[2010] JMCA Crim 69

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 94/2008

BEFORE: **THE HON. MR JUSTICE HARRISON, J.A.**
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

WESLEY PATTERSON v R

Leroy Equiano for the applicant

Mrs Annmarie Feurtado-Richards for the Crown

4, 5 & 22 October 2010

HARRIS, J.A.

[1] The applicant was convicted on 31 July 2008 in the Home Circuit Court on an indictment containing three counts. He was charged with burglary and larceny on count one, rape on count two, and assault occasioning bodily harm on count three. A sentence of 12 years imprisonment at hard labour was imposed on count one, 20 years at hard labour on count two and three years at hard labour on count three. It was ordered that the sentences on counts one and two should run concurrently and the sentence on count three should run consecutive to those imposed on counts one and two.

[2] The complainant, a 75 year old lady, retired to her bed, having securely locked the front and back doors of her house before doing so. It was her custom to leave the lights on, in each room in her house at nights. At about 2:00 o'clock in the morning of 6 July 2002 she was awakened by the sound of someone kicking her back door and calling her.

[3] Sometime after, the door was kicked in and she said the applicant entered the house. She then hid under her bed. While there, the applicant, she said, searched her handbag from which he took $5,000.00. Thereafter, he found her hiding under the bed. He pulled her out causing some injury to her arm.

[4] He tried to undress her, she being clothed in her pyjamas. She resisted and protested. A struggle ensued between them. The applicant then used a knife to cut off her clothes. She revealed that he said to her that "him come fi some pussy and me a get it and me a tek it now". Following this, he threw her down on the floor and had sexual intercourse with her on two separate occasions. During this time she said she cried, told him she was dying and asked him to leave her alone.

[5] She further stated that she had known the applicant for over 30 years. He lived close to her. She asserted that initially, the applicant tried to cover his face by placing his shirt over it but she removed the shirt and

threw it away. She went on to relate that she had the opportunity to view his face with the aid of a bright light which was over their heads in the room.

[6] After the incident, she remained on the floor as she felt battered and exhausted. One of her daughters, later that morning, came and took her to the doctor and then to the Half Way Tree Police Station.

[7] Three original grounds of appeal were filed by the applicant. These were abandoned. Leave was sought and obtained for the filing of the following supplemental grounds of appeal:

Ground 1

> "The Learned Trial Judge's summation was very biased towards the prosecution's case and in so doing failed to present the Applicant's case to the jury fairly."

Ground 2

> "The nature of the case and the behavior of the Complainant during cross examination required that the Learned Trial Judge present the case to the jury in a fair and even-handed manner and in particular should have warned the jury on how to approach comments made out of context by the Complainant that were discriminatory to the Applicant and of no probative value to the case."

[8] It was Mr Equiano's submission that the learned trial judge was biased in the manner in which he presented the case for the defence, as shown in his directions generally. He belittled and ridiculed the defence by his comments, yet showed sympathy to the complainant, he argued.

[9] Mrs Feurtado-Richards submitted that there is nothing to show bias on the part of the learned trial judge in the manner in which he dealt with the defence, as he made it clear to the jury that the applicant had done nothing wrong. The learned trial judge, she further argued, fairly outlined the evidence and properly dealt with the unsworn statement.

[10] The gravamen of Mr Equiano's submissions is that the learned trial judge presented the defence in an unfavourable light to the jury. He brought to our attention several passages in the summation which he contended showed bias on the part of the learned trial judge.

[11] An examination of the summation reveals that at page 11 lines 11 – 25 and page 12 lines 1 – 9, the learned trial judge gave the following directions:

> "The defence is not saying that … was not in her house at …, on the 6th of July, 2002. They are not saying that somebody never come and broke down her door, they are not saying that a man never come in there and raped (sic) her. What they are saying is that it was not the accused man, it was not him because he was not there, he was elsewhere. And further, they are saying that that woman who tells you she is seventy-five

> years of age, is not a nice woman; she said she go to church but she really is not a nice woman; she is a bareface (sic) liar; having been raped and robbed, all she is doing is pinning it on a man whom she does not like, pin on a man whom she has known for at least thirty-five years; and in fact, the defence is saying forty years, pin on a man whom is one of her nearest neighbours, but whom she don't really talk to, she don't like; she don't care, so she take a whole number of four days before she can pin it on him because she don't like him. That is really what the defence is saying; not that she was not robbed, not that she was not raped, not that her house was not burglarized, and not that she was not assaulted, as stated in the indictment. So, the real issue for you to try is, who did it."

The foregoing was prefaced by the learned trial judge alerting the jury to the fact that the applicant was saying that he was not present on the morning of the incident and he went on to state that the applicant should not be taken as having committed any offence. He impressed upon them the importance of satisfying themselves that the applicant had committed the offence, before ascribing guilt to him.

[12] After outlining to the jury the evidence relating to the identification of the person who the complainant said was the applicant, he went on to say at page 23 lines 1 - 10:

> "On the other hand, let me remind you that what the Defence is saying is that it is a concocted story, it is some put-up story, although this woman is going to church, she just telling lies."

These instructions were followed by a direction to the jury that they should carefully consider the complainant's evidence and decide whether she was a witness of truth so that they would feel sure of the guilt of the applicant.

[13] At page 26 lines 22 – 25 and page 27 lines 1 – 10, the learned trial judge continued as follows:

> "But what is the significant thing about it? You get arrested in June 2006, and you were told about an incident in July, 2002, unless something significant happens, would you know where you were? Would you know that you were not at …, unless it was a significant date to you? But, that is what he says. He says when the incident took place, "I was not there." He is not saying the incident didn't take place, but he is saying he was not there. And then, he says that the lady say he was doing things for five hours; the lady said four; be that as it may. And, defence attorney was at pains to show that it could be less than four hours, but he says it is five hours and then he said he didn't know what else to say because he was not in the area."

He immediately reminded the jury that the applicant had nothing to prove and was under no obligation to say anything. He later reiterated the warning he gave in respect of visual identification and went on to state at page 28 lines 4 – 18, the following:

> "The defence really is not saying that she was not raped, the defence is not saying that her house was not broken – and you also bear in mind the

> question of the credibility of the witness …, because the defence is saying that that old woman has come to this court to perjury (sic) her soul; that she tells you that she is a church woman, but she don't like people because they might be poor and hungry and beg money. She don't like the accused because him poor; she is telling lies, and she come here to tell lie pon her neighbour who lives next door to her, and she pick on that poor man, that poor defenceless man because although she knows him for so long, she don't like him, she don't like his family and she is a liar. After all, he was not there."

[14] We can find nothing in the excerpts from the learned trial judge's summation to which we have referred, to justify the complaint of bias. The applicant denied that he was present at the complainant's home at the time of the incident. An assessment of the extracts from the learned trial judge's summation reveals that in reviewing the evidence, he took into account such of the defence's case as was elicited by cross-examination. In addition, it exposes certain comments made by him. There is nothing in the passages from the summation which could be said to have been capable of reducing the value of the applicant's unsworn statement nor did the comments of the learned trial judge fall outside the permissible bounds. Further, he clearly instructed the jury that they were not bound to follow his views.

[15] Mr Equiano further submitted that the learned trial judge failed to instruct the jury as to the manner in which they ought to treat certain

unsavoury remarks made by the complainant against the applicant. The remarks, he argued, amounted to a serious attack against the applicant's character and consequently the learned trial judge ought to have given a stern warning to the jury by directing them to ignore the remarks.

[16] Mrs Feurtado-Richards conceded that the disparaging comments by the complainant were unfortunate but she argued that one should take into account her age, the level of her intelligence and the traumatic experience which she had undergone. She argued that if the learned trial judge had repeated the remarks to the jury, he would have run the risk of reinforcing the unfortunate outbursts, thus causing some prejudice. So far as the comments made against the attorney-at-law are concerned, she submitted that when they are examined they cannot be said to be devastating.

