[2016] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 49/2013

BEFORE: **THE HON MISS JUSTICE PHILLIPS JA A**
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

IAN GREEN v R

Peter Champagnie for the appellant

Mrs Denise Samuels-Dingwall for the Crown

25, 28 January and 1 February 2016

ORAL JUDGMENT

F WILLIAMS JA (AG)

Background

[1] This matter comes before us as a renewal of an application for leave to appeal against conviction and sentence. By this application, the applicant, who was refused leave to appeal against conviction and sentence by the single judge on 20 December 2013, seeks this court's leave to appeal against his conviction for two counts of rape,

for which he was sentenced to 10 and 12 years' imprisonment at hard labour respectively. The sentences were ordered to run concurrently.

[2] His conviction came at the end of a trial which ran from 13 to 16 May 2013 before a judge and jury in the Saint Catherine Circuit Court. He was convicted by a majority verdict of 5:2 after the lapse of one hour, as is permitted by section 44(3) of the Jury Act. He was sentenced on 16 May 2013.

Summary of the facts

[3] A summary of the facts as led in evidence from the virtual complainant by the Crown and which formed the basis of the applicant's conviction, was to the effect that the applicant raped the virtual complainant twice on the night of Sunday, 10 April 2011 in a motor car that she had rented from his cousin, through him. She had met him the Friday before that in the vicinity of the Portmore Mall, Saint Catherine, where he plied his trade as a taxi driver. The rape is said to have occurred in the vicinity of the Rodney's Arms Restaurant, also in the Portmore area of Saint Catherine.

[4] When she met him on the Friday, she had agreed to go out with him the Sunday, 10 April 2011. She had originally rented the motor car for a friend of hers for two days; but failed to return it at the agreed time, so that she owed him the sum of $4,000.00 for an additional day's rental.

[5] After conversing with him for some time on the back seat of the motor car, he managed to overpower her and forcibly had sexual intercourse with her there. Some

time after, the same night, he pulled a knife, threatened to kill her and throw her over a precipice, ordered her to remove her clothes and again had sexual intercourse with her against her will. He used a condom on each occasion. He telephoned her in the days following the incident, threatening her and demanding to be paid the $4,000.00 that she owed him. He was again demanding sex from her, when she informed him that she was going to report the matter to the police and in fact did so. That report was made on 16 April 2011 and a written statement given to the police on 18 April 2011.

[6] The information concerning the report, taking of the statement and the arrest and charging of the applicant was confirmed by the investigating officer, Detective Sergeant Mervlyn Burnett, who also gave evidence at the trial. She also testified to conducting a question-and-answer interview with the applicant on 21 April 2011 and arresting and charging him on the same date. He made no statement on being cautioned.

The defence

[7] For his part, the applicant, who gave sworn evidence, testified to facts similar to those spoken to by the virtual complainant in her evidence as to the rental of the motor car. She owed him the sum of $4,000.00. When he picked her up on the night in question, it was with a view to collecting the sum owed. They drove around for some time whilst the virtual complainant tried to make contact with the friend on whose behalf she had rented the motor car. He suggested that they park and not waste gas whilst she continued trying to make contact with her friend, and she parked in the

vicinity of Rodney's Arms. They later left there, her efforts to make contact with her friend having proven futile. He had to keep calling her in an effort to collect the $4,000.00 and she kept on giving him excuses, even when arrangements were made for them to meet for him to be paid. His frustration at receiving nothing but excuses from her, led him to tell her not to let two o'clock pass without him getting his money. He did not get his money. Instead, around that time he received a telephone call from the police to report to the Caymanas Police Station. When he went there, among other things, he was informed that the virtual complainant had made a report that he had raped her. He denied raping or even having consensual sexual intercourse with the virtual complainant at all. It had been suggested to the virtual complainant, as well (which she denied) that she had fabricated the story of the rape because she was unable to come up with the $4,000.00 that she owed him and for which he was insisting on payment.

The application

[8] When this matter came before us on 25 January 2016, Mr Champagnie, representing the applicant, informed the court that, having carefully reviewed the matter, he was of the view that there was nothing that he could usefully urge on the court on the applicant's behalf. We allowed him time to personally inform the applicant of this and to take written instructions. On 28 January 2016 he informed the court that he had done so and that the position that he had earlier taken had not changed.

[9] Mrs Samuels-Dingwall, on behalf of the Crown, was also of that view: that is, that the conviction and sentence should not be disturbed.

[10] Whilst we had no reason not to accept the word of both counsel, in keeping with our duty, we also carefully reviewed the summation and notes of evidence in the matter. Having done so, we are of the considered opinion that the concession made by Mr Champagnie (along with the observation of Mrs Samuels-Dingwall) was quite properly made – both in relation to conviction and sentence.

The issue before the court

[11] The issue in this case was one of credibility, a matter that fell to be resolved by the jury, acting on their consideration of the directions given by the learned trial judge and of the evidence in the case.

[12] We have combed through the summation and notes of evidence and have found there was sufficient evidence and adequate directions for the tribunal of fact to have properly arrived at the verdict that they did. We see no deficiency in the directions given and, therefore, no reason to disturb the verdict of the jury. The conviction, therefore, must stand.

Sentence

[13] In relation to the sentence that was passed, we fortunately have the benefit of this court's judgment in **Oneil Murray v R** [2014] JMCA Crim 25. In that case,

Morrison JA (as he then was), reviewed several decisions and sentences in rape cases spanning some 15 years. At the end of that exercise, he offered the following guidance at paragraph [23] of the judgment:

> "[23] In our view, these cases, which span a period of close to 15 years, suggest a sentencing range of 15-25 years' imprisonment, with 20 years perhaps most closely approximating the norm, on convictions for rape after trial in a variety of circumstances. For this purpose, we have disregarded **Marvin Reid v R**, in which the sentence of 10 years' imprisonment appears to be plainly on the low side, and **Lynden Levy et al v R**, in which the sentence of 30 years' imprisonment handed down to the first named appellant clearly reflected, not only the particularly heinous circumstances of that case, but also his role as the 'ring master'."

[14] Accepting this guidance, it becomes immediately apparent that, notwithstanding the learned trial judge's comment on the applicant not appearing to be remorseful, in the circumstances of this case where there were what might be regarded as aggravating factors (such as the use of a knife in respect of the second count on the indictment), the applicant might well consider himself fortunate to have received the sentences that he did. So that, although we think that, in the sentencing process, the learned trial judge might have articulated somewhat more the considerations that guided her in arriving at the sentences that she ultimately arrived at, that would not have mattered at the end of the day, the sentences falling below the accepted range of 15-25 years.

[15] In these circumstances, therefore, the application for leave to appeal against conviction and sentence is refused. The sentences are to be regarded as having commenced on 16 May 2013.