JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 84 OF 2004

BEFORE: THE HON. MR. JUSTICE P. HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

ROHAN CHIN v.R.

Delano Harrison, Q.C. for the applicant

Tanya Lobban, Assistant Director of Public Prosecutions (Ag.) for the Crown

25th and 26th July, 2005

SMITH, J.A.

The applicant, Rohan Chin, was tried on an indictment containing four counts. Counts 1, 2 and 3 charged him with having carnal knowledge of P.C, a girl above the age of 12 years and under the age of 16. Count 4 charged him with buggery committed against S.C. the sister of P.C.

The trial began in the St. Mary Circuit Court before G. Smith, J. and a jury on 10th March 2004. On the 12th March 2004 the jury returned verdicts of guilty in respect of counts 2 and 3 and not guilty in respect of counts 1 and 4. On the 19th March 2004 he was sentenced to consecutive terms of 5 years imprisonment on counts 2 and 3. On the 31st March, 2004 he applied for leave to appeal against his conviction and sentence on the following grounds:

"a) The verdict of the jury in respect of counts 2 and 3 of the indictment are unreasonable and cannot be supported by the evidence.

b) The verdicts of the jury in respect of counts 2 and 3 of the indictment are inconsistent with the verdicts to count (sic) 1 and 4 of which they found the accused man not guilty.

c) The learned trial judge erred in law in summing up the case to the jury in that she failed to direct the jury as to how they should treat the complainant's credibility in relation to count (sic) 2 and 3 in the event they found him not guilty on the first count.

d) That the consecutive nature of the sentences of five (5) years on each count is excessive in the circumstances."

His application for leave was refused by a judge in chambers. He has now renewed his application for leave before this court.

Counsel for the applicant, Mr. Delano Harrison Q.C., informed the court that he did not intend to pursue ground (c). He sought and obtained permission to argue two supplementary grounds:

1. The learned trial judge not only failed to warn the jury adequately about the danger of acting on the uncorroborated evidence of young children but rather sought to shore up the credibility of the young witness complainant, P.C. (See page 25 line 4 to page 27 line 1).
2. In her charge to the jury, just before their retirement to consider their verdict, the learned trial judge omitted to assist the jury as to how to

approach the matter if they disbelieved the Applicant's evidence, in that she failed to direct them that, even if they rejected the Applicant's defence, they should not merely on that account convict him.

The Prosecution's Case

The following is gleaned from the summing up of the learned trial judge.

In 2002, P.C., a 14 year old student, lived in St. Mary with her grandmother, Miss Monica Henry and her two sisters S.C. and Adrian Cox. She met the applicant in 2001 when she started living with her grandmother. Her grandmother had a stall at the Port Maria market. The applicant operated a "cook shop" at the said market. P.C. helped her grandmother at the stall on Thursdays, Fridays and Saturdays. On Thursdays and Fridays she would assist her grandmother before going to school and sometimes after school. She would wear her school uniform when she went to the market. On occasion her grandmother sent her to buy meals from the applicant. She testified that she and the applicant became boyfriend and girlfriend. In January 2002 the applicant asked her to accompany him to a friend's house in Pagee. She went with him. The applicant escorted her into a house. He sat on a bed and she sat on a chair. He smoked a spliff (a cannabis cigarette). He invited her to sit beside him on the bed. She declined. He jumped up from the bed and pulled her from the chair. He removed her uniform pushed her on the bed, went on top of her and inserted his penis into her vagina. When he was finished, she bit him on the shoulder and pushed him off. She dressed herself and returned to

school. She said she did not report the incident because of fear. That was the first occasion.

She described the second incident in this way:

On a Wednesday in March 2002, she went with the applicant to a house on Cox Street. Inside the house the applicant took off her school uniform and undressed himself. He lay her on a bed and had sexual intercourse with her. After this episode he threatened to "cut off her neck" if she told anyone. She went home and told no one.

The third incident took place on a day unknown between the 1st day of March, 2002 and the 20th of March 2002. The applicant, she said, took her again to the house on Cox Street. There he repeated what he did on the second occasion.

She further testified that on the 20th March, 2002 her sister S.C. accompanied her to the applicant's "cook shop". She left her sister and the applicant at the back of the market and went to the front for awhile. When she returned she saw her sister "bending over and her shorts and her panties were down at her knees". Her sister, she said, "jumped up" and said that she was not going to do it. She saw the applicant pull up the zipper of his pants.

S.C. also gave evidence. She was also at the time a student. She knew the applicant from about January 2002. She used to buy things from him at his cook shop. She testified that on the 20th March 2002 at about 7:00 p.m. she and her sister P.C. went to Port Maria to buy pencils. They went to the applicant's

shop. She said that the applicant dragged her into a stall. He pulled down her shorts and panties. At this time P.C. left the stall. The applicant then told S.C. to bend over. She did. He put his penis "at the edge of her bottom". She "jumped up and said she was not doing it." The applicant told her to go away and called her a fool.

Miss Monica Henry the grandmother of the two complainants also gave evidence. She told the court that P.C. was born on the 28th of September, 1988. Patricia Roberts is the mother of P.C. She resides in St. Maarten. She knew the applicant from he was a child. She testified that in 2002 she used to send her granddaughters P.C. and S.C. to buy food from the applicant. She admitted to beating P.C. with a fan belt when she heard that she and the applicant were seen kissing.

Constable Angella McTaggart testified that on the 16th May 2002 Miss Patricia Roberts took P.C. to the Port Maria Police Station and made a report to her. Consequent on the report she commenced investigation. On the 17th May, 2002 she saw the applicant at the station. She told him of the report she got from P.C. and S.C. In response the applicant said: "This is off the record. To say me have sex with one of them, but two of them, that is foolishness." According to Constable McTaggart when she arrested and charged him for the offences, she cautioned him and he said, "Miss the court will have to prove seh me deh wid the two of dem."

The Defence

The defence is one of complete denial. On oath he told the trial court that he operates a "cook shop" in the Port Maria market. He knew P.C. and S.C. and their grandmother. He denied taking P.C. to Pagee and having sexual intercourse with her. He also denied taking her to a house at Cox Street and having sex there with her. He denied having sex on any occasion with her.

He said it is not true that he took off S.C.'s shorts and underwear and put his penis "at the edge of her bottom". He recalled the complainants' grandmother telling him that her little granddaughter Adrian had told her that P.C. and the applicant were kissing each other at the library. He told her that that was a lie. We will now consider the several grounds of appeal.

Grounds (a) and (b) – Inconsistent verdicts

These grounds were argued together. Mr. Harrison, Q.C. submitted that the jury's verdict of guilty in respect of count 2 is inconsistent with their verdict of acquittal on count 1 as the complainant's accounts of the two alleged incidents are materially indistinguishable . Also, he contended, the verdicts of acquittal on counts 1 and 4 are inconsistent with the verdicts of guilty in respect of counts 2 and 3 since all four counts are based on the evidence of P.C. The credit of P.C. is indivisible and accordingly the verdicts are inconsistent and unreasonable and no jury who had applied their minds properly to the facts in the case could have arrived at such a conclusion. He relied on **R.v. Durante** (1972) 56 Cr. App. R 708 at 714 and **R.v. Leonard Johnson** 11 J.L.R. 525.

The relevant principle of law as to the approach of the court in dealing with the complaint of inconsistent verdicts was stated in **Durante** (supra) and in **R.v. Malashev** (1997) Cr. L.R. 587 to be that:

> "The Court will interfere if it is satisfied that no reasonable jury who had applied their mind properly to the facts in the case would have arrived at the conclusion which was reached."

This statement of principle was accepted and applied by this Court in **R.v. Leonard Johnson** (supra). The burden is on the applicant to satisfy the Court that the inconsistency is such that it would not be safe to allow the verdict to stand. The decision of the English Court of Appeal in **R.v. McCluskey** (1994) 98 Cr. App. R. 216 is instructive. The facts in so far as they are relevant to this appeal are as follows: McCluskey was charged with murder and affray both counts arising out of the same incident. (It is permissible in England to charge murder and another offence in the same indictment). His defence to the murder charge was self-defence. The judge directed the jury that if they found that the appellant had acted in self-defence, they must acquit him of murder, but if they found him not guilty of murder on some other basis then they had to consider manslaughter. The judge also directed the jury that if they convicted the appellant of either murder or manslaughter, there was no defence to the count of affray. The jury returned a majority verdict (11-1) of guilty of manslaughter and acquitted McCluskey of affray.

