[2010] JMCA Crim 55

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 62/2008

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag.)

KEVAUGHN IRVING v R

Mrs Jacqueline Samuels-Brown, QC and Mr Kashka Hemans for the applicant

Mrs Ann-Marie Feurtado-Richards for the Crown

17, 18 May & 30 July 2010

PANTON, P.

[1] The applicant was convicted by Sarah Thompson-James, J sitting alone in the High Court Division of the Gun Court on an indictment containing five counts which charged the offences of illegal possession of firearm, abduction, rape, indecent assault and robbery with aggravation. For each of the offences of illegal possession of firearm and rape, he was sentenced to five years imprisonment, whereas for each of the other offences he was sentenced to three years imprisonment. These sentences were ordered to run concurrently.

[2] A single judge of this court refused leave to appeal, so the applicant renewed his application before the court. Four grounds of appeal were filed, and

the Court granted leave to argue two supplemental grounds. The four original grounds read as follows:

> "(1) Misidentity by the witness: That the prosecution witness wrongfully identified me as the person or among any other persons who committed the crime.
>
> (2) Lack of Evidence: That the learned trial judge erred in law in not accepting the result of the D.N.A. test. Medical report, bank receipt and a prescription to prove my innocence to the Court.
>
> (3) Unfair Trial: That the evidence and testimonies upon which the prosecution relied on to convict me lack facts and credibility, thus rendering the verdict unsafe in the circumstances.
>
> (4) Miscarriage of Justice: That the court and the learned trial Judge failed to recognize the fact that I was also a victim of the crimes and should not have been convicted for a crime or crimes I did not commit."

[3] The supplemental grounds read as follows:

> "1. The Learned Trial Judge erred in law as she failed to give herself the requisite warning as to the need for corroboration and the dangers of proceeding in the absence of the said corroboration in a case alleging rape. The said failure has resulted in a miscarriage of justice and vitiates the convictions.
>
> 2. (This ground was abandoned)
>
> 3. The Appellant did not receive a fair trial as evidence favourable to him was not adduced at the trial."

The evidence from the prosecution

[4] The complainant boarded a taxi at Bog Walk at about 8.30 p.m. on 7 April 2007. A few moments later, the taxi stopped and four men including the applicant entered the vehicle. The driver pointed a gun at her and one of the others asked the complainant for her phone and purse, while holding a gun at her side. On reaching an area known as Roadside, one of the men asked the applicant if he knew where they could take the complainant. He responded that his grandmother had land in the neighbourhood, and proceeded to direct them to the location. However, on arrival, there was too much activity at the location as persons were moving about. One of the men took the gun from the applicant hit him and asked him if he had directed them there to inform on them. They next moved to the notorious Mud Lake area, where all the men raped the complainant. She gave clear intimate details as to the applicant's personal participation in the rapes and other acts of indecency. Eventually, she was released and left to find her way to safety.

The defence

[5] The applicant gave evidence – an unusual feature of this case, given the fact that in this jurisdiction accused persons either opt, or are advised by their attorneys-at-law, to make unsworn statements in their defence. In his evidence, he recounted how he boarded the taxi and became a prisoner thereafter. According to him, he had gone on errands for his mother and sister. The errands had occupied his time from he left work at about 3 p.m. until he boarded the

vehicle at Angel's. The other men were in the vehicle when he entered. The taxi continued on its journey and the complainant came into it thereafter. She was fondled by one of the men who revealed that she was not wearing an under-garment. According to the applicant, in answer to a query from one of the men, he directed them to a location where sexual intercourse with the complainant could take place. He said that this was a ruse on his part to get the group to an area where there would be activity which would deter the commission of the criminal offence contemplated.

[6] The applicant denied participating in any sexual activity whatsoever with the complainant. He never attempted to escape, and on two separate occasions, under the watchful eyes of his 'guards', he had withdrawn sums of money from his mother's bank account. Eventually, they released him and he made a report at the St. Ann's Bay Police Station. From there, he called his father in St. Catherine to come for him. While making a report at Ewarton Police Station on the following day, he came face-to-face with the complainant who promptly identified him as one of the men who had put her through the ordeal of the previous night. The applicant was arrested and charged.

The summation

[7] Although learned Queen's Counsel, Mrs Jacqueline Samuels-Brown has challenged certain aspects of the summation, we are of the view that taken as a whole the important issues were reasonably well addressed by the learned trial

judge. Firstly, there was no real issue as to identification. The matter was a question of fact and the learned judge was quite clear as regards whom she believed. She was best placed to adjudicate as to the credibility of the complainant and the applicant who both gave evidence. The fact that we will later in this judgment express our reservations as to the convictions does not detract from the judge's pre-eminent position to assess credibility. Secondly, as regards the lack of a warning as to the absence of corroboration, we agree with Mrs Ann-Marie Feurtado-Richards' submission on behalf of the Crown that there was no need for such a warning in the instant case.

