[2022] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 69/2017

JEVANNE ERWIN v R

Ravil Golding for the Applicant

Mrs Sharon Millwood Moore and Mrs Nickeisha Young-Shand for the Crown

21 October 2021 and 28 January 2022

G FRASER JA (AG)

[1] On 23 June 2017, Mr Jevanne Erwin ('the applicant) was convicted on an indictment containing seven counts, wherein he was charged for the offences of grievous sexual assault (count 1), unlawful detention with intent to engage in grievous sexual assault (counts 2 – 5), and unlawful detention with intent to have sexual intercourse (counts 6 – 7). His convictions came after a trial before a judge and jury in the Circuit Court for the parish of Saint Catherine. On 7 July 2017, he was sentenced to 15 years' imprisonment at hard labour with respect to count 1, and five years' imprisonment at hard labour with respect to counts 2 – 7. The sentences were ordered to run concurrently.

[2] The applicant applied for leave to appeal against his convictions and sentences, but this was refused by a single judge of this court. On his renewed application before us, and after hearing the submissions of counsel for both parties, we made the following orders:

1. The application for leave to appeal against convictions and sentences is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal against convictions and sentences is dismissed.

4. The convictions and sentences are affirmed.

5. The sentences are to be reckoned as having commenced on 7 July 2017.

[3] At that time, we promised to put our reasons in writing. This judgment is a fulfilment of that promise.

Background

[4] It was the prosecution's case that on 11 May 2012, a young woman (whom we shall identify only as 'the complainant') was at a party with her friends at Caymanas Gardens, in the parish of Saint Catherine. She left the party with her boyfriend (who shall be referred to as 'T') and they went to his friend's house. There, she engaged in sexual intercourse with her boyfriend in a room at the house. When they were finished having sex, and whilst the complainant was putting on her clothes, the applicant entered the room and said to T, "mek she have oral sex with you". In reply, T said, "[n]o, if she nuh want do it low di girl". The complainant said she also responded, "[n]o". The applicant then responded to T, "[i]f she naw do it to you she 'ave to do it to me fi di spite of it".

[5] The complainant said she attempted to leave the room with T, but the applicant pushed her back into the room and pushed T out of the room. The applicant slapped the complainant in her face, pushed her to the ground onto her knees, and forced her to perform oral sex on him. After this ordeal, the complainant ran outside the room through

a back door where she said she saw a little passage where she could escape. She made it outside but was held on to by another person with the assistance of the applicant. She fought with them and told them to let her go, but they continued to hold onto her. Eventually, she was forced back into the room by the applicant and the other man.

[6] Once back inside the room, the complainant, at the instigation of the applicant, was grievously sexually assaulted by four other males, one of whom also raped her. When she tried to resist the atrocities heaped upon her she was physically assaulted and threatened by her assailants. When she tried to leave the room where she was being detained, she was ordered by the applicant to return there. The applicant orchestrated the entire event and told her she had to perform oral sex on all the men before she could leave.

[7] After the fourth man had violated her, she re-entered the room where the applicant was and asked him whether she could now leave. The applicant responded, "come go a you yaad now man", before proceeding to demand that she give him her telephone number and warned her to make sure it was not a wrong number. The complainant said she gave the applicant her number because she wanted to leave. She then left the premises, stopped by a friend's house to return a phone, and then went home. She said nothing to the friend about what happened. By the time she got home, her mother was awake and getting ready for work, but she also did not say anything to her mother. She said she was embarrassed. She also gave evidence that "[a]fter that now, is like mi nuh come out none at all. Mi nuh go outside, mi not even go a mi doorway. Mi just stay in a mi house".

[8] On Wednesday (on or around 16 May 2012), the complainant said a friend of hers brought her to the Caymanas Police Station, and she made a report to the police, who recorded a statement from her. About a day later, she was brought to the Spanish Town Hospital, where she was medically examined. On 29 May 2012, she attended an identification parade at the "Hundred Man Police Station" where she identified the applicant.