McCluskey appealed against his conviction on the ground that the verdicts of the jury were inconsistent. It was held, dismissing his appeal, that

although the verdicts on manslaughter and affray were clearly inconsistent, the fact that the two verdicts were shown to be logically inconsistent did not make the verdict complained of unsafe unless the only explanation for the inconsistency must or might be that the jury was confused and/or adopted the wrong approach.

The **McCluskey** case (supra) provides a good example of inconsistent verdicts. Counsel for the appellant has not demonstrated to us the inconsistency of which he complained. The mere fact that different counts all depended on the evidence of the same witness whose evidence was uncorroborated, and whose credibility was in issue, could not render different verdicts on different counts inconsistent for this purpose – See **R.v. Bell** (1997) 6 Archbold News 2 and **R.v. Vander Molen** (1997) Crim. L.R. 604. Moreover, even if the inconsistency were established, the applicant would also have to show that the only explanation for the inconsistency must or might be that the jury was confused and/or adopted the wrong approach.

In the instant case the learned trial judge in her summing-up hinted at the fact that P.C. was extensively and intensively cross-examined by defence counsel, Mr. McCalla. The jury might have entertained some doubt as to what took place at the house in Pagee and hence the verdict of not guilty on Count 1. However they clearly had no such doubt as to what took place at the house on Cox Street and when it happened. Hence their verdicts on counts 2 and 3. Counsel for the applicant has not persuaded us that the verdicts were in fact

inconsistent. Very often an apparent inconsistency reflects no more than that the jury is not satisfied that an offence has been "proven". It does not necessarily indicate that the jury had found the witness to be not credible.

It has been said that the credibility of a witness is not divisible. In **R.v. Mark Burke** 25 JLR 215 this Court held that the phrase "the credit of a witness is indivisible" applies to a situation where a particular witness has given evidence and has lied or has been discredited in relation to one aspect of his evidence, and therefore his entire evidence should be rejected. However, whatever this phrase means it does not mean that the jury may not accept a part of a witness' evidence and reject a part. And it certainly does not mean that where two or more counts all depend on the evidence of the same witness that the counts must stand or fall together. As the judge correctly directed the jury, it was their duty to consider each count separately (See **Williams and Banks v. R** (1997) 51 W.I.R. 212 at 221 g-j).

As regards the 4th count it cannot in our view, be seriously argued that the verdict of acquittal thereon is inconsistent with the verdicts on count 2 and/or count 3.

These grounds fail.

<u>Ground 1 – Inadequate corroboration warning</u>

Mr. Harrison, Q.C. complained that the learned trial judge failed to warn the jury adequately about the danger of acting on the uncorroborated evidence of young children. He relied on **R.v. Stewart** (1990) 27 JLR 19.

> is no harm in telling you about that. It is felt that children sometimes indulge in what is known as flights of fantasy. Sometimes they will make up stories and in this case it is being advised that because they might have found themselves in trouble with their mother and grandmother they made up the story against Mr. Chin and that Mr. Chin's name has been instilled in their head because their grandmother had made that suggestion to them and that she had beaten them."

During the submission of counsel for the applicant, as to the adequacy of the above direction, the Court drew counsel's attention to the fact that the witness P.C. was not a "child" at the time she was giving evidence. It was not the contention of counsel that although the witness was not a "child" yet in all the circumstances such a warning was desirable. Accordingly counsel did not further pursue this ground.

Ground 2

In this ground counsel complained that the learned trial judge failed to direct the jury as to how they should proceed in the event they rejected the applicant's defence. He submitted that the judge should have warned the jury that they were not entitled to convict the applicant merely because they rejected his defence. He cited **R.v. Alwyn McBean** (1996) 33 J.L.R. 437 in support.

Miss Lobban for the Crown submitted that the directions of the learned trial judge on the burden of proof were correct and adequate in that they made it clear upon whom the burden of proof rested. She relied on the decision of the court in **R.v. Garth Wilson et al** S.C.C.A. Nos. 68-70 of 1991 delivered February 7, 1994. In that case the court had to consider a complaint not

dissimilar to the instant one. In delivering the judgment of the court Wolfe, J.A. (as he then was) said (page 11):

> "A judge does not have to repeat this direction in parrot – like fashion through out his summation. The question is, did the trial judge properly convey to the jury a direction which made it clear upon whom the burden of proof rested and what was the standard of proof required before the burden could be regarded as having been discharged."

