

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 8 of 2018

IND. 21 of 2016

SC#00863/2016

BETWEEN:

MARLON PORTER

Applicant

- and -

Her Majesty the Queen

Respondent



BEFORE:

**The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon. C Dennis Morrison, Justice of Appeal**

Appearances:

Mr. Keith Myers, Attorney-at-Law for the Appellant
Mr. Scott Wainwright Officer of the DPP for the Crown

Date of Hearing and

Decision:

11th September 2020

Reasons Judgment delivered: 1st October 2020

JUDGMENT

Hon. C Dennis Morrison J.A.

1. On 10 October 2017, after a trial before Malcolm J ('the judge') and a jury, the applicant was convicted of the offences of rape, assault occasioning bodily harm and causing intentional harassment, alarm and distress.
2. On 20 February 2018 he was sentenced to terms of imprisonment of 13 years on count 1, two years on count 2 and one year on count 3. The judge ordered that these terms of imprisonment should run concurrently.

3. Before us on 11 September 2020, the applicant sought leave to appeal against (i) his conviction, on the ground that he was not given sufficient time to call and locate a potential witness for the defence who would have been able, if called, to furnish relevant evidence; (ii) the sentences which the judge imposed, on the ground that they were manifestly excessive in the circumstances.
4. After hearing Mr. Myers for the applicant and Mr. Wainwright for the Crown, we refused leave to appeal and affirmed the convictions and sentences. These are the reasons which were then promised for this decision.
5. It is first necessary to give a brief summary of the facts. The complainant and the applicant were known to each other. On the evening of 22 January 2016, the complainant encountered the applicant in the vicinity of Archie's Bar on Shedden Road, George Town. Her evidence was that the applicant agreed to give her a lift to a petrol station to buy some food, as she was hungry.
6. But instead, the applicant drove her to a secluded area where he committed the offences for which he was charged and ultimately convicted. After having vaginal sex with and performing oral sex upon her without her consent, the applicant dragged her out of the vehicle and across the ground towards the nearby sea. Then, after threatening to drown her, he drove away leaving her there.
7. During the course of the attack on the complainant, a chain with a ring on it which the complainant wore around her neck broke. When it was done, her blouse was torn and she was unable to locate her trousers. So, not knowing precisely where she was, she set out on foot in an attempt to make her way home.
8. In the early morning of 23 January 2016, a government truck driver, whilst on duty, encountered the complainant walking along the road a short distance from where the incident had occurred. She was bare-footed, her blouse was torn, and she had no clothing on the lower half of her body apart from her knickers. Her glasses, which were damaged, were sitting awkwardly on her face.
9. The truck driver stopped and came to the complainant's assistance. The complainant told him that she had been raped. The police were called and in due course the place where the offence had taken place was identified, and the complainant's chain, ring and shoes were there discovered on the ground. Medical examination of the complainant revealed bruising on her buttocks.
10. Closed Circuit Television (CCTV) and Automatic Number Plate Recognition (ANPR) footage from the relevant area led to the arrest of the applicant on 3 February 2017.

11. The applicant gave evidence at the trial. He stated that whilst they were at Archie's Bar he had made an agreement with the complainant that he would give her \$50.00 in exchange for sex. As a result, he drove the complainant to the location where they had consensual sex. Afterwards, when he attempted to give the complainant the \$50.00, she demanded \$200.00 instead. The complainant said that she would tell the police that he had raped her. She became angry and got out of the car. He told her to get back into the car, but when she refused he drove away. At that time, she was wearing her shoes, trousers and blouse. He denied assaulting her, dragging her across the ground and threatening to drown her.
12. At the end of the applicant's evidence on Friday, 29 September 2017, the trial was adjourned to facilitate the calling of a witness for the defence ('the potential witness') who the court was told could not be available until the following Monday.
13. On the Monday following, 2 October 2017, the potential witness was still not available. However, the Crown disclosed a case summary and a defendant's interview in relation to a complaint of another sexual assault by the complainant in this case against the potential witness. The suggestion was that there were striking similarities between that case and this, in that it also involved a charge of a sexual offence arising out of an alleged disagreement over payment for sexual services, leading to the laying of a false charge.
14. Ultimately, after hearing argument from counsel on both sides, the judge adjourned the trial to 9 October 2017 to allow the defence to secure the potential witness's attendance.
15. On the resumption of the trial on 9 October, 2017, the potential witness was not in attendance. As it turned out, attempts by the applicant's counsel and the potential witness's own counsel to locate him had proved futile.
16. Faced with this difficulty, the applicant's counsel's next step was to make an application to the judge to discharge the jury in order for the potential witness's attendance to be secured for some future date. The judge refused the application, observing that –

