

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 58/2012

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA**

LEON CAMPBELL v R

Miss Deneve Barnett and Miss Terry-Joy Stephenson instructed by Brown & Shaw for the applicant

Jeremy Taylor and Miss Ashtelle Steele for the Crown

2 October 2017

BROOKS JA

[1] This is an application for leave to appeal by Mr Leon Campbell. He was convicted on 26 April 2012, for the offence of rape. The conviction was in the Circuit Court for the parish of Saint Catherine. On 18 May 2012, the learned trial judge sentenced Mr Campbell to 10 years imprisonment at hard labour.

[2] The evidence which was led by the prosecution in respect of this case is, briefly, that the virtual complainant (the complainant) was 17 years old at the time of the

offence. She lived with her mother in the same yard where Mr Campbell also lived but they lived in different buildings. There were other dwelling houses in the same yard.

[3] On 8 January 2009, the complainant was in the yard at a pipe filling bottles with water. She said that while filling the bottles Mr Campbell came nearby and was watching her. She said she went inside her house with two of the bottles and he followed her with one.

[4] Eventually, she said, she sat down and was watching television in her house and he came to her and started trying to kiss her. She resisted but he persisted. He pulled her into his lap on a chair and then moved her onto the bed. All the time she was wrestling and trying to get away from him. She said that he pulled down her shorts and panties, pulled down his pants and put his penis in her vagina, all without her consent and while she wrestled to try to escape from him. She said that she eventually got away from him, went into the bathroom and locked the door. After he had left she called her mother by telephone.

[5] The evidence of the mother was that, while she was at work, she got a call from a man named Horace Millwood, otherwise known as Kenroy, who lived in the same yard, and then she also got a call from the complainant who was crying at the time. The mother said she could not make out what the complainant was trying to say to her on the telephone. The mother said she went home as soon as she could after getting that call.

[6] She said she saw the complainant looking dirty, which was very unusual for her and crying. The complainant told the mother that Mr Campbell had raped her. After that report was made, mother and daughter went to the police station where a report was made to the police.

[7] The following day, Mr Campbell went to the police station and he was eventually arrested and charged. His defence was that the sexual intercourse between himself and the complainant was consensual and the only motive that he could ascribe to the false accusation was that the complainant's mother, at sometime in the past, had asked him for money and that he did not give it to her. He said that she also had arranged with him for him to do some construction work for her, but he did not get that job as he saw somebody else doing it at a later date.

[8] In this application for leave to appeal against his conviction, Miss Barnett sought and was granted leave to argue four supplemental grounds of appeal on Mr Campbell's behalf.

Ground 1

"The Learned Trial Judge erred in permitting to be led evidence in which the prejudicial effect outweighed the probative value and having done so he failed to properly direct the jury regarding same."

Ground 2

"The Learned Trial Judge failed to give to the jury adequate instruction regarding inferences."

Ground 3

"The Learned Trial Judge failed to give adequate instructions regarding the issue of consent/force."

Ground 4

"The Learned Trial Judge failed to properly direct the jury as to [Mr Campbell's] failure to make a statement as he had requested."

Grounds 1 and 2

[9] Miss Barnett argued grounds 1 and 2 together. She said that the sequence of the narrative disclosed by the evidence could have led the jury to believe that Kenroy had made a report to the mother. She submitted that the learned trial judge should have told the jury that they should not draw any inference about the conversation. The likely prejudice to Mr Campbell was exacerbated by the fact, learned counsel said, that the learned trial judge did not give the jury any example of what an inference was.

[10] We agree that the learned trial judge's direction on inferences was terse, but cannot agree with learned counsel that it was inadequate. The learned trial judge told the jury that an inference was their common sense conclusion based on the evidence. The evidence, at best, could have been left to the jury to speculate as to what the complainant could have said to Kenroy and what Kenroy could have said to the complainant's mother.

[11] That, however, is what the learned trial judge specifically warned the jury not to do. At pages 5-6 of the summation, the learned trial judge said:

"...You are also entitled to draw reasonable inferences, that is to come to commonsense conclusions based on the evidence which you accept, but you must not speculate on what evidence there might have been. For example, don't speculate about the shorts and the underwear and the tissue

your [sic] heard about. It has not been presented before you, so you have to decide the case without having seen it. Don't speculate.

Also you have heard that Kenroy spoke to [the complainant] after the alleged incident of rape and also he placed a call to her mother. **So again don't speculate about what Kenroy might have said.** He has not come here. What you need to do is to look at the witnesses who were brought here and decide the case based on that. As I indicated the facts of this case are your responsibility." (Emphasis supplied)

[12] The learned trial judge was using different words, but was telling the jury exactly what Miss Barnett said was required, that is, that they could not draw an inference as to the conversations involving Kenroy.

[13] As a subset of those grounds, Miss Barnett complained that the learned trial judge also erred when he failed to instruct the jury that the telephone conversation between the complainant and her mother was not a recent complaint. She said that an exchange between the learned trial judge and counsel for Mr Campbell, during the course of examination-in-chief of the complainant, could have led the jury to think that it was a recent complaint. The exchange is recorded at pages 33-34 of the transcript of the evidence:

"Q. Did you speak to your mother?

A. Yes, sir.

Q. What did you say to her, if anything?

A. I was, when, when she answered the phone, I was crying and I was trying to tell her what happened, but she was...

[Defence Counsel]: The Prosecution is eliciting evidence, there is no evidence that the accused man was in earshot.

HIS LORDSHIP: You are aware of the concept of a recent complaint?

