[2013] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 121/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

GARFIELD VASSELL v R

Miss Gillian Burgess for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Mrs Tracey-Ann Robinson for the Crown

5, 8 March and 26 April 2013

PANTON P

[1] The application for leave to appeal in this matter was refused on 8 March 2013, oral arguments having been heard by us three days earlier. We ordered then that the sentences of 20 years imprisonment for rape and 10 years imprisonment for what the law describes as "the abominable crime of buggery" were to run concurrently from 19 February 2011.

[2] The applicant was convicted by a jury at a trial presided over by Evan Brown J in November 2010. The offences were committed on separate dates on the same female – the rape on 8 April 2009 and the buggery two days later. The female, who was 12

years old at the time, is related to the applicant by virtue of his common law linkage with her mother. They, along with others, shared the same residence. On both occasions, the applicant and the complainant were alone at the residence.

[3] As regards the commission of the rape, the applicant had prepared the way by ensuring that the other occupants were out of sight and hearing. He then proceeded to lock the windows and doors. Thereafter, he had non-consensual sexual intercourse with the complainant who had been watching television. The act was interrupted by the sound of the opening of the gate to the premises. During the sexual act, the applicant threatened the complainant with death if she were to disclose the occurrence to anyone.

[4] In respect of the offence of buggery, the applicant summoned the complainant while she was at a neighbour's residence, to come home to iron clothes for her mother. The complainant complied with the request. As she was completing the task of putting away the clothes that she had ironed, the applicant entered the room, pushed her on the bed with her face downwards, and forced his penis into her anus.

[5] While the complainant was being examined in chief by counsel for the Crown, the learned judge posed this question to her:

> "How long had he been living with you – in the same house with you, before the incident on the 9th?"

The witness answered thus:

> "From he come from prison."

This response was the main source of the complaint advanced before us at the hearing of the application.

[6] The applicant denied having sexual intercourse with the complainant. He said there was a religious war being waged by the grandmother of the complainant who did not like the fact that he as well as the mother of the complainant, the complainant herself and her siblings were all of the rastafarian faith. In his unsworn statement, he spoke also of the complainant's father having died as a result of "lotto scamming" and there being a belief that he had died leaving money for the complainant's mother whom the applicant describes as his (the applicant's) "empress". This situation had caused the complainant's grandmother and two aunts (her father's sisters) to be upset with him, the applicant. Consequently, they have painted an untrue picture of him molesting the complainant and they have instigated the laying of the charges against him.

[7] The applicant also stated that the complainant suffered from piles and that his "empress" (complainant's mother) was a bush doctor who had treated her for the condition. In ending his unsworn statement, he asserted: "All of these story weh dem a mek up because me jus a come off a charge like dat, m'Lord".

[8] The original grounds of appeal that were filed with the application read thus:

> "(a) **<u>Lack of Evidence</u>:**
>
> - That the Medical Evidence presented to the Court by the prosecution witnesses failed to justify the alleged offence for which I was charge [sic].

- That the evidence and testimonies upon which the learned trial judge relied on [sic] for the purpose to convict me lack facts and credibility, thus rendering the verdict unsafe in the circumstances.

(b) **Unfair Trial**: That the Learned Trial Judge in his Summation to the jury for their deliberation failed to address the Question of Coercian [sic] and intimidation of the Complainant by the prosecution witnesses

(c) **Miscarriage of Justice**: That the Court failed in law convicting me on the offence of Buggery and Rape when the testimonies and Medical evidence, did not support, the allegeed [sic] offences for which I was charged."

[9] The following supplemental grounds of appeal were filed on 21 February 2013:

"1. That evidence of the accused bad character was inadmissible in the circumstances in which it was led and amounted to a substantial miscarriage of justice. The introduction of this evidence was a material irregularity which renders the convictions unsafe.

2. The summation of the learned judge was inadequate to deal with the inadmissible evidence of bad character and he ought properly to have discharged the jury. In the alternative, even if directions to the jury could cure the defect in the evidence the learned trial judge misdirected the jury on the reason for excluding the evidence of bad character and in the circumstances the failure to give adequate directions amounted to a miscarriage of justice and rendered the convictions unsafe.

