JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 110/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

FABIAN SPENCE v R

Andrew Campbell for the applicant

Mrs Karen Seymour-Johnson and Mr Brodrick Smith for the Crown

10, 11, 16, 25 March and 15 April 2011

PHILLIPS JA

[1] This is an application for leave to appeal against conviction. The applicant was charged with four counts on an indictment of two counts of illegal possession of firearm and two counts of rape. The particulars in respect of counts one and three are that on a day unknown between 1 and 31 July 2008, the applicant had in his possession a firearm not under and in accordance with the terms and conditions of a firearm user's licence for counts two and four in respect of rape, the particulars are that he, on a

day unknown between 1 and 31 July 2008 in the parish of Saint Andrew, unlawfully had sexual intercourse with the complainant without her consent.

[2] The applicant was tried in the Home Circuit Court on 24 and 25 August 2009 and convicted on all four counts and was sentenced on 2 October 2009 to seven years imprisonment at hard labour on each count. On 25 October 2010, a single judge of this court reviewed his application for leave to appeal and refused it. The application for leave to appeal was therefore renewed before us. On 25 March 2011, we made the following order:

> "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 sentences set aside. In the interests of justice a new trial is ordered."

These are the reasons.

Background facts

[3] The prosecution adduced evidence from two witnesses: the complainant and Detective Verron Johnson. The applicant gave sworn evidence and called three witnesses in support: his sister, his mother and his cousin..

[4] The prosecution's case was that the applicant on the two occasions referred to in the indictment, had in his possession a firearm which he pointed at the complainant and having done so, had sexual intercourse with her without her consent.

[5] This case was ultimately decided purely on a question of law, and as a new trial was ordered, we will set out the facts as briefly as possible.

[6] The complainant is a student and the applicant is her cousin. The complainant's version of events is that the applicant had unlawful sexual intercourse with her, without her consent, on two occasions, one week apart, at a house which was largely unoccupied, and which was owned by the applicant's sister. The complainant said that on both occasions the applicant had a gun.

[7] Initially the complainant did not report the matter to the police as the applicant had told her that "if mi tell anybody him a go kill mi". She gave evidence of reporting the matter to the police after an incident with her mother who took her to the station as she (the mother) said she had been hearing talk in the area and she wanted to find out if it were true. The complainant told the court of her mother threatening her with a stone and telling her to leave their home and go to her father. She thereafter left the house and stayed at her cousin's house, which was where she slept the night before she actually went to the police station.

[8] Detective Sergeant Verron Johnson, who was attached to the Centre for the Investigation of Sexual Offences and Child Abuse (CISOCA), gave evidence that after interviewing the complainant and her mother, she later cautioned the applicant, arrested and charged him for the offences of illegal possession of a firearm and carnal

abuse. She said that his response was, "Me never have sex from me born, because me have skin problem. Me have skin problem and me can't let anyone see me naked".

[9] An unsuccessful no-case submission having been made on behalf of the applicant, he gave sworn evidence and confirmed that he knew the complainant who was his cousin, but he denied that he ever "put his penis in her vagina" and that he ever had a firearm. He also denied ever having threatened her. He agreed that he had told the police that he had a skin problem which he said that he had had for about three years.

[10] As indicated, the applicant called three witnesses, his younger sister, his mother and his cousin, none of whom could give any direct evidence about the two incidents in respect of which he had been charged.

The appeal

[11] Counsel for the applicant Mr Andrew Campbell indicated that there were originally four grounds of appeal, (a) – (d). The original grounds (a) and (b) were not abandoned and are set out below. Ground (c) was subsumed by the amended ground of appeal nine and ground (d) was subsumed by the amended ground of appeal one.

The original grounds (a) and (b) are:-

> "(a) There was no corroboration of the Crown's case.
>
> (b) The Crown's witnesses challenged the credibility of the Crown's case."

[12] Counsel filed, requested and was granted permission to argue nine amended grounds of appeal. These are as follows:

> "1) It is necessary to examine on voir dire all children under the age of fourteen years old when they are presented as witnesses and the learned trial judge's failure to establish the complainant's competence as a witness by voir dire was fatal to the conviction and sentence of the applicant.
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> 2) The applicant has been denied the right to a fair trial, subject to Section 20 of the Jamaican Constitution.
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> 3) The learned trial judge throughout the course of the trial conducted the proceedings in a manner which prevented the Appellant from having a fair trial in that on numerous occasions during the evidence-in-chief and cross-examination of the witnesses for the prosecution, he repeatedly and consistently intervened and obstructed the responses of the witnesses and supplied evidence (i.e. put words into the mouths of the witnesses), which was accepted by the said witnesses for the prosecution and formed a part of the evidence.
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> 4) That the Learned Trial Judge erred throughout the course of the trial by making interpolations and interventions, as well as comments, remarks and observations to and of Defence counsel which were intimidatory, with the result that the Appellant's defense was severely hampered.
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> 5) That the Learned Trial Judge erred in that throughout the course of the trial he descended into the arena and by his interventions and participation in the proceedings became prosecutor and advocate as well as leading witness for the Crown, with the result that the adversarial nature of the entire trial was totally and completely eroded.
>
> 6) That the Learned Trial Judge's failure to recognize the element of duress under which the complainant first

made her complaint and not to address this was a material misdirection of his own jury mind.

7) The Learned Trial Judge's verdict was inconsistent with his findings of fact.

8) The Learned Trial Judge's findings that reconciled the inconsistencies in the complainants' (sic) evidence and previous statement to the police, by finding it was as a result of a (sic) incorrectly prepared statement by the Investigating Officer is legally redundant. If it were so, it would result in such an insurmountable prejudice to any defendant in that they (sic) could never properly prepare a Defense. The constitutional right to fair trial would have been breached ab initio and any prosecution or conviction on those grounds would automatically fail.

9) The actions of the trial judge and the Crown have so prejudiced the case to the detriment of the applicant so as to render it unfair and manifestly unjust in all the circumstances."

These grounds cumulatively fell into four main areas of contention:

(1) The complainant was a child of tender years and it was necessary to examine on voir dire all children under the age of 14 years when they are presented as witnesses.

(2) There were "interpolations and interventions as well as comments, and remarks and observations" made by the learned trial judge which were intimidatory to the defence, obstructed the responses from the witnesses and resulted in the judge becoming prosecutor and advocate, and the defence was thereby severely hampered.

(3) The learned judge failed to appreciate that the complainant was under duress when she first made her complaint and failing to address this was a material misdirection.

(4) The trial was unfair.

[13] Counsel submitted on all of the above grounds. In our view, ground one had merit. It is not in dispute that no voir dire was conducted at the commencement of the testimony taken from the complainant. Because of the way the appeal has proceeded, and the determination of the same, we do not think it is necessary for us to deal with any of the grounds, save and except ground one.

[14] Counsel referred us to the case of ***R v Whitely*** (1978) 16 JLR 228. In the instant case though, he was unable to point to any evidence to show that the complainant was under the age of 14 years, although he indicated that he had raised objections at the trial with regard to the prosecution changing course and indicting the applicant for rape instead of carnal abuse. He seemed to be relying on this to support his contention that the complainant must have been of tender years. There was no mention of this on the transcript. In any event, the complainant could have been 15 years old and the applicant could have been charged for carnal abuse and that would not have made her a child of tender years for the purposes of the voir dire as required by section 20 of the Child Care and Protection Act.

[15] Counsel for the Crown, however, after much diligence, was able to uncover through searches at the school where the complainant attended, a copy of the birth registration form of the complainant issued by the Registrar General's Department on 12 February 1996. This document had been faxed to the office of the Registrar of the Court of Appeal. On the face of it, it showed that the complainant at the time of giving evidence was a child of tender years, as she had not yet reached the age of 14 years.

The court pursuant to section 28(a) of the Judicature (Appellate Jurisdiction) Act thought it expedient in the interests of justice, to order production of a certified copy of the said document as it was connected to the proceedings, and appeared to the court, to be necessary for the determination of the case.

[16] We therefore made an order "that the Registrar of the Court of Appeal issue a witness summons directed to the Registrar General to produce the certified copy of the Birth Registration Form No. EA 446 in respect of the complainant, to this court on the 25 March 2011 at 2:00pm". The matter was adjourned for this to be done, and on that date the Registrar General attended in response to the said summons and produced to the court a certified copy of the said birth registration form which was tendered into evidence as exhibit 1.

Analysis and Conclusion

[17] Section 20 of the Child Care and Protection Act states:

> "20.-(1) Subject to subsection (2), where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, the child's evidence though not given upon oath-
>
> (a) may be received, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth;
>
> (b) if otherwise taken and reduced into writing in accordance with the

provisions of section 34 of the Justices of the Peace Jurisdiction Act, or of this Part, shall be deemed to be a deposition within the meaning of that section and this Part, respectively.

(2) Where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by other material evidence in support thereof implicating him.

(3) In this section, 'child of tender years' means a child under the age of fourteen years."

[18] Based on the evidence gleaned from exhibit 1, the complainant was under the age of 14 years at the time of giving evidence and pursuant to the above Act was therefore a child of tender years. As indicated previously, no voir dire was held. The principle to be deduced from the case of ***R v Whitely*** can be taken from the headnote of the case which reads:

> "It is necessary to examine on voir dire all children under the age of fourteen years when they are presented as witnesses and the learned trial judge's failure to establish the boy's competence as a witness by voir dire was fatal to the conviction and sentences of the applicant."

This is even more compelling when the sole eye witness' evidence is uncorroborated.

