was sentenced to serve 12 months' imprisonment at hard labour. The conviction arose from information number 2555 of 2013. Information number 17744 of 2011, charging sexual touching, was also before the court below but was not proceeded with. How the latter information was dealt with, is not in issue before this court.

[2] The appeal came on for hearing before us on 25 July 2019. We reserved our decision to 31 July 2019, and on that day, with a promise of written reasons to follow, we made the following orders:

> "(i) The appeal is allowed.
>
> (ii) The conviction is quashed and the sentence is set aside.
>
> (iii) A judgment and verdict of acquittal are entered."

We apologize for the delay in providing these reasons.

The Crown's case below

[3] In seeking to prove its case, the Crown called as witnesses the virtual complainant, her mother and the investigating officer. The Crown's case, as originally framed in the information, was that on a specific date, that is: 4 August 2011, the appellant indecently assaulted the virtual complainant, his stepdaughter, whilst at their home in the parish of Saint Andrew. We say "originally framed" as, the trial judge, in making her findings of fact, as a prelude to finding the appellant guilty of the offence, expressed doubt about the accuracy of the evidence so far as it related to the date of the commission of the offence.

[4] The trial judge's concern about the date of the alleged incident, which led her to, of her own volition, direct the clerk of courts to amend the information, arose from (i) the complainant's seeming uncertainty about the exact date of the occurrence of the incident that led to the charge; and (ii) a discrepancy that arose as to the date between the complainant's evidence and that of her mother. The information was amended to indicate that the offence would have occurred between 1 and 12 August 2011. This was done at the end of her summation and immediately before she found the appellant guilty.

[5] It is important to note at this stage that the appellant had put forward an alibi, supported by witnesses, in respect of the date of 4 August 2011. That evidence was accepted by the trial judge. At page 35 of the notes of evidence the trial judge said:

> "Having considered his alibi witnesses they appeared truthful. Their evidence caused me to form the view that the date of the 4th August may not have been accurate. In fact from the very beginning of the cross-examination of the complainant I wondered as to the accuracy of the date when she indicated that she was unsure what date in August the incident occurred." (Emphasis added)

Summary of the defence

[6] At trial, the appellant sought to set up an alibi; and, towards that end, called four witnesses, after himself giving sworn testimony. The essence of his defence was that, at the time the incident is said to have occurred, he was at his workplace at Constant Spring Road, and was not able to leave until around 9:00 pm on account of a downpour of rain accompanied by lightning and thunder. At least three of the four alibi witnesses fully supported his alibi. He, therefore, on his case, was not at home around 7:00 pm when the incident is said to have occurred; and when he got home, he did not sit in a sofa with the complainant where the incident is said to have occurred. On his case, he went in, soaked from the rain, collected chickens from a deep freeze and then left the house.

The appeal

[7] Being dissatisfied with the outcome of the trial, the appellant, on 4 September 2013 (that is, after conviction but before sentencing) filed his notice and grounds of appeal. These were the grounds on which he originally sought to rely:

> "1. The Learned Resident Magistrate fell into error when she amended the Information and convicted the Appellant/Defendant without giving him an opportunity to respond to the said amended Information. The said amendment having been made after the close of the cases for both the Prosecution and that of the Appellant/Defendant.
>
> 2. The Appellant hereby applies for the Notes of Evidence consequent on which supplementary grounds will be filed."

[8] When the matter came on for hearing, Mr Equiano sought and was granted, permission to abandon the original grounds filed and to argue the following supplemental grounds of appeal:

> "(i) The Learned Resident Magistrate erred in law in instructing the Clerk of Court to amend the information at the close of her summation.
>
> (ii) The Learned Resident Magistrate erred in law in instructing an amendment to the information without giving the Defendant an opportunity to respond to the amended information.
>
> (iii) The amendment to the information at such a late stage of the trial was grossly unfair to the Defendant.
>
> (iv) Having found that the defence raised doubt on the Crown's [case] any such doubt must be resolved in the defence favour."

The Crown's response

[9] The Crown sought to oppose the grounds, except for grounds (ii) and (iii), to which it conceded. As the Crown's concession on those two grounds was sufficient to dispose of the appeal, it is those two grounds to which we will direct our focus, it being unnecessary in the circumstances to address the others.