3. That the learned trial judge erred in law in eliciting inadmissible hearsay evidence of a complaint immediately after the commission of the offence. The

> learned trial judge gave no directions as to how to treat the evidence and this was a substantial misdirection which rendered the convictions unsafe."

[10] No submissions were advanced in relation to the original grounds of appeal. Miss Gillian Burgess, on behalf of the applicant concentrated on the supplemental grounds and submitted that the admission of evidence of bad character amounted to a material irregularity, the prejudicial effect of which outweighed its probative value. This was a reference to the complainant's response ("from he come from prison") when she was asked by the judge how long before 9 April had the applicant been living at the house. Miss Burgess cited the case ***Peter McClymouth v R*** (SCCA No 35/1995 – delivered on 20 December 1995). In that case, during cross-examination of the main witness for the prosecution, it was suggested by counsel that the witness was telling a lie. The witness responded that she was not, and added that that case was the second murder that the appellant had committed, and that counsel knew, as he had defended the appellant on another murder charge prior to the one on which he was being tried. On appeal, it was argued that this was a situation in which not only had the appellant been damned by the comment but also the character of his counsel had been tainted in the eyes of the jury. This court said at page 8 of the judgment:

> "In the instant case, the matters blurted out reflected to a high degree not only on the character of the applicant viz that he had committed murder before but also on the character of his counsel. We do not think that this double punch could be cured by words of caution by the learned trial judge. It would be manifestly unfair to continue the trial of the applicant on a charge of murder

> in the face of the revelation that the applicant had previously been convicted of murder, that being the obvious inference, and had been defended by the same lawyer: the lawyer was as bad as his client."

In the circumstances, the appeal was allowed, the conviction quashed and the sentence set aside. In the interests of justice, a new trial was ordered. Miss Burgess argued that the instant case should have had a similar result.

[11] The Director of Public Prosecutions submitted that what occurred in the case was unfortunate. However, it was for the trial judge to decide how to exercise his discretion as regards the continuation of the trial or ordering a new trial before a different jury – ***R v Weaver*** [1967] 1 All ER 277. It was not unreasonable for the judge in this instance to continue the trial. In any event, the directions of the judge were such, the learned director said, as to erase any question of a miscarriage of justice.

[12] The applicant has placed reliance on three cases decided by the English Court of Criminal Appeal between December 1934 and November 1935. They are: ***John Taylor*** [1934] 25 Cr App R 46; ***Lilian Grace Palmer*** [1935] 25 Cr App R 97 and ***William Charles Richard Peckham*** [1935] 25 Cr App R 125. The judgment of the court in each case was delivered by the Lord Chief Justice Hewart. In ***Taylor*** the appellant was convicted of conspiracy to defraud, uttering forged documents, and obtaining and attempting to obtain money by forged instruments knowing them to have been forged. He appealed on the basis that "by reason of improper questions put to him by the Judge it was made to appear to the jury that he was a man of bad character" (page 48). The questions asked by the judge were of "a very wide scope" and culminated in

the question: "What I want the jury to know is your history for the last ten years" (page 48). This resulted in defending counsel feeling obliged to reveal to the jury the fact that the appellant had a previous conviction. The Lord Chief Justice said:

> "It is very unfortunate that a mistake was, quite unwittingly, made in the course of putting questions which, if they had been framed with more particularity, would have been quite proper, but the disastrous result of those questions in the form in which they were put was to cause the fact to become known to the jury that they were trying a man who had already been in prison. We bear in mind all that was subsequently said in further questions, in the speech of counsel, and in the summing-up, but we cannot avoid the conclusion that in these circumstances, which so accidentally and unfortunately arose, the appellant did not have a satisfactory trial. We have no course but to allow the appeal and quash the conviction."

[13] In ***Taylor***, the presiding judge asked a series of questions that covered "a very wide scope" in comparison to the single question asked by the learned trial judge in the instant case which resulted in a single vague answer. The questioning of the judge certainly did not result in the revelation of any conviction.

[14] In ***Palmer*** the headnote reads:

> "Before the trial of the appellant, in the presence and hearing of the jury who were to try her, counsel appearing for her son, who had been put up for sentence on another charge, stated by way of mitigation that his client was the son of a notorious shoplifter. In the summing-up at the appellant's trial the jury were warned to disregard that statement.

