[2019] JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 14/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BRENTON TULLOCH v R

Lambert Johnson instructed by Johnson & Company for the appellant

Ms Cadeen Barnett and Ms Kelly-Ann Francis for the Crown

18 and 22 November 2019

PHILLIPS JA

[1] Mr Brenton Tulloch (the appellant) has filed an appeal challenging his conviction and sentence for the offence of rape. He was tried for the said offence in the Clarendon Circuit Court before Gayle J and sentenced to 15 years imprisonment at hard labour. He was granted leave to appeal both conviction and sentence by a single judge of this court.

Summary of the facts

[2] It was alleged that on 31 March 2012 at about 5:00 pm, the complainant (TS), (who was 14 years old at the time) went to visit her friend, S, at her home in Salem in the parish of Clarendon. Upon meeting S, S asked TS to follow her (S) to the appellant's

house which was located "in front" of S's house. TS accompanied S to the appellant's house where she saw the appellant and S's boyfriend. S said she was going to her house and told TS that she did not have to follow her there or go to her own home then, because S said she intended to return to the appellant's house. S and her boyfriend then left the appellant and TS at the appellant's house.

[3] While at the appellant's house waiting for S to return, the appellant and TS were sitting on the bed in the room in his house. TS stated that the appellant then asked her to have sex with him but she declined. The appellant then proceeded to take off TS's tights and panty, took out his penis and "was pushing his penis into [TS's] vagina". TS testified that it only went into her vagina a "little bit", but caused her to feel pain in her vagina.

[4] When TS left the appellant's house, she said that she met a boy in a district called Chocolate, and thereafter walked home. She said when she went home sometime after 6:00 pm, she noticed blood on the clothes that she had been wearing and blood was also coming from her vagina. She thereafter went on the verandah at her home and spoke to the same boy she had met in Chocolate who was her classmate. She spoke to this male classmate at her home, but did not tell her mother, who was at home when she arrived there, what had happened. The next day, TS was still bleeding and feeling pain from her vagina. She found that to be unusual as it was not yet time for her monthly menstruation. She then told her mother that she had been raped and she was taken to the Percy Junior Hospital where she was hospitalised for four days.

[5] The mother testified that TS was born on 2 April 1997. She stated that on the date in question TS arrived home at 7:00 pm, although in her statement to the police she had said 8:00 pm. The mother testified that TS was on the verandah until about 10:00 pm that night.

[6] A report was later made to the police by TS's mother on 2 April 2012. The appellant was arrested and charged for the said offence, and said nothing when cautioned.

[7] The appellant gave an unsworn statement in support of his defence where he said that on the day in question, TS had visited his house to collect clothes that his girlfriend had previously abandoned at his house. He stated that S had left his house and gone to church, but TS had remained at his home. He told TS to leave because he had to go to work and she left at about 12:30 pm that day. He later left his house for work at about 4:00 pm, and while walking on the road he saw TS standing up at the church gate. TS and the appellant spoke, and the appellant told her that he had no time for further discussions with her.

[8] The appellant said that the next day TS asked him to lend her some money and stated that she did not want her parents to know what had happened. He stated that TS had texted him indicating that she would tell him where he should deliver to her the money she had requested. The appellant thereafter called her and indicated that she should tell her mother what had happened to her. Her response, by way of text, was to say that she was bleeding but did not want her mother to know about it. The appellant

said that he had told TS that she should to go to her mother with those problems and not bring them to him. He also said that TS had even texted him while she was in the hospital.

[9] After receiving information alleging that TS had made a report against him at the police station, the appellant visited the police station. He indicated that he had taken the phone containing text messages from TS to court to show the judge.

The appeal

[10] Having been convicted and sentenced for rape the appellant, as indicated, sought and obtained leave to challenge that conviction and sentence. Counsel for the appellant, Mr Lambert Johnson, requested and was granted permission to abandon the original grounds that had been filed and to argue supplemental grounds of appeal. However, Mr Johnson did not clearly articulate the grounds upon which he intended to rely, and so, with the helpful assistance of the Assistant Director of Public Prosecutions, Ms Cadeen Barnett, and Crown Counsel, Ms Kelly-Ann Francis, we have distilled four issues from the submissions and grounds which were generally canvassed by Mr Johnson. These four issues are as follows:

1. Did the learned trial judge err when giving his directions on the alternative count of having sex with a person under 16 years? (ground 1)
2. Was the learned trial judge's treatment of the appellant's unsworn statement unbalanced and unhelpful? (ground 2)