Summary of the submissions

For the appellant

[10] On the appellant's behalf, Mr Equiano submitted that, although the court has the power to amend an information (as was done in this case), the later in the trial that the amendment occurred, the greater would be the risk of the amendment causing injustice. He referred to the cases of **R v Bonner** [1974] Crim LR 479 and **Wright v Nicholson** [1970] 1 WLR 142, the latter of which, he submitted, is on all fours with the instant case. He further submitted that the amendment ordered at the stage at which it was, did not

afford the appellant an opportunity to address it and possibly call further evidence in his defence. It was therefore very prejudicial and unfair to the appellant, he submitted.

For the Crown

[11] The Crown submitted that when an amendment is made to an information (which the court has the power to do) the central question is whether the amendment will cause injustice to a defendant. An injustice will be said to have occurred when the amendment hinders or prevents a defendant from putting forward a defence, it submitted. In support of this, the Crown also referred to the case of **Wright v Nicholson**.

[12] The essence of its concession is to be found in paragraph 12 of the Crown's written submissions, as follows:

> "13. The amendment was made during the summation and immediately before the sentence [sic] was passed upon the appellant. It is submitted that fairness would dictate that the accused is to be allowed an opportunity to present further information to the court regarding his defence or to further cross examine the witnesses for the Crown. The Respondent further concedes that the amendment further prejudiced the appellant as the date in the instant case was particularly relevant to his defence which rested solely on alibi."

Discussion

[13] The issue for discussion is whether the amendment, having regard to the manner in which and the time at which it was made, was prejudicial to the appellant, such as to render his trial unfair and his conviction unsafe. In **Wright v Nicholson**, the appellant had been convicted by justices on an information alleging that on 17 August 1967, he had incited a boy to commit an act of gross indecency. On appeal from the decision of the justices to a deputy recorder, it was found that the appellant was in fact guilty of the offence, which, it was found, had been committed on a day in August of 1967, although the prosecution had failed to prove that it was committed on the precise day set out in the information charging the offence. On further appeal to the Queen's Bench Division, it was held as indicated in the head note as follows:

> "Held, allowing the appeal, that the variance between the information, which had been laid as to a specific date, and the evidence, which had been that the offence had been committed on some day in August, was such that there might have been grave injustice to the defendant: the deputy recorder should have invited the prosecution to amend the information and the defendant could then have applied for an adjournment with a view to seeking to establish an alibi for the whole of August."

[14] In that case, there was a failure to amend the information and the court had convicted where the evidence did not support the charge as alleged. So, there is a difference between the facts of that case and the instant one. Here, although the information was amended, the consequential action that should have followed such an amendment, which was to have allowed the defendant an adequate opportunity to put forward his defence in the light of the amendment, did not occur.

[15] In **R v Bonner**, the appellant had been tried on an indictment which alleged that he committed an offence of indecent assault on a day in November 1972. However, the possibility of an assault in January 1973 was canvassed in evidence. The trial judge, during the course of the summation, directed that the particulars be amended to refer to a day between 1 November 1972 and 31 January 1973. It was held by the Court of Appeal, *inter alia*, that, although an amendment of that nature was permissible, making it at that stage of the trial was not to be encouraged. It quashed the conviction on the ground that the verdict was unsafe and unsatisfactory. The headnote records the main considerations as follows:

> "If a court felt that the interests of justice required the amendment of the indictment it should only be done after particular care had been taken to ensure that the defence had had ample opportunity, by way of adjournment, to consider whether witnesses should be recalled, or further evidence called. Only when that had been done could it be said with any safety that the risk of injustice had been avoided."

[16] The case of **R v Johal, R v Ram** [1973] QB 475, a decision of the English Court of Appeal, is to the same effect. In that case, Ashworth J, delivering the judgment of the court, observed at page 481(c) as follows:

> "…this court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely it is that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby." (Emphasis added)

For these purposes, there is no material difference between an indictment and an information.

