JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 145/2002

BEFORE: **THE HON MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

ANTHONY McCALLA v. REGINA

Mrs. Jacqueline Samuels-Brown for the appellant

Herbert McKenzie and Mrs. Stephanie Jackson-Haisley for the Crown

November 25, 26, 27; December 3 and 19, 2003

PANTON, J.A.

1. The applicant was convicted on June 28, 2002, in the Saint Mary Circuit Court of the offence of rape and sentenced on July 5, 2002, by Miss Justice Beckford to eight years imprisonment. His application for leave to appeal, having been refused by the single judge, he renewed it before us.

The prosecution's case

2. The complainant, Miss C, was involved in an intimate relationship with the applicant between April and December 2000. They lived at Rio Nuevo, St. Mary, in the same house but in separate rooms during the period of this relationship as well as after. Miss C. moved out of the house on May 23, 2001, but returned on

the following day to collect her belongings. She had left the key in the door to her room the previous day, but never saw it on her return. However, she pulled the door and went in the room. She proceeded to the bathroom to take a shower. After she had removed her underwear, the applicant entered the bathroom, held her and pushed her into her bedroom. He asked her: "Gal, whey you doing here, gal you nah make haste and leave?" He also told her that when she was leaving she was to make sure that she left "the stand" and "his mother's $10,000.00". The applicant hit the complainant in her face and all over her body, and also kicked her. During the process, he placed her belongings on the verandah. While the complainant was being beaten, the applicant's cousin drove into the yard and there was a conversation between the applicant and his cousin. After his cousin had left, the applicant took out a knife, held it at the complainant's throat, gagged her with a rag, and had sexual intercourse with her without her consent on the floor. During the struggle between the complainant and the applicant, the latter received a cut on one of his fingers and he wiped the blood on her dress. He stopped having intercourse with the complainant and flung her on the bed. He dragged her while hitting her on the thumb as she was holding on to the bathroom door. He threw her over his shoulder and eventually locked her in his bedroom. A vehicle came into the yard and the complainant, who had been crying and calling for help, ran outside after the applicant had opened the door. Three men, George Rose, Norbert Thompson and Tiny had come in the vehicle. The applicant went outside with a machete in hand, and

announced to the men that he had just had sexual intercourse with the complainant, and he wanted to know what they were going to do about it. Thereupon, there was an incident resulting in injuries to Thompson and the applicant. Both were transported to the St. Ann's Bay hospital where they were treated.

The defence

3. The applicant denied having sexual intercourse with, or using violence on, the complainant. According to him, the complainant was in the process of removing her belongings from the premises when he cautioned her not to remove anything that was not hers, and he reminded her of the need to settle outstanding amounts for rent. The complainant became boisterous. Thereafter George Rose, Thompson and Tiny came on the premises and assaulted him. Further, other men were summoned unto the premises. They came with stones, bottles, cutlass, fish-gun, and other implements, and proceeded to beat the applicant severely. He was taken to hospital in an unconscious state. Two days later, after having been released from hospital, he went to the police station where he was informed that Miss C had reported that he had raped her. He invited the investigating officer to retrieve the clothing that he had been wearing on the date in question, but the officer did not act on that invitation.

The grounds of appeal

4. Mrs. Samuels-Brown sought and was granted leave to argue twelve supplemental grounds of appeal. However, ground 3 was not pursued. As might

have been expected, due to the number of grounds, there was some overlapping of submissions in respect of the various grounds of appeal. Although we heard full arguments in respect of the remaining eleven grounds, we do not find it necessary to address all of them for the purpose of arriving at a decision in the matter. This is so because of the view that we have taken of ground 7.