Character evidence

[8] Supplemental ground 3 challenges the conviction of the applicant on the basis that he did not receive a fair trial as evidence favourable to him was not adduced at the trial. In this regard, it was submitted that the failure to adduce evidence as to the applicant's character adversely affected the proper determination of the matter and deprived the applicant of a deserved acquittal. We granted leave to the applicant to adduce evidence in support of this complaint. To that end, the following transpired. Mr Nicholas Edmond, an attorney-at-law, swore an affidavit filed 21 December 2009 attaching, as exhibit "NE 1", a certificate of good character from the Ebony Park HEART/NTA Academy in respect of the applicant who had worked at that institution for a while. In attaching the certificate, Mr Edmond said, among other things:

"5. I crave leave to attach and exhibit hereto copy of letter of recommendation from the HEART/NTA Academy at Ebony Park Toll Gate PO Claredon (sic) dated the 7th of May 2008 and marked **"NE-1",** which was provided to our office by the mother of the Applicant, Mrs. Belva Goodwin.

6. I am informed by Mrs. Belva Goodwin and verily believe her that a copy of the letter obtained by her was handed to the Attorney who represented the Applicant at his trial."

[9] We requested a comment from Mr Ernest Smith in respect of the contents of Mr Edmond's affidavit. In his own affidavit filed on 1 March 2010, Mr Smith responded thus:

"5. That I have examined the affidavit of Mr. Nicholas Edmond and comment as follows:-

(a) That it is a blatant lie that I was provided with a copy of letter dated May 7, 2008 marked "NE1" for identification. That I saw this letter for the first time when I received this affidavit from the Court of Appeal. That I can only conclude that Miss Belva Goodwin, in keeping with her verbal assault on me after the trial, obtained this letter after the trial and verdict.

6. That at my request character evidence was made available to me during the mitigation exercise.

...

9. That it has become fashionable for Attorneys-at-Law, who practice primarily in the Court of Appeal to attack the competence of Attorneys-a-Law at trial..."

[10] It is clear that the certificate, which is dated 7 May 2008, was not made available to Mr Smith until after the trial. The applicant, it should be noted, was convicted on 9 April 2008 and sentence was postponed until 23 April 2008 when it was further postponed until 9 May 2008. Mr Smith's affidavit above states that "at (his) request character evidence was made available to (him) during the mitigation exercise". We cannot be sure of the nature of the character evidence that Mr Smith received as the evidence suggests that if he received this particular certificate, he certainly did not receive it before 7 May 2008, that is, two days before 9 May 2008. On the latter date, he was not present for the sentencing process, but according to the record of appeal Miss Cruickshank appeared and duly made a plea in mitigation. However, no evidence of character was called even at this final stage, and no explanation has been offered for the failure to do so. It is quite noticeable that Mrs Goodwin who provided Mr Edmond with the certificate did not swear an affidavit. That fact makes the picture incomplete, given her obvious role in securing the certificate.

The guiding principles in respect of character evidence

[11] In ***Michael Reid v R*** (SCCA No. 113/2007: delivered 3 April 2009), this court listed the main principles applicable in respect of a complaint of this nature. There, Morrison, J A stated:

> "44. In our view, the following principles may be deduced from the authorities to which we have been referred:

(i) While it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel, can lead to the conclusion that there may have been a miscarriage of justice (***Sealy and Headley v The State,*** paragraph 30 and the Judicature (Appellate Jurisdiction) Act, section 14(1)).

(ii) Such a breach of duty may also include a failure to advise, in an appropriate case, if necessary in strong terms, on whether the accused person should make an unsworn statement from the dock, give sworn evidence, or say anything at all in his defence (***R v Clinton).***

(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged ***(Muirhead v R***, paragraphs 26 and 35).

(iv) On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be of relevance and will ordinarily, in the absence of other factors, be accepted by the court (***Bethel v The State,***

page 398; ***Muirhead v R,*** paragraphs 30 and 37).

(v) The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted *(**Whilby v R***, per Cooke, JA (Ag) at page 12, ***Jagdeo Singh v The State*** (2005) 68 WIR 424, per Lord Bingham at pages 435-436)."

[12] It bears stressing that the failure to adduce evidence of the good character of an accused person will not automatically result in the allowing of an appeal based thereon. The circumstances have to be carefully examined and the impact of the failure assessed to see whether a conviction would inevitably and indubitably have resulted.

[13] In the instant case, we are of the view that the peculiar circumstances warrant our intervention. We are fully conscious that behaviour patterns have changed drastically in our country, and that unspeakable criminal activity quite often now knows no bounds and emanates from sources and situations hitherto unthinkable. The issue of credibility being of utmost importance in this matter, we are of the view that the applicant ought to be given the opportunity to present to the tribunal of fact evidence as to his character. Accordingly, the

application is granted; the hearing of the application is treated as the hearing of the appeal which is allowed. The convictions are quashed and the sentences set aside. However, in the interests of justice, a new trial is ordered to take place as soon as possible.