[17] While we entertain no doubt that, pursuant to section 190 of the Judicature (Parish Court) Act, the trial judge had the power to have ordered the amending of the information, as was done in this case, the procedure that was adopted thereafter (or, perhaps more accurately, that the court below failed to adopt), was what led to the error in this case. In the same way that the appellant called four witnesses and gave testimony to support his alibi in relation to 4 August 2011 around 7:00 pm, had he not been straightaway convicted; but had been afforded an adjournment, it is not impossible that he might have had witnesses to call in relation to the other dates in the period of 1-12 August 2011, or otherwise to speak to that time period in his defence. The appellant might also have wanted to cross-examine the witnesses in relation to the new dates within that time period. The injustice in the process lies in the fact that he was denied that opportunity. In these circumstances the conviction could not be allowed to stand.

[18] Granting an amendment without allowing the defence an adjournment might be permissible if the nature of the amendment is minor – for example to correct the spelling of a name, where that is not a matter in issue. Where there is an amendment to change the date on which an offence is alleged to have been committed, on the other hand, or

another amendment of a substantial nature, we would expect: first, for the defendant to be re-pleaded to the amended information. In **R v Radley** (1974) 58 Cr App Rep 394, the English Court of Appeal made the following observation at page 404:

> "We can see no possible reason for saying that to arraign the accused again after the amendment is made can be prejudicial or irregular in any way. By arraignment, we refer of course strictly to the putting of the charge to the accused and asking him to plead to it. It is not suggested that when that has been done he has to be put in charge of the jury a second time or that a jury have to be empanelled again. It is perfectly permissible, if an amendment is made of a substantial character after the trial has begun and after arraignment, for the arraignment to be repeated, and we think that it is a highly desirable practice that this should be done wherever amendments of any real significance are made. It may be that in cases like HARDEN [(1962) 46 Cr. App. R. 90; [1963J 1 Q.B. 8.] where amendments are very slight and cannot really be regarded as in any way introducing a new element into the trial a second arraignment is not required, but judges in doubt on this point will be well advised to direct a second arraignment."

[19] Second, we would expect for an adjournment to be offered and granted to the defendant (if he desired one) for him to respond, if he could, to the now new allegation concerning the other date(s). Had that procedure been followed and the record of proceedings reflected it, then the outcome of this matter would likely have been different.

[20] However, with the circumstances being what they are, the conviction was clearly unsafe and it only remained for us to consider whether to order a retrial, as the Crown requested, or to enter a judgment and verdict of acquittal, as Mr Equiano prayed.

Retrial

[21] The consideration of whether or not to order a retrial is governed by section 14(2) of the Judicature (Appellate Jurisdiction) Act. The section reads as follows:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and

> direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[22] The case of **Dennis Reid v R** (1978) 16 JLR 246 provides useful guidance as to the considerations that should be borne in mind, when a court is considering whether to order a retrial in the interests of justice. For the purposes of this appeal, the relevant guidance is to be found at paragraph (v) of the headnote, which reads as follows:

> "(v) Among the factors to be considered in determining whether or not to order a new trial are: (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

[23] When consideration must be given to the question of whether to order a retrial, each case will turn on its own particular facts. In the instant case, although there can be no denying that the incidence of sexual offences in Jamaica is high, we gave particular consideration to the length of time that had elapsed between the date the offence is said to have been committed (August 2011) and when the appeal was heard (July 2019). We recognized that a retrial, if one had been ordered, would not have taken place until after the passage of additional time, with what were (at best) the apparent memory lapses shown by all the witnesses, not likely to improve with that further passage of time. Additionally, it was not lost on us that the lapse of time would also likely have been prejudicial to the appellant in light of the nature of his defence- alibi- and the amendment that had been made to the information. If a retrial was ordered on the basis of the amended information he would be required to find and call, not only those witnesses that he had called to testify about 4 August, 2011; but (depending on his defence) probably also witnesses to speak to his movements at the relevant time(s) for 1-3 and 5-12 August 2011, over eight years since the incident and six years (at least) since the trial in 2013.

[24] We took the view that the passage of time between the date the offence is alleged to have occurred and the possible date of a retrial, would make the attainment of a fair trial unlikely. In the result, we made the orders indicated in paragraph [2] of this judgment.