> *Held*, in view of the above disclosure with regard to the appellant's character, the proper course would have been to adjourn the case of the appellant and try it before another jury, and in the circumstances the conviction must be quashed."

The court felt that although the jury had been directed to dismiss the statement from their minds, it was "a request to the jury to perform a very difficult task". In the particular circumstances, the quashing of the conviction was inevitable. However, that was not the only reason for allowing the appeal. The summing-up, the court said, amounted to "a statement to the jury that a person can be found guilty of receiving property well knowing it to have been stolen if, having innocently received the property, he afterwards finds that it was stolen" (page 100). The factual differences with the instant case are quite obvious.

[15] In ***Peckham*****,** the appellant was charged on two indictments. He was pleaded on them but was given in charge to the jury on one only. The case for the prosecution was however opened on all the material for both indictments and during the trial on the one indictment, evidence relevant only to the other indictment was given. After the trial had reached an advanced stage and the attention of the court was drawn to the unfortunate state of affairs, the trial judge told the jury to "wash out of their minds" the evidence that had been improperly adduced so far. In addition to this, a witness had revealed during his evidence under cross-examination that he had been to the appellant's house when he was away in prison. A new trial before another jury was urged on the judge but he dismissed the application. The Lord Chief Justice said that in the opinion of the court, "where a statement with regard to a prisoner's previous record

is inadvertently made from the witness-box to his prejudice, and his counsel applies for the trial to be begun again before another jury, the Court ought to begin the trial again". However, he did go on to say that it was "enough for the purpose of this appeal that there was misreception of evidence which was relevant only to the other indictment. Such misreception is fatal, and the effect is not merely to make the trial a nullity". So, strictly speaking, the conviction in this case was not quashed due to the evidence of previous conviction.

[16] The learned trial judge in the instant case, directed the jury thus:

> "Now, Mr Foreman and members of the jury, how trials are conducted in this jurisdiction is that the accused man's past is not revealed to a jury, and it is not revealed to a jury because you are to deliberate – your deliberations are to be unaffected by any knowledge of the accused man's past, so this is prejudicial. In the extreme, it came out of his mouth, even worse, because he has gone so far to say, a charge like this, so he has made it worse. So, members of the jury, it is very important. I know you are human beings, but the only way to be truthful to your oath in deliberating this case, is to put out of your mind what the complainant said about the accused man in that respect, and what he, himself, has said in that respect.
>
> Mr Foreman and members of the jury, I cannot stress it too much, I cannot emphasize it too much that you are not, in any way, to make that a part of your deliberations; I want to be very clear on that. He stands indicted on these charges in this indictment, and his fate in relationship to the charges in this indictment must rest solely on the evidence that the Prosecution has brought. So, if the Prosecution has not made you feel sure in relation to the charges laid by virtue of the evidence they brought, you are not to go off a [sic]

> wandering and be influenced by that one line from the complainant, and that one line from him. I want to be very clear about that, Mr Foreman and members of the jury, it is not to form any lot or part of your deliberation. You must come to your deliberation with that expunged, put out of your mind, totally, and deal with the evidence." [Pages 20 and 21]

[17] We found that the learned judge did the correct thing in the circumstances of this case. He exercised the discretion that a trial judge has in a situation such as the one that faced him. It cannot be that on every single occasion that a bit of prejudicial evidence is adduced that a new trial must be ordered. There would be the danger that a trial may become a never-ending process. As the learned Director of Public Prosecutions said, the law has moved on since ***Peckham.*** In any event, as has been shown, the cases relied on by the applicant had other issues which were fatal to the convictions. As stated in paragraph [13] above, the complainant in the instant case was asked a single question by the learned trial judge unlike the wide range of questions asked by the judge in the ***Taylor*** trial, and in her response the complainant did not say what the applicant had been in prison for and for how long; nor did she say that he had actually been convicted of an offence. In any event, it was the clear wish of the applicant that the jury be informed that he had been in prison, as it was part of his defence that his conviction on a similar charge was one of the reasons for the instant complaint against him. The applicant having made the disclosure, he ought not to be the one to say that his trial was prejudiced by the disclosure.

[18] We formed the view that the jury was properly directed in the circumstances, and that the convictions should stand. The issue before them was primarily one of credibility, and they seemed to have had little difficulty in determining it as they took less than 25 minutes to return their unanimous verdict.