3. Was counsel for the appellant incompetent, that is, did counsel use all fair and reasonable means to present the appellant's defence? (ground 3)

4. Was the learned trial judge's direction on sympathy for TS sufficient? (ground 4)

Directions on the alternative count (ground 1)

[11] Just before the learned trial judge concluded his summation, he left an alternative count of having sex with a person under 16 years to the jury for their consideration. In fact, this is what he said at pages 34-35 of the transcript:

> "You recall that the young girl's mother gave evidence that she is under the age of 16, the indictment charges Rape, the young girl is under 16, so, I am leaving with you a second count, that if you do not find him guilty for Rape, but if you find that sex took place and it wasn't Rape, you can look at the second count to say that he had sex with a young girl under 16, I am leaving that with you, for your consideration, very well."

[12] Mr Johnson submitted that the directions in that regard were inadequate because the learned trial judge did not direct the jury that if they accepted the appellant's version of events that sex had not occurred, then he ought to be acquitted. This comment made by the learned trial judge, counsel argued, also had the effect of depriving the appellant of a lesser sentence, to which he would have been entitled, if he had been convicted of the lesser offence, that is, having sex with a person under 16 years.

[13] Crown Counsel, Ms Francis, conceded that the directions were inadequate to the extent that the jury had not been told of what should be the result if they believed the appellant's position that no sex had taken place. Counsel argued that the directions given by the learned trial judge were nonetheless sufficient to the extent that the directions set out the different criteria required to prove both offences. It was therefore ultimately a matter as to which position (either that given by TS or by the appellant) the jury believed. There was, counsel asserted, no set formula of words required to be used by the learned trial judge.

[14] We are of the view that although the learned trial judge failed to direct the jury as to the consequence on the second count if they believed the appellant that he did not have sex with TS, the appellant would not have been prejudiced by this omission in the light of his defence. As indicated, the appellant's defence was that he had not had sex with TS. His defence was not that he had had consensual sex with her. So, the consequence that would have applied if the jury believed that no sex had occurred, would have been the same that would have applied with regard to the offence of having sex with a person under 16 years. The appellant could not hope to benefit from a defence that no sex had taken place but that if it had, it was consensual, as TS was under the age of 16 years. Once the jury had accepted that sex had occurred, then he would properly be subject to a direction that he could be found guilty of that offence, which was the alternate count left open to the jury by the learned judge, on the facts relied on by the prosecution. Accordingly, this ground of appeal is without merit and must fail.

Unsworn statement (ground 2)

[15] This ground asserted that the learned trial judge's treatment of the appellant's unsworn statement was unbalanced and unhelpful. Mr Johnson indicated that this was so since the learned trial judge pointed out discrepancies between the unsworn statement and questions posed to Crown witnesses in cross-examination, which counsel submitted, undermined any semblance of credibility that could have been attached to the appellant's unsworn statement. In particular, he complained that the learned trial judge had commented often on the fact that matters referred to by the appellant in his unsworn statement had not been put to the Crown witnesses, thereby suggesting recent fabrication or concoction (although he did not say so specifically).

[16] Ms Francis, in reliance on **Director of Public Prosecutions v Leary Walker** [1974] 1 WLR 1090, reminded the court of Lord Salmon's guidance as to how to treat with, and the evidential value attached to unsworn statements. She indicated that in keeping with this guidance, the learned trial judge had informed the jurors of the appellant's right to make an unsworn statement and he had told them of the evidential value of an unsworn statement, in that, it was not evidence because it had not been tested by any cross-examination, and indicated that they could "give it what weight [they] think" fit. He had reminded the jurors of these principles before he examined the appellant's unsworn statement. Counsel also submitted that, in any event, it was reasonable for the learned trial judge to comment on matters relevant to the appellant's case but which had not been suggested to the prosecution witnesses.

[17] We are in agreement with submissions made on this point by counsel for the Crown. The learned trial judge, in our opinion, gave proper directions with regard to the appellant's unsworn statement and how it was to be examined. The learned trial judge's reference to the discrepancies and inconsistencies between the appellant's unsworn statement and questions posed to Crown witnesses in cross-examination, did not in any way undermine the value of the appellant's unsworn statement. In our view, it was fair and reasonable for the learned judge to comment on matters appearing to be of some significance to the appellant's unsworn statement, which were not put to the witnesses for the Crown. This approach could give the impression of a lack of sincerity in the defence. In any event, although the unsworn statement is not evidence, it is well known and acknowledged that it is exclusively for the jury to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. It is also for the jury to decide whether the evidence for the prosecution has satisfied them of the appellant's guilt beyond a reasonable doubt, and in considering their verdict, they should give the appellant's unsworn statement only such weight as they think it deserves (see **DPP v Leary Walker**). Ground 2 would therefore not succeed.