[9] In his defence, the applicant gave an unsworn statement from the dock where he denied committing the offences against the complainant. He stated, among other things, that on 12 May 2012, after 4:00 am, he and the complainant made an arrangement to go over to the house, and they did their "stuff". On their way out of the house, the complainant stopped to have a conversation with her boyfriend, but he did not stop with her as he was going to work early in the morning. He said he and the complainant had made arrangements before and she asked him "for a ting, a ting you could classify as money". When she asked, he agreed to give it to her, so he took her number and said he was going to work and whenever he left work he would contact her in the evening and they "link up back". He further said that he was shocked when a friend of his visited his house and told him that the complainant said she was raped by him (the applicant) and some other men.

The appeal

[10] The applicant was granted leave by this court to abandon his original grounds of appeal and to argue, instead, the following supplemental ground of appeal:

> "The verdict of the Jury was unreasonable and cannot be supported by the evidence having regard to the lack of credibility and unreliability of the virtual complainant either by reasons of inconsistencies discrepancies or other inadequacy. That it was not reasonably open to the jury to be satisfied beyond reasonable doubt that the Applicant was guilty."

[11] Mr Golding, counsel for the applicant, argued that the complainant was not a credible witness and that her evidence was confused and unclear. He highlighted several inconsistencies in the complainant's evidence, some of which he withdrew after acknowledging that some of the 'inconsistencies' he raised were not supported by the evidence. Primarily though, counsel took issue with aspects of the complainant's evidence concerning the voice identification of the applicant. He submitted that the complainant said she recognized the applicant by his voice, but her evidence of hearing the applicant speak before was during conversations between the applicant and her father. During

cross-examination, the complainant said her father had migrated some 10 years before the trial, which would also mean that her father would have migrated five years before the time of the incident in 2012. He also referred to the complainant's evidence where she said she heard the applicant speaking to some of his friends a week before the incident when she went to purchase breakfast at the track. However, she did not say how close she came to the applicant or how long she had heard him talking. Counsel submitted that nowhere in her evidence did the complainant state that prior to the night of the incident, she spoke with the applicant or that he spoke with her directly. The evidence as to voice identification, he said, was therefore tenuous.

[12] Counsel further submitted that the only evidence presented by the prosecution as to what transpired that night was given by the complainant and that her evidence was uncorroborated. He conceded that corroboration, in this case, was not necessary for the jury to come to a verdict of guilty. However, he contended that with so many discrepancies and inconsistencies and omissions, corroboration would be necessary and that the learned trial judge ought to have directed the jury accordingly.

[13] Counsel, whilst accepting that the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses, especially where that assessment is dependent upon the evaluation of the witnesses in the witness box, submitted that the court should examine the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies or other inadequacies; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to the proof of guilt. In support of this submission, he relied on para. 39 of the Australian case of **Pell v The Queen** [2020] HCA 12.

[14] In response, Mrs Millwood Moore, on behalf of the Crown, argued that the mere fact that there were a number of inconsistencies and discrepancies in the complainant's evidence, does not necessarily mean that a case has not been made out against the applicant. Counsel submitted that of critical importance when dealing with inconsistencies

and discrepancies, the consideration for the jury is whether the relevant subject matter is slight, serious, material, or immaterial and whether it goes to what may properly be called the 'root of the matter'. She contended that, in the instant case, the matters of which the evidence of the complainant involved contradictions were not germane to the case, and in some instances, explanations were provided for them. Counsel highlighted, for the court, several inconsistencies, discrepancies, and omissions referred to by the learned trial judge in her summation. She submitted that the learned trial judge appropriately and adequately canvassed all the inconsistencies and had sufficiently scrutinized them. Consequently, the jury was put in a position to make findings of fact that ought not to be lightly disturbed.