[17] The real issue in this case is whether the portrayal of the applicant by the complainant as a person of bad character is so devastating that it can be said that the applicant received an unfair trial. The first outburst manifested itself during the examination in chief of the complainant. She was asked about the length of time which she had to view the face of her assailant. Her answer was, "I saw this boy, him go formatory."

[18] During the cross-examination, the complainant launched a sustained attack against the applicant and to a lesser extent, against his

attorney. The following exchange took place, shortly after the applicant's attorney-at-law commenced his cross-examination of her in seeking to elicit evidence from her relating to her prior knowledge of the applicant (page 21 lines 24 & 25 and page 22 lines 1 – 25):

> "Q. Nobody else nuh live nearer to you than him?
>
> A. Is only him uncle, him live that way and him uncle live that way, two a them live near me.
> (Witness demonstrates)
>
> Q. Nobody else?
>
> A. No.
>
> Q. And him live de fi more than 40 years, nuh true?
>
> A. Say me live there more than 40 years?
>
> Q. Him live de more than 40 years, more than 40 years?
>
> A. Why you want to tell me that, sar?
>
> Q. Nuh true?
>
> A. Why you ask me? Mi know them more than how you know them, them a mi neighbor, do you know that him grow a 'formatory', mi know him.
>
> Q. Fi di years him and yuh never talk?
>
> A. I don't talk to him, this is boy, what I have to talk to him say.
>
> Q. Is somebody you don't talk to?

A. I have no time to talk to him.

Q. As a matter of fact him a somebody weh you don't even like see?

A. You talking to get him out of the trial and crosses but God see him already.

Q. You a go answer mi questions?

A. These bad breed people I 'fraid of them."

The cross examination continues as follows at page 23 lines 3 – 25 and page 24 lines 1 - 24:

"Q. I going ask you again, you nuh like him, yes or no?

A. Don't ask me foolish question I have five children and I have enough grandchildren I didn't tell you that I don't like him, but I don't like him behavior, him behavior is very bad.

HIS LORSHIP: Just one minute.

A. You talking to get him off the bad, better you take him one side and take him a church and talk to him because him dun spoil. What you going to do to get him off, you can help him? Mi spirit don't tek him, him spoil already, you can't help him.

Q. Ready to answer?

A. If I can.

Q. And you ready to – you nuh like him?

HIS LORDSHIP: She has already answered that question.

Q. You hardly see this youngster?

A. You hear what mi saying Mr., mi know you trying to get him out of the mess, you cannot get him out. Take him one side and teach him good, how to live, mi old like him granny, mi olda.

Q. You and fi him people nuh get on either from long time?

A. You trying to go 'round the curb and you can't get him off the bad ways, him must have manners.

Q. That night in question you a tell lie pan him, him was nowhere near your yard?

A. Don't tell me foolishness, you a lawyer but you can't talk more than me. A foolishness yuh a tell yuh lawyer.

Q. You a tell lie and decide …

A. Me a tell lie? A money yuh want from him, but them don't even have it.

Q. You a one lady weh never see him that night, lie you a tell?

A. Go sidung, mi naw tell lie, you want me fi tell lie.

Q. You a say a him because you nuh like him?

A. Galang go sidung, a money you a look from him, because a crocus bag him a sleep pan and bush, you galang go sidung, go sidung.

Q. Because you know say him poor you come with your mouth full a lie."

At page 28 lines 24 – 25, and page 29 lines 1 – 25 and page 30 lines 1- 7 the following is recorded:

"Q. You tell the police say you tear off the mask?

A. Mask?

Q. The something weh him tek and wrap up him head.

A. Mi nuh like your style, you come in like say you a lawyer, you a look work, you nuh suppose to a run mi down. You work a Morant Bay, you is a poor lawyer.