Ground 7

5. This ground reads:

> "The learned trial judge misquoted the evidence at page 17 of the summing-up when she said:
>
> > 'Both the accused and the complainant are telling you that there was some anger between them, that the accused had beaten up the complainant, boxed her, and kicked her, and that sort of thing'.
>
> In fact there had been no evidence for or on behalf of the appellant and nothing in his statement to the jury to say that he had ever been angry towards the complainant or that he had ever "beaten", "boxed", or "kicked" the complainant or any of "that sort of thing". Accordingly the jury was mis-directed in this important regard and in the result there has been a miscarriage of justice".

6. Mrs. Samuels-Brown submitted that this misquotation of the evidence must have seriously affected the applicant's chance of an acquittal. It was, she said, a grave error when it is considered that the defence was the very opposite of what the learned judge had said and portrayed. She relied on **Floyd Howell v. The Queen** (P.C. Appeal no. 21 of 1997 delivered February 11, 1998). In that case, the learned judge had made a comment which indicated that he had either

misunderstood, or had forgotten, the evidence in the case. At page 9 of that judgment, it reads thus:

> "Secondly, he suggested to the jury, contrary to the evidence, that the credibility of the senior police officer involved was not in issue . . .The true position is that the counsel for Howell had expressly challenged the veracity of the Assistant Commissioner. The judge's comment struck at the core of the defence case: if the jury accepted the judge's comment it cogently undermined the defence case that he had been beaten".

Mr. McKenzie, for the Crown, submitted that, in the instant case, the words did not go to the core of the issue that was before the jury, and that in any event the error would have been cured by the later directions at page 18, lines 19 and 20. The full context of that to which Mr. McKenzie referred has to be looked at. It begins at line 12 and reads thus:

> "You have the evidence of the complainant, if you accept what she is telling you, that she was struggling with the accused, the accused had a knife at her throat and they were struggling, and he was struggling with the knife, and she didn't get any cut. So, it is a matter for you to look at, you look at that and you determine.
> **The accused on the other hand has told you that no such thing happened".**

The emphasised sentence above is the direction to which reference was being made by Mr. McKenzie. He described it as "some amelioration of the situation". Mrs. Samuels-Brown countered by saying that those words relate only to the struggle with the knife, and not to the general issue of violence alleged by the prosecution in the case.

The law as to misdirection on the facts

7. This Court has said on several occasions that, in determining the effect of a misdirection on the facts of a case, we are guided by the principle which is well-stated by Scarman, L.J. in **R. v. Wright** (1974) 58 Cr. App. R. 444 at 452:

> "At the end of the day, when the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts, the questions must be first of all, was there error, and secondly, if there was, was it significant error which might have misled the jury? If this Court has a lurking doubt, it is its duty to quash the conviction as unsafe..."

We recently revisited this area of the law in **Ian McDonald v. Regina** (Supreme Court Criminal Appeal No. 202/2001), in which the judgment was delivered on July 31, 2003. In that case, the appellant was tried and convicted by Miss Justice Beckford, sitting alone in the High Court Division of the Gun Court, of the offences of illegal possession of firearm and shooting with intent. In giving her reasons for judgment, the learned judge gave an incorrect location for the commission of the crimes. This error formed the basis of one of the grounds of appeal. In applying the principle stated above, we concluded that although the learned judge had indeed made the error complained of, it was "of minimal importance" and did not detract "in the slightest degree" from the findings of fact that she had made, and so had "no effect whatsoever on the validity of the convictions" (page 5).

8. In the instant case, the prosecution's case was that the applicant applied extreme violence on the complainant and had forced sexual intercourse with her. The defence was that the applicant used no violence on the complainant, and no sexual intercourse took place on that day between them. The applicant had merely reminded the complainant about her obligation to pay the outstanding sum due for rental, and this was followed by the appearance on the scene of some friends of hers who severely beat the applicant resulting in his hospitalization. The issue for determination by the jury was that of the credibility of the witnesses. This issue was of critical importance in relation to all relevant disputed facts. It was therefore of some moment that the learned judge should have clearly and accurately set out the contending positions that were before the jury. In saying the words complained of, she made a serious misrepresentation, in giving to the jury as an undisputed fact a view which was opposite to the stance of the defence, and to the contents of the unsworn statement of the applicant.