[15] With respect to the issue of corroboration or lack thereof, counsel for the Crown directed the court to several pages in the transcript which, she submitted, illustrated that the learned trial judge devoted a significant amount of time exploring the case for the defence against the backdrop of the applicant's good character; and reminding the jury that it is dangerous to convict upon the uncorroborated evidence of a victim of a sexual offence. She submitted that the learned trial judge also directed the jury that there was no corroboration in the case. Finally, counsel submitted that the learned trial judge having correctly directed the jury in keeping with the law, and the jury having assessed the complainant to be a credible witness, there is no basis upon which this court ought to be moved to disturb the verdicts.

Analysis

[16] In assessing the applicant's sole supplemental ground of appeal, we found the dictum in **R v Joseph Lao** (1973) 12 JLR 1238 to be instructive. In that case, Henriques P, cited with approval, at page 1241 of the report, an excerpt from Archbold, Criminal Pleading, Evidence and Practice, that:

> "The court will set aside a verdict on this ground [that the verdict is unreasonable and cannot be supported by the

> evidence], where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

[17] Further, as set out in the headnote of that case:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. **He must show that the verdict is so against the evidence as to be unreasonable and insupportable**." (Emphasis added)

[18] Accordingly, this court would have been moved to set aside the verdict against the applicant only if it were satisfied that the verdict by the jury was obviously and palpably wrong. To achieve this, the applicant was required to demonstrate that the "verdict is so against the evidence as to be unreasonable and insupportable".

[19] Mr Golding, in contending that it was not reasonably open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty, argued that the complainant was not a credible witness. In doing so, he made reference to several inconsistencies in the evidence of the complainant at the trial, including the voice identification of the applicant, which he submitted was tenuous. He also took issue with the fact that the evidence of the complainant was uncorroborated.

[20] As it relates to counsel's submission regarding the voice identification of the applicant, we found no merit in that submission as there was no issue at trial as to the identification of the applicant. In fact, the applicant, in his unsworn statement, did not deny having spoken to the complainant. Neither did he deny being with the complainant at the house. What he said was that he and the complainant had an arrangement, they did their "stuff", and then he left the house whilst the complainant stopped to speak to her boyfriend. He also said the complainant asked him "for a ting, a ting you could classify as money" and that at the time she asked, he agreed to give it to her, and so he took

her number so that they could "link up back" in the evening. Identification of the applicant, therefore, was not in issue.

[21] As for Mr Golding's contention that in this case, corroboration would be necessary and that the learned trial judge ought to have said more in relation to this, we also did not find merit in that submission. According to section 26 of the Sexual Offences Act:

> "26. – (1) Subject to subsection (2), where a person is tried for the offence of rape or any other sexual offence under this Act, it shall not be necessary for the trial judge to give a warning to the jury as to the danger of convicting the accused in the absence of corroboration of the complainant's evidence.
>
> (2) Notwithstanding the provisions of subsection (1), the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining –
>
> (a) whether to accept the complainant's uncorroborated evidence; and
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> (b) the weight to be given to such evidence."

[22] Accordingly, though at the trial of sexual offences under the Sexual Offences Act, it is not necessary for the trial judge to give a corroboration warning to the jury, such warning may be given to the jury where the trial judge considers it appropriate to do so. In this case, the learned trial judge, in her discretion, gave a corroboration warning to the jury. She repeatedly directed the jury that "there is no corroboration in this case". She explicitly directed them that:

> "In sexual offences it has been said that it is dangerous to convict upon uncorroborated evidence of a victim of a sexual offence. This is because it is said that allegations of a sexual nature are sometimes easy to make and hard to refute. It has also been said that when you make these kind [sic] of allegations for all sorts of reasons, or for no reason at all it might be that she has consented, but now she is ashamed of what happened. Or she may say that this happened because she feel slighted. Or what he is saying, she didn't get the

> money that was promised. Or it may be, that she made up these things. All of these things you have to consider."