Incompetence of counsel (ground 3)

[18] Mr Johnson posited that the appellant's defence was not robustly, if at all presented, and that counsel, Mrs Nicole Gordon-Haynes, who represented the appellant at the trial, was incompetent. In the light of evidence on the transcript which clearly

disclosed that counsel failed in her duty to her client in the conduct of the trial, Ms Francis correctly conceded that there was merit in this ground of appeal.

[19] As indicated, TS testified that the appellant tried to push his penis into her vagina and that it only went in "a little bit". TS also said that she bled profusely (despite not menstruating at the time) and had fainted on her way to the hospital where she remained for four days. It is clear on the evidence of her physical condition that some sexual activity had taken place. TS testified to being in the presence of another male person on her way home and on the verandah at her house after this ordeal was said to have occurred. However, she stated that it was the appellant who had had sex with her without her consent.

[20] The appellant's defence was that he had not had sex with her. In order to solidify the appellant's defence, counsel attempted to elicit evidence that someone else may have had sex with TS. However, when she was met with an objection from Crown Counsel, and was referred to section 27 of the Sexual Offences Act by Crown Counsel and the learned trial judge, her response was "[v]ery well, m'Lord, I am guided". Instead of making an application to elicit such evidence pursuant to section 27 of the Sexual Offences Act, Mrs Gordon-Haynes made a suggestion to TS that nothing happened on the day in question, and shortly thereafter completed her cross-examination.

[21] A majority in the Caribbean Court of Justice case of **Paul Lashly and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ), at paragraph [11], has stated

that if counsel's ineptitude has affected the outcome of the trial and where counsel's management of a case results in the denial of due process, the conviction will be quashed regardless of the guilt or the innocence of the accused.

[22] In the instant case, Mrs Gordon-Haynes was clearly inept, and her ineptitude and poor management of the appellant's case would have prevented the admission of evidence that could have been elicited pursuant to section 27 of the Sexual Offences Act, which may have had an effect on the outcome of the trial. Even when given assistance by Crown Counsel and by the court, Mrs Gordon-Haynes did not attempt to utilise section 27 of the Sexual Offences Act to elicit evidence that could bolster her clients defence. Instead, she resiled from lines of questioning that would tend to suggest that someone else had had sex with TS and had caused her injuries, and by her actions, denied the appellant his right to due process. Indeed, the evidence of the transcript suggests that perhaps counsel may not have been aware of the procedure which was required to be utilised under section 27 of the Sexual Offences Act, but it is also clear that she did not make any attempt to obtain assistance to do so.

[23] The Judicial Committee of the Pricy Council held in **Bethel (Christopher) v The State** (1998) WIR 55 394 that as a matter of course an attorney-at-law should always ensure that there is a written record of their client's instructions. At the court's direction, both counsel were urged to file affidavits detailing their attempts at obtaining the instructions the appellant had given to Mrs Gordon-Haynes.

[24] In an affidavit filed 19 November 2019, Mr Johnson detailed his efforts to contact Mrs Gordon-Haynes, which included making telephone calls and writing a letter, in order to obtain the written instructions she would have received from the appellant. He stated that all his efforts proved futile and indicated that on one occasion Mrs Gordon-Haynes had indicated that "she had moved out of office and was unable to locate her file with" the appellant's instructions.

[25] Ms Francis, in an affidavit filed on the same date, also detailed her efforts to contact Mrs Gordon-Haynes in an attempt to obtain information regarding her instructions which included telephone calls and emails. Her attempts also bore no fruit. The court is therefore left without a record as to the content of the appellant's instructions to Mrs Gordon-Haynes.