9. The error was a significant one. Here was a situation in which the jury was told that the applicant had said to them that there was anger between himself and the complainant, and that he had beaten, boxed and kicked her. In that situation, the jury may have come to its verdict by reasoning that if the applicant had admitted to these things then he also committed the act of forced sexual intercourse. The jurors do not have the benefit of the transcript of the proceedings in the jury room. They have to rely on a repetition of the evidence

and relevant statements by the judge during the summation. Where significant errors are made in the repetition, and there is any doubt as to the likely impact on the fairness of the proceedings, the conviction cannot stand. It is human to err, and judges are not exempt from this human failing. It would be a good thing therefore if counsel involved in a criminal trial were to pay careful attention to the summation. Had this been done in this case, we feel that the judge would have been alerted to the error and would have duly corrected it. This gross distortion of the defence would not have been left to the jury.

10. The question now arises as to whether there should be a re-trial of this matter in view of the fact that the conviction is being quashed due to judicial error. In that respect, we are firmly guided by the Privy Council judgments in **Reid v. The Queen** [1980] AC 343 and **Everad Nicholls v. The Queen** (Privy Council Appeal No. 14 of 2000 - delivered December 13, 2000). Mrs. Samuels-Brown submitted that the applicant has already spent eighteen months in prison, and that with due consideration for good behaviour, that represents a substantial part of the sentence that he would have been required to serve. Consequently, it was her contention that it would not be in the interests of justice for the applicant to be subjected to another trial which would not take place immediately, but rather after several more months would have elapsed. Mr. McKenzie's answer to this submission was that justice was not divisible, and that the judge's error should not impact adversely on either the applicant or the complainant. The difficulties, if any, he said, arose from things being done which

ought not to have been done, and for which the prosecution should not be blamed. This latter point, of course, overlooks that which we think is the duty of counsel, including prosecuting counsel, that is, to listen carefully to the summation and to point out to the judge, before the jury is invited to retire, glaring errors of fact and law that the judge may have made.

11. We are of the view that in the circumstances of this case, it would be unfair for the applicant to be put to face another trial. Firstly, he has been in custody for a substantial period of time. Secondly, there is the danger that a second trial would provide an opportunity for the prosecution to make good deficiencies that were exposed at the first trial. These deficiencies include the prosecution's failure to produce medical evidence to support the severe beating that the complainant alleged that the applicant visited on her. She is supposed to have been examined by two doctors, one on the day of the assault, and the other on the following day. In spite of these medical examinations, no medical evidence was forthcoming. There is a strange situation in this respect in that notwithstanding the nature of the beating she said she received, the complainant, in re-examination, said that only her vagina was subjected to medical examination.

12. Mr. McKenzie, in submitting that there should be a re-trial, said that the defence would then get an opportunity to call medical evidence which Mrs. Samuels-Brown sought to adduce at the commencement of the hearing before us. In making the application, Mrs. Samuels-Brown conceded that the evidence

which was in the form of a medical certificate was not fresh evidence. She relied on section 28(a) of the Judicature (Appellate Jurisdiction) Act. The fact is that the evidence was available at the trial. The applicant, represented by very senior counsel, took a considered decision not to rely on it at the trial. We see no reason to impugn that decision, and at the same time we do not wish to set an "evil precedent" wherein this Court will be regularly called on to reverse decisions taken by accused persons and their counsel, particularly experienced counsel, in the conduct of the defence. In any event, Mr. McKenzie's submission overlooks the legal position that it is for the prosecution to prove its case beyond reasonable doubt. There is no burden on the defence to prove anything, so the Court will not accede to Mr. McKenzie's suggestion.

Conclusion

13. So far as the application for leave to appeal is concerned, we grant it and treat the hearing of it as the hearing of the appeal. We allow the appeal, quash the conviction, set aside the sentence and enter a verdict of acquittal.