Q. You decide to be rude and continue to tell lie?

A. I am not telling any lie.

Q. Lie. You don't know …

A. You come in yah like lawyer, nobody nuh want you.

Q. You call other people name?

A. Lie you telling, you are a lyad lawyer.

Q. You only a say a Patterson because you don't like him and you don't like him from long time.

A. You know – you ever come cross Patterson yard, him nuh have nuh weh fi sleep.

Q. And because him hungry and nuh have nuh money.

A. What him have fi gi you?

Q. You are a very untruthful old lady.

A. Mi come a yuh office, yuh nuh even can turn a good lawyer, mi haffi turn back.

Q. And you come and tell lie?

A. Di boy just live three chains off, mi see him everyday.

Q. What I am telling you is that before this you and him don't even talk,

A. Mi not telling any lie on him. Mi talk the truth.

Q. Him nuh go nowhere where you live?

A. You a lyad.

Q. You and …..

A. Mi nuh lyad like you."

[19] It cannot be denied that the denigrating comments of the complainant tend to show that the applicant is of disreputable character. These comments must be viewed as being capable of causing some harm to the applicant. Where a trial judge is faced with a situation of this nature, it is open to him to embark on one of two options: he may discharge the jury, or he may give a strong warning to them, depending on the nature of the case. If the impugned words used by the witness clearly show a preconceived notion that an accused is of a bad reputation, in such a case it would be proper for the trial judge to discharge the jury. However, where the offending words, although prejudicial, are not so objectionable as to warrant the discharge of the jury, then the judge must issue a firm warning to the jury in order to

disabuse their minds of the fact that the words were used. They should be cautioned that they should ignore the offending words.

[20] There are however situations where the trial judge may in the exercise of his or her discretion deem it prudent to avoid making reference to the repugnant words. It could be that in referring to the words, the jury may be reminded of them, when in fact they may well not have remembered them.

[21] Every case, of course, is dependent on the facts and the decision as to whether a jury ought to be discharged is exclusively within the trial judge's discretionary powers. Accordingly, an appellate court is loathe to interfere in the exercise of this discretion. In **R v Weaver** [1967] 1 All ER 277 at page 280 Sachs L.J. said:-

> "…the decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion. When that has been said, it follows, as is repeated time and again, that every case depends on its own facts. As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged."

[22] In **McClymouth v R** (1995) 51 WIR 178, Carey J.A. acknowledged that an appellate court will only intervene in the judge's exercise of his or her discretion if there is justification that the information which had been divulged is absolutely abhorrent. At page 184 he had this to say:

> "The court will be slow to interfere unless it feels that the applicant would be justified in saying that what occurred was devastating. The court must have regard to what was divulged, whether accidentally or deliberately, to appreciate whether it was perhaps a casual remark, as the court found in ***R v Coughlan*** (1976) 63 Cr App Rep 33, or whether it was so prejudicial as to be not capable of curative action by the trial judge."

[23] We are of the view that the derogatory statements made by the complainant about the applicant, having substantially reflected on his character, the learned trial judge ought not to have permitted the complainant to have continued her attack on the applicant's reputation after the first outburst in examination in chief, nor should he have permitted her attack to persist during cross-examination. Even if the witness, due to her age and the traumatic experience which she had undergone, had been infuriated by the cross-examination, she ought not to have been allowed to continue her onslaught against the applicant. It was incumbent on the trial judge to have intervened.

[24] The credit of the witness was of great importance, she being the sole witness upon whom the prosecution relied. Her remarks about the applicant and his counsel were highly distasteful, obnoxious and prejudicial. It cannot be said that the words used by her would not have adversely operated on the minds of the jury in arriving at their verdict. In these circumstances, the proper course would have been for the learned trial judge to have discharged the jury and ordered a new trial.

Ground 3

> "The sentence of the Court was manifestly excessive."

[25] In view of our conclusions, it will be unnecessary to give consideration to this ground as it relates to sentence.

[26] The hearing of the application for leave to appeal is treated as the hearing of the appeal. The appeal is allowed, the convictions are quashed and the sentences are set aside. A new trial is ordered in the interests of justice.