[Defence Counsel]: Indeed, my Lord.

[Prosecutor]: Shall I...

HIS LORDSHIP: Yes, please proceed."

[14] We cannot agree with Miss Barnett. This is because the learned trial judge did tell the jury that it was the complaint which was made when the mother came home which constituted the recent complaint. That is an entirely reasonable position for the learned trial judge to have taken, as both the mother and the complainant said that the mother could not hear on the telephone what the complainant was saying.

[15] The learned trial judge correctly directed the jury how they should treat with the mother's evidence. This is recorded at pages 27 - 29 of the summation, where the learned trial judge said as follows:

"So that in that regard I must direct you concerning how to treat the evidence of [the complainant's] mother.... [The mother's] evidence is that after she received the phone call from Kenroy and [the complainant], she came home and saw [the complainant] in the bathroom, crying. She is hysterical looking sweaty, dirty and ragged, which was not the way [the complainant] normally looks. And she is wiping up something from the floor with tissue that [the mother] assumed was blood after she shouted at [the complainant]. [The complainant] told her that [Mr Campbell] had raped her.

What [the mother] gave evidence of is firstly, [the complainant's] distressed condition. And secondly that [the

complainant] made what is called a recent complaint to her soon after the alleged incident, a report of the incident was made by [the complainant] to her.

The value of the recent complaint is that, if you believe it, it provides evidence of consistency of conduct of the complainant in alleging that rape was committed against her. I must stress, however, that the recent complaint does not amount to independent support or proof of the occurrence of rape as the complaint comes from [the complainant] herself. So, it is not independent of her; so, it can't be independent of her, it's just evidence of consistency."

[16] Based on that reasoning and the observation by the learned trial judge, grounds 1 and 2 fail.

Ground 3

[17] In respect of ground 3, Miss Barnett complained that the directions on consent were inadequate because the learned trial judge failed to specifically instruct the jury that if they rejected the complainant's account that there was no wrestling with Mr Campbell, then this would suggest that there had been no force, and in that event they should acquit Mr Campbell. Learned counsel submitted that there was a lack of balance in the summation.

[18] We cannot agree with Miss Barnett on this point. As was submitted by Mr Taylor, for the Crown, there was ample evidence from the complainant as to the struggle between herself and Mr Campbell. This evidence and the assertion by Mr Campbell that the complainant agreed to have sexual intercourse with him made the issue of the

credibility of the complainant central to the case. In this regard the learned trial judge is recorded at page 26 of the transcript of the summation, as having said, in part:

"...The issue is one of credibility, that is who do you believe. So the live question is consent. Did [the complainant] consent?

If you find that she consented that would be the end of the matter as there could be no rape if she agreed to the sex. However, if you do find that she did not consent that does not automatically mean that [Mr Campbell] is guilty. He would only be guilty if you find that [the complainant] did not consent and [Mr Campbell] intended to have sexual intercourse with [the complainant] without her consent and he intended to have sexual intercourse with her regardless of whether she consented or not."

[19] The learned trial judge, in addition to giving specific and accurate directions on the burden and standard of proof, and that such allegations, as made by the complainant, were easy ones to make, put the issue of consent squarely before the jury. He did so at pages 21-22 of the summation:

"Secondly, the Prosecution has to prove that the sexual intercourse was without [the complainant's] consent by force; and by force those words mean exactly what they say. It does not mean that there has to be a fight or blows have to be inflicted. It means that there has to be some violence used against the woman to over-bear her will or that there has to be a threat of violence as a result of which her will is over-borne. And you recall that [the complainant] told you that she did not consent to [Mr Campbell] having sex with her; that she did not want him to have sex with her and that she was 'wrassling' with him; that she was crying and trying to get away as he was holding her down. **Now, if you accept that evidence, it would be open to you to find that she did not consent.**" (Emphasis supplied)

[20] It would be pedantic to say, in that context, what the result should be if they did not believe the complainant. It has been said repeatedly that the juries must be accorded with the degree of common sense and such a comment would be applicable in this case. This ground also fails.

Ground 4

[21] In respect of ground 4, Miss Barnett submitted that the learned trial judge should have instructed the jury that Mr Campbell had every right to refuse to give a statement to the police, and that his refusal ought not to be held against him. Learned counsel cited Lord Diplock's judgment in the case of **Dennis Hall v R** (1970) 12 JLR page 240, at pages 242-243, in support of her submissions.

[22] There are two aspects of the instant case that affect this submission. The first is that there was a slight disagreement between the investigating officer and Mr Campbell as to what had occurred in respect of this aspect of the case. The investigating officer said that after cautioning Mr Campbell he asked her if he could make a statement. She said that she did not take a statement from him at that time because it would have had to be done before a Justice of the Peace. She said that when she got the Justice of the Peace, Mr Campbell had by then had legal representation and said that he did not wish to give a statement.

[23] Mr Campbell, for his part, said that he wanted to give a statement but the investigating officer refused. There was, therefore, an issue of credibility for the jury to resolve.

[24] The second aspect is that it would have been clear to the jury that Mr Campbell was acting on legal advice. The learned trial judge had given specific directions on the presumption of innocence and the burden of proof. It was a situation where he should have given a direction that Mr Campbell was within his right to refuse, but, in the circumstances of this case, we agree with Mr Taylor that the failure did not result in any miscarriage of justice. This ground therefore also fails.

[25] Based on the above reasoning, the application for leave to appeal is refused and the sentence is deemed to have commenced on 18 May 2012.