[23] The learned trial judge also explained that

> "What corroboration is basically, is independent evidence. That is, evidence from some other source that shows that this act was committed. And [sic] you have the accused man saying that this act was committed, but he is saying that it was with consent. So you have no corroboration as it relates to the question of consent. The report that he [sic] made to the police, that is not corroboration. So basically what all of this means is that you have to examine the account that she has given carefully and that burden of proof is on the prosecution. They have to make you feel sure … you have to look at all the evidence. If at the end of the day you are convinced and you believe her when she says she did not consent to any of these, then it is open to you to find the accused guilty in relation to these acts."

[24] No issue was raised by the applicant concerning the learned trial judge's direction to the jury in this regard, and rightly so. Therefore, we saw no value in the applicant's complaint as it relates to the uncorroborated evidence of the complainant.

[25] Having assessed the learned trial judge's direction to the jury, we agreed with counsel for the Crown that the jury was put in a position to make findings of fact which ought not to be lightly disturbed. We also observed that the factual circumstances, in this case, could not be classified as being plagued by "compounding improbabilities" as was the situation in **Pell v The Queen**, the Australian High Court decision on which Mr Golding relied as being persuasive to this court.

[26] In that case, the appellant, the Archbishop of Melbourne, had been convicted by a jury for the offences of sexual penetration of a child under 16 years and committing acts of indecency with or in the presence of a child under the age of 16 years. The complainant alleged that these acts of sexual assaults occurred in 1996 and 1997, but the complaint was not made until 2015. At the trial, the prosecution's case was, to a large extent, dependent upon the credibility and reliability of the complainant's evidence. The

appellant appealed to the Court of Appeal following his conviction by a jury, and that court, having viewed the recording of the complainant's testimony, by a majority assessed the complainant to be "a compellingly credible witness". The Court of Appeal also reviewed what has been termed "solid obstacles" to conviction and concluded that the jury was entitled to the view taken in respect of the appellant's guilt, based on the evidence they had heard. The conviction was accordingly upheld. The appellant obtained special leave to appeal the decision of the Court of Appeal. On appeal, the High Court grappled with the findings of the jury as to the credibility and reliability of the witness on the one hand and what they termed at para. 119 as the "compounding improbabilities caused by the unchallenged evidence…[which] required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt". That court assessed the evidence presented at the trial and concluded that the factual circumstances as they existed at the time of the alleged offences as to the appellant's "invariable practice", and the "unchallenged evidence of the requirement under Catholic church practice" were inconsistent with the acceptance of the complainant's evidence. This led the Australian High Court to conclude that "there is a significant possibility … that an innocent person has been convicted".

[27] In the instant case, there was an opportunity for a sexual encounter between the complainant and the applicant. The applicant himself admitted that he and the complainant did "stuff", which we interpret to mean that some conduct of a sexual nature transpired between the parties. As to whether or not that sexual interaction was consensual and whether or not, at the applicant's invitation, the complainant was sexually abused by other men was entirely a matter for the jury to assess. It was entirely reasonable for the jury to have accepted the complainant as being truthful and reliable in that regard, based upon the evidence they heard and having been adequately directed by the learned trial judge.

[28] Further, it was not lost upon us that the applicant did not raise any issue that the matter ought to have been withdrawn from the jury, nor did he raise any issue with the

learned trial judge's general directions to the jury. His sole issue was in relation to the verdict arrived at by the jury, which he argued was unreasonable and unsupported by the evidence having regard to the lack of credibility and unreliability of the complainant either by reasons of inconsistencies, discrepancies or other inadequacies. In view of the fact that the evidence was fully ventilated by the learned trial judge and proper and fulsome directions given to the jury, we did not consider that the inconsistencies, discrepancies, or any omission were of such a character as to amount to a miscarriage of justice and to make the applicant's conviction unreasonable and insupportable.

[29] Consequently, there was no basis on which it could successfully be argued that it was not reasonably open to the jury to be satisfied that the applicant was guilty beyond a reasonable doubt.

[30] It was for these reasons that we made the orders outlined above at para. [2].