The impugned direction in the instant case begins at line 9 page 54:

> "As I said before, Mr. Foreman and members of the jury, it is the prosecution who has brought this accused before this court, they have the duty or burden of proving his guilt to the extent that you feel sure that he is guilty. The defence does not have to prove his innocence. If having viewed all the evidence in this case you accept what Mr. Chin has told you and that he is speaking the truth then you must acquit him on all the charges. If you are left in a state of reasonable doubt then you must resolve that doubt in the accused man's favour. However if you are satisfied to the extent that you feel sure of his guilt and that you accept these two young ladies witnesses of truth bearing in mind the warning I give then it is open to you to return a verdict in accordance with that finding as it relates to the four counts of the indictment."

The burden of Mr. Harrison's contention is that the learned trial judge should have gone on to the tell the jury that if they reject the defence of the applicant they may not convict him merely because they have rejected his defence.

The judge's summing-up must be seen as a whole. The learned judge in the above directions referred the jury to what she had told them before. At the

beginning of the summing-up the trial judge in directing the jury on the burden and standard of proof said (pp 8 & 9):

> "There is no duty on the accused to prove his innocence, but he may attempt to do so, as he has done in this case, because he gave evidence on oath. If he attempts and succeeds then he is not guilty ... but if he fails – suppose you don't believe him that is not the end of the matter. If he fails you will have to consider all the evidence in the case including what he has told you and then arrive at the verdict in the matter. Because – and when you look at it you will have to look at the whole of the evidence and examine it to see if you are satisfied to the extent that you feel sure that the Crown has proved its case against the accused."

Throughout the summing-up the learned judge was at pains to bring home to the jury the fact that the applicant was not required to prove his innocence or anything. For example at p. 45 she told them:

> "As I told you when we started the summation, he is not required to prove his innocence. He is not required to prove anything."

The learned trial judge, in our view, made it clear to the jury beyond peradventure that they could only convict the applicant if the prosecution upon whom the burden of proof rested, satisfied them beyond reasonable doubt of his guilt. The jury could not, we make bold to say, have entertained any doubt that they could convict the applicant merely because they rejected his defence. This ground fails.

Ground (d) Consecutive sentences

Counsel for the appellant founded his submission on the oft quoted words of Lawton L.J. in **R.v. Sergeant** (1974) 60 Cr. App. R. 74 at page 77 which were adopted by this Court in **R.v. Lewis et al** 17 J.L.R. 202. In the case of **Sergeant** (supra) Lawton L.J. stated that there were four classical principles which a trial judge must have in mind and apply when passing sentence, those are retribution, deterrence, prevention and rehabilitation. It is the submission of counsel that the consecutive sentences of imprisonment for 5 years on counts 2 and 3 are manifestly excessive in all the circumstances.

The offences of which the applicant were convicted did not arise out of the same set of facts. Consecutive sentences would clearly be wrong if the offences arose out of the same incident. However where the offences are committed on separate occasions there is no objection in principle to consecutive sentences – See **R.v. Walford Ferguson** S.C.C.A. no. 158 of 1995 delivered 26th March 1999. The offences of which the applicant was convicted are equally serious.

In determining whether or not the consecutive sentences of 5 years imprisonment are manifestly excessive, the court must bear in mind the age of the victim, the object of the law which is to protect young girls from men and from themselves, the hitherto good character of the applicant, the relationship between the applicant and the complainant and of course the maximum sentence which such an offence attracts. At the time of the offence the

complainant was 13 years 6 months; the applicant had no previous conviction; according to the complainant the applicant and herself were "boyfriend and girlfriend"; and the maximum sentence for the offence is 7 years. We are of the view that in all the circumstances a sentence of 4 years imprisonment on each count to run consecutively would be appropriate.

Conclusion

We have treated the hearing of the application as the hearing of the appeal. The appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence of 5 years imprisonment in respect of each count is set aside and a sentence of 4 years imprisonment on each count substituted therefor. The sentences are to run consecutively as of 19th June, 2004.