JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 77/94

COR: THE HON MR JUSTICE CAREY J A
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE PATTERSON JA

R v BERNARD SIMPSON

Leslie Cousins for Appellant

Miss Kathy Pyke for Crown

1st & 22nd May 1995

FORTE J A

This appeal came to us by leave of the single judge. On the 1st May 1995, having heard arguments, we allowed the appeal, quashed the conviction, set aside the sentence, and ordered that a verdict and judgment of acquittal be entered. At that time we promised to put in writing our reasons for so doing. This we now do.

The appellant was convicted on the 29th July 1994 in the St. Catherine Circuit Court for the offence of rape. The allegations of the Crown revealed what appeared to be a very simple case. From what can be gleaned from the summing-up of the learned trial judge, the

complainant alleged, that while walking on the street on the 14th July, 1991, the appellant held her and by threats with the use of a knife, and in view of several persons on the road, pulled her into his house, and there raped her. In the process of pulling her, against her will, he cut her on her hand with the knife. At the time, the appellant committed the offence upon her, another man, by the name of "Mujjet" who took no part in the activity was also in the room. Nothing else was heard of or from this man at the trial. The complainant, did not report the offence to the police until three days later on the 17th July 1994, and apparently gave no explanation for this delay. At the trial, she made it known to the Court, that since the offence had been committed, she had become a "christian" and because of that she wished to discontinue the case against the appellant. The learned trial judge, nevertheless quite correctly in our view, ordered the prosecution to proceed.

The only other witness for the prosecution was the investigating officer whose testimony revealed two relevant factors. The first is that when the complainant made the report to her on the 17th, she noticed a cut on her hand. The other is that when the appellant was asked about the incident, he was alleged by the officer to have said:

> "When you get out of control, you
> just get carried away."

In his defence, the appellant admitted that he had sexual intercourse with the complainant but maintained that she consented to the

act. He had known her for 5 - 6 years before the incident, and in fact up to 6 months before that, they were living together. The fact that she had once lived with the appellant was admitted by the complainant. In respect of the incident, he alleged that he had met her on the street and after an amicable discussion, she willingly came to his room, with him, where they had sexual intercourse with her consent. He admitted that "Mujjet" was in the room at the time. In so far as the cut on her hand was concerned, he alleged that it happened accidentally, and that it was he who cleaned it, and dressed it subsequently.

Before us Mr. Cousins for the appellant, filed and argued several grounds of appeal, none of which regrettably addressed the complaints which led us to our decision to allow this appeal, all of which relate to defects in the summing-up. We now address our minds to these complaints.

1. CORROBORATION

It has long been settled law that, a Judge in dealing with the question of corroboration in a case of rape is required to define corroboration to the jury, and if there is no such evidence, to inform them of that fact, and to warn them of the dangers of convicting an accused person in the absence of such evidence. To support this principle, no reference to authority is necessary, the principle having been so often discussed, and finally determined so long ago. Yet, in the instant case,

no such warning was given to the jury. It is so, that the learned trial judge did instruct them, that there should be corroboration. This is what he said:

> "In this case, Mr. Foreman and members of the jury, there is no evidence from any independent quarter that the woman was consenting. The law says that you should have corroboration because it says it is easy for somebody to say 'Yes I did not give consent' and it is very difficult to disprove there was no consent."

Though he instructed the jury that there should be corroboration, nowhere did he instruct them that in the absence of corroboration,

before they could act adversely to the appellant, they ought to proceed cautiously because of the danger of acting upon the evidence of the complainant alone. In our view the jury was left to determine the credibility of the complainant without regard to the danger of finding her credible in the absence of corroboration evidence.

2. CONSENT

Though the learned trial judge's direction on 'consent' for the most part was adequate and correct, there is one particular passage which gave us great concern, and which influenced our decision.

In dealing with this issue (at page 5) he said:

> "Even if the woman consented, you will have to ask yourselves the question, 'Did she give any indication to him that she was consenting'?"

This statement if nothing else, was misleading and ambiguous, and must have confused the jury. Having been so directed, they would have retired with the impression, that even though they might find that the complainant had consented to the act, they could nevertheless find the appellant guilty if they found that she did not indicate to him (we suppose by words or action) that she was in fact consenting. This would be clearly an error. The learned trial judge apparently inadvertently transferred the examination of the mental state of the appellant to that of the complainant. He was quite correct, when he earlier told the jury that if the appellant believed that the complainant was consenting, when in fact she was not, then that would necessitate an acquittal. But to put it in the converse as he did in the passage complained of - that is to say that if she was in fact consenting, but gave no indication to him that she was, then he would nevertheless be guilty is clearly wrong and must as we have found be fatal to the conviction.

3. INFERENCES

The learned trial judge's directions on "inferences" is another area of the summing-up that gave us great concern. It was terse and offered no assistance. In addition, it was incorrect, and confusing and consequently unhelpful. The only directions he gave on this subject are as follows:

> "You can draw inferences in a case of this nature that is to say, you can put two and two together to find the missing facts which go towards guilt or innocence. But the inference which you draw must be a reasonable inference."

The least said about these directions is the better. Suffice it to say that the jury were never told that inferences must be drawn from facts which they find to have been proven.

On the basis of these three errors, we determined that the conviction could not stand, and consequently that the appeal ought to be allowed. In determining whether a verdict of acquittal ought to be entered, we considered the fact that the offence was alleged to have been committed in 1991, that the parties once lived together before the incident, that the evidence was by no means overwhelming and that the complainant had expressed a desire not to proceed with the case.

For these reasons, we made the order referred to earlier.