[26] Nevertheless, some evidence of what the appellant's instructions to counsel were can be gleaned from the affidavit of Ms Francis. Ms Francis deponed that sometime between 2 and 9 October 2019, she (Ms Francis) spoke to Mrs Gordon-Haynes who had enquired of Ms Francis whether "she [Mrs Gordon-Haynes] had questioned [TS] in relation to the text messages during the trial". It was also stated in the notes of evidence that when the appellant gave his unsworn statement, he indicated that TS had sent him text messages asking for money and telling him that she was bleeding. The appellant also said that he had taken the phone containing the text messages with him to the Parish Court so that a judge could examine the phone and the text messages. This enquiry from Mrs Gordon-Haynes suggests that she had knowledge about the text

messages at trial, and yet, had failed to put forward that portion of the appellant's defence to the jury.

[27] In all these circumstances, it cannot be said that counsel had presented the appellant's case fairly and reasonably. Her incompetence in failing to pursue an application pursuant to section 27 of the Sexual Offences Act, particularly in relation to the possibility of sexual relations between TS and another male, TS's peculiar injuries in the context of the evidence in this case, and perhaps a blatant disregard of her instructions relating to the text messages, prevented her from advancing a robust defence of the appellant. In the light of the evidence on the Crown's case, we are unable to say what would have been the verdict had counsel properly managed and presented the appellant's case. As a consequence, the appellant would not have received a fair trial as his right to due process would have been denied. His conviction, therefore, would have been unsafe and must be quashed. Accordingly, this ground of appeal succeeds.

Directions on sympathy (ground 4)

[28] While TS was in the process of testifying, when asked what had happened after the appellant had pulled down her panty, she started to cry. The court rose for 16 minutes, beginning at 12:12 pm and returning at 12:28 pm. Counsel for the appellant asserted that the learned trial judge ought to have specifically addressed TS's crying in his summation, as her crying may have led to the jury to be sympathetic towards her, which could have adversely affected the appellant's trial. Counsel argued that the learned trial judge's failure to do so amounted to a misdirection.

[29] In response, Crown Counsel pointed to several instances throughout the summation where the learned trial judge reminded the jury that they were not to have sympathy for the appellant. For instance, he said at page 7, "[s]o, no speculation, no sympathy, no prejudice, very well eliminate those... no emotions, don't let your emotions replace the evidence that has been led before you in this case or in this court". She further submitted that if the learned trial judge had made specific reference to TS's crying, it may have undermined those said directions, and would have had the adverse effect of evoking sympathy by refreshing the memory of the jurors as to TS's emotional state when recounting her ordeal.

[30] In our view, Crown Counsel was correct. The learned judge dealt adequately with the directions to the jury on sympathy and matters of emotion which could influence them. We agree that any further reference to TS's tears, which brought about an adjournment of 16 minutes, could easily have had an adverse effect on the fairness of the trial. There is therefore no merit in this ground.

Should a retrial be ordered?

[31] Our learned brother Brooks JA in **Nerece Samuels v R** [2017] JMCA Crim 17, in reliance on the principles gleaned from **Dennis Reid v R** [1980] AC 343, summarised the factors to be considered when deciding whether to grant a retrial. They include a consideration of:

> "a. the strength of the prosecution's case;
>
> b. the seriousness or otherwise of the offence;
>
> c. the time and expense that a new trial would demand;

d. the effect of a new trial on the accused;

e. the length of time that would have elapsed between the event leading to the charges, and the new trial;

f. the evidence that would be available at the new trial; and

g. the public impact that the case could have."

[32] Although the offence in respect of which the appellant had been charged, especially in the light of TS's age, is serious and indeed prevalent, we cannot say that the instant case was a particularly strong one for the prosecution. The trial itself lasted for only two days and so a new trial would not consume considerable time and expense. However, the appellant, in our view, is likely to be severely prejudiced by a new trial, as approximately eight years would have passed between the date of the incident and the appeal, and when a new trial could be ordered. These allegations would therefore have been hanging over the appellant's head for the said eight years, and he would have already served five years and 10 months of the sentence imposed of 15 years' imprisonment at hard labour. Of even greater significance, however, is the fact that Ms Francis has indicated to the court that over a protracted period the police have been unable to locate the witnesses, and that situation continues to obtain. Any attempt, therefore, to conduct a retrial would likely be an exercise in futility. In all these circumstances, the interests of justice would be better served if no retrial was ordered.

Disposition

[33] In the light of counsel's glaring ineptitude, ground three of the appeal succeeds. All the other grounds fail. Based on the factors aforementioned we would not order a retrial. The court therefore makes the following orders:

1. The appeal is allowed.
2. The conviction and sentence is set aside.
3. Judgment and verdict of acquittal is entered.