“... there seems to be no serious prospect of getting this evidence. I must take into account that this is the end of a serious rape trial, the complainant has given evidence, and ... there is not the evidence available for me to discharge the jury. So in the circumstances, I refuse the application to discharge the jury.”

17. The judge then proceeded to sum up the case to the jury, in terms of which no complaint is made; and, in due course, the applicant was convicted and sentenced in the manner already indicated.
18. The applicant now relies on a single ground of appeal, which is that the convictions are unsafe because he was not given sufficient time to call and locate the potential witness who would have been able to provide highly relevant evidence.
19. While the application for leave to appeal was pending, counsel for the applicant, having again located the potential witness, applied for his evidence to be admitted as fresh evidence before us. The application was made pursuant to rule 51(2) of the *Court of Appeal Rules (2014 Revision)*, which provides for the court, on application by either the applicant or the respondent, to order the attendance of any witness to give evidence before it.
20. In response to the application, in a ruling made on 19 June 2020, the learned President directed that arrangements should be made for the potential witness to be available to give evidence on the day of the hearing of the appeal. The intention was that, in accordance with the procedure approved by the House of Lords in the leading case of *R v Pendleton* [2001] UKHL 66, the court would hear the proposed fresh evidence *de bene esse*. The learned President also gave further consequential directions which it is not now necessary to rehearse.
21. On 7 July 2020, in furtherance of this direction, the Chief Bailiff of the Grand Court attempted to serve the potential witness with the appropriate order for a witness to attend court for examination. However, the Chief Bailiff's report was that the potential witness refused to accept the documents.
22. When the matter came up for hearing before us on 11 September, 2020, Mr. Myers for the applicant advised the court that the potential witness was not in court and that he did not propose to pursue the fresh evidence application any further.
23. However, Mr. Myers submitted that, if the learned trial judge had allowed the defence more than a week to locate the potential witness, it is possible that the applicant would not be in the position in which he now found himself.
24. Mr. Wainwright for the Crown submitted that, even if the potential witness had attended, it would not have altered the jury's verdict.

25. It is well established that a decision to adjourn or not is a matter for the discretion of the court in question. Accordingly, in accordance with general principle, an appellate court will only interfere with a trial judge's decision to grant a further adjournment in circumstances such as these if very clear grounds for doing so are shown (*Crown Prosecution Service v Picton* [2006] UKPC 1108, per Jack J at para 9 and Keene LJ at para 11).
26. We have no doubt that this high bar was not met in this case. As a reading of the relevant portions of the transcript makes clear, the judge bent over backwards to facilitate the defence in their quest to have the potential witness attend, first adjourning the trial over the weekend, then granting a further adjournment for a week for the potential witness to be found. Nothing has been shown, in our view, to suggest that the judge's decision not to, in effect, grant a further adjournment by discharging the jury, was an improper exercise of his discretion in any way.
27. But in any event, as Mr. Wainwright submitted, we are quite satisfied that any evidence which the potential witness might have given had he been called would have had no impact on the verdict of the jury. This case was a contest of credibility between the evidence of the complainant and the evidence of the applicant. The complainant's evidence was supported by the independent evidence of the government truck driver, as well as the finding of her personal items at the scene of the incident. In these circumstances, it seems to us that the jury would inevitably have arrived at a verdict of guilt.
28. Finally, as regards the appeal against sentence, Mr. Myers told us frankly that he did not consider this the stronger of his two grounds of appeal. We agreed with him. The sentences imposed by the judge cannot possibly be said to have been manifestly excessive in the dreadful circumstances of this case.
29. It is for these reasons that we refused the application for leave to appeal against conviction and sentence.