[19] In ***R v Lal Kahn*** (1981) 73 Cr App Rep 190, where the statute in the UK is similar to the Child Care and Protection Act, the appellant was charged with and convicted of living on the prostitution of a child of 12 years old, the daughter of the

woman he was living with. Kilner Brown J described the case as an unfortunate one as the mother admitted that she had been "running her daughter" as a prostitute and was properly sentenced to five years imprisonment. The conviction and sentence of ***Kahn*** however were quashed on appeal as the court held that where a witness is a child of tender years, and she is about to give evidence, there is an obligation upon the trial judge to question her as to her understanding of the nature and solemnity of an oath in the presence and hearing of the jury. This was not done. This case therefore also involved unsworn uncorroborated evidence.

[20] In the Privy Council case of ***Fazal Mohammed v The State*** (1990) 37 WIR 438, on appeal from Trinidad and Tobago, the Board approved ***R v Whitely*** and applied ***R v Lal Kahn*** and stated that as a matter of practice before a child under the age of 14 years is called to give evidence in criminal proceedings, "the trial judge must satisfy himself by appropriate inquiry that the child has a sufficient understanding of the nature of an oath and the solemn obligation to tell the truth that it implies before allowing the child to give evidence". Lord Griffiths in delivering the judgment of the Board stated that it was good practice for the trial judge to record in his note the whole inquiry that he makes of the child less than 14 years before allowing the oath to be taken. The evidence was accepted as being improperly admitted.

[21] We decided that the conviction in this matter must be quashed and the sentence set aside, and made the orders accordingly as stated in para [2] herein. We invited

counsel to address us on whether there should be a new trial, pursuant to section 14 (2) of the Judicature (Appellate Jurisdiction) Act.

[22] Both counsel relied on the well known oft cited Privy Council case on appeal from Jamaica, **Reid *v R*** (1978) 27 WIR 254. In that case the appellant had been convicted of murder. The case against the appellant was based on a sole eye witness who had heard a description of him between the murder and the date that she identified him at the identification parade. She was not asked, and so she had not said, what characteristics had featured in the description that she had heard, and what part that description would have played in her identification of the appellant at the identification parade. The appeal was allowed and the Court of Appeal, by a majority, ordered a new trial. This was overturned, on appeal, as in the view of the Board, the facts of the case fell into the category of "those in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence. The Court of Appeal's error in principle lay in failing to treat this as a conclusive factor against ordering a new trial".

[23] In that case at the request of the Court of Appeal, the Board set out certain factors to be taken into consideration in deciding whether to order a new trial. The Board warned that the list was not exhaustive and must be viewed in the particular circumstances of each case. Lord Diplock in delivering the judgment of the Board emphasized that:

> "The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of

justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions."

[24] The factors to be considered in deciding whether to order a new trial have been utilized over the years and are set out below:

(a) the seriousness and prevalence of the offence;

(b) the expense and length of time involved in a fresh hearing;

(c) the ordeal suffered by an accused person on trial;

(d) the length of time that will have elapsed between the offence and the new trial;

(e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial;

(f) the strength of the case presented by the prosecution.

This list, however, is not exhaustive. The Board also gave other guidance, viz:

(i) The Court ought not to order a new trial if in doing so it would give the Crown another chance to fill the gaps in their evidence.

(ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.

(iii) It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case.

(iv) Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie, the more appropriate course is to apply the proviso and dismiss the appeal.

[25] At the end of the judgment the Board reiterated that they had deliberately refrained from giving any indication that any factor was more important than any other, but maintained and insisted that each case would depend on its own peculiar facts and "the social environment in which criminal justice in Jamaica falls to be administered ..."

[26] In the instant case, the offences are very serious ones (gun-related and sexual offences), which are very prevalent throughout the island. The failure to hold a voir dire could be considered a technical blunder by the trial judge, but as no evidence of the complainant's age was submitted, he could perhaps be excused. However, there was some information, (although confusing and appearing contradictory) in the possession of the prosecution which ought to have been presented to the court, which was conceded (quite correctly) by Mrs Seymour Johnson, at the hearing of the appeal. This is not a case in which the prosecution is being given an opportunity to cure deficiencies in the case, or to fill gaps in the evidence. The alleged incidents took place in 2008, the witnesses are all related, live in the same community and so can be located to give evidence again at a new trial. The matter could be re-tried in the Easter term 2011 which would only be three years since the alleged commission of the offences, and based on the information before the court thus far, the trial should last only two days.

[27] One must recognize the ordeal suffered by an accused person on trial and the anxiety of having to endure the experience of a new trial, but that having been said, as the law lords said, it is not an exhaustive list. Each case must be dealt with on its own peculiar circumstances, and the fact that the offences relate to the abuse of a young child also cannot be overlooked. In all the circumstances of this case, in the interests of justice, there must be a new trial and we so ordered. We recommend that the matter be relisted for trial at the earliest opportunity.