THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal 18 of 2019
IND 57 of 2018

BETWEEN

JOHN MICHAEL SORIANO

Appellant

-And-

Her Majesty the Queen

Respondent

Before: **The Rt. Hon Sir John Goldring, President**
The Hon C Dennis Morrison, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Appearances: **Mr. Alex Davies of McGrath Tonner on behalf of the Appellant**
Mr. Ken Ferguson of DPP on behalf of the Respondent

Heard: **3rd September 2021**

Judgment Delivered: **16th September 2021**

JUDGMENT

Sir John Goldring, President

1. On 21 February 2019, following a trial which took place between 7 and 10 January 2019 in the Grand Court, the Appellant was convicted by Acting Justice Carter of rape. On 9 July 2019 he was sentenced to 8 years' imprisonment. He now seeks leave to appeal against conviction. We grant leave.

2. The Appellant is from the Philippines. He is said to have a poor understanding of English. He says his primary language is Ilocano. Ilocano is the third most spoken language in the Philippines. Although no longer forming a discrete ground of appeal, his case is that from the time of his arrest

in the early hours of the morning of 4 September 2018, until he was sentenced on 9 July 2019, he was at a disadvantage because he was only ever provided with an interpreter who spoke Tagalog, the main language of the Philippines and the second language of the majority of its inhabitants. The Appellant accepts that at no time during the course of the proceedings did he say he did not understand Tagalog or request an Ilocano speaker. He provided a proof of evidence in Tagalog. He gave evidence in Tagalog. He says he never raised the issue because no-one asked him whether he had difficulty understanding or speaking Tagalog. It was his first ground of appeal that this language problem rendered his conviction unsafe or unsatisfactory. Unsurprisingly, Mr Davies on the Appellant's behalf, abandoned that ground.

3. Two grounds of appeal were argued before us. First, it was submitted that an interview conducted by the police after the Appellant's arrest should have been excluded. Mr Brady, a Cayman Islands attorney, who was then representing the Appellant, should have sought its exclusion at the trial. His failure to do so, and its resultant admission, render the conviction unsafe. Second, it was submitted that Mr Brady was in a further respect seriously incompetent in his conduct of the defence: he failed to put to the complainant in cross-examination the account of events the Appellant had given in a proof of evidence made in September 2018, a failure exacerbated by not informing the court of the proof's existence when the Appellant was being cross-examined to the effect that his account in evidence had recently been fabricated. That led, submitted Mr Davies, to the judge concluding the account had recently been fabricated and rejecting the Appellant's evidence in consequence. That too rendered the conviction unsafe.

The facts

Ms M's account

4. The complainant, Ms M, lived in Cayman Brac. She said she had not been feeling well and went to the home of a friend of hers to lie down. When she was resting on the bed in her friend's bedroom, the Appellant, who was in a relationship with Ms M's friend, and was in the house, came in and suddenly sat on the bed. She smelt alcohol. Although she moved away from him, he groped her breast, moved towards her and leaned over. She kept telling him to stop. He was saying, come on. There was a struggle. They fell to the floor. The Appellant removed her clothing and raped her. She was continually telling him to stop. At one stage he said she was horny. After the rape, Ms M found her underwear was full of blood. In evidence she summarised it in this way, "*I have never had*

sexual intercourse before. I never consented or agreed for John Michael to have sexual intercourse with me at that time."

5. Ms M described herself sitting on the bed crying when her friend returned. She told her friend what had happened. The accounts she gave to her friend, the wife of a pastor who became involved, the police and the doctor at the hospital were all consistent. When seen by the doctor at hospital, she was in a lot of pain, at times losing consciousness. She was in a state of considerable distress when she spoke to a police officer. She was crying, her face was red and she appeared very distraught and emotional.

6. Examination revealed some tenderness and swelling to the left hand, bleeding and oozing from her introitus, a swollen vulva with an abrasion. However, the judge did not find that the medical evidence was suggestive of non-consensual intercourse.

The Appellant's arrest and interview

7. The Appellant was arrested during the morning of 4 September. According to the arresting officer, whose statement was read at trial, he gave his name when asked, was informed of the allegation, arrested and cautioned. He said that he understood the caution. Before being interviewed, he spoke by telephone to Mr Furness, a Cayman Islands defence attorney. Mr Furness, in a recent email, has given his account of what happened. He said the police telephoned him. "*I tried as best I could to speak to Soriano. His English was not good…Soriano, as I remember, told me he had told the police he had been drinking and did not remember anything. He was given advice in simple terms to deal with the interview. Very difficult dealing with foreign national over the phone.*"

8. The Appellant was interviewed for some 55 minutes starting at 1.10 in the afternoon. The interview was videoed and recorded. The video was played at trial. No objection was taken to its admission. One of the interviewing officers was DC Sarah Bodden. She spoke Tagalog and translated many of the questions and answers. The Appellant accepts that the record of interview accurately sets out what he said. The caution was given in Tagalog. The Appellant was told that whatever he said would be "*presented in evidence in court*." He was told he could consult an attorney if he wished to do so, that there was one available "*for free*" and that the interview could be stopped if he wished to consult an attorney privately at any time. He indicated he understood. At times during the interview, he spoke in English. In his account, he said he had been drinking while cooking. He fell asleep. He woke up when the police came. He did not know why he had been arrested. He said he

could not remember anything about Ms M's complaints. "*I can't say if it is true because that night, I was drunk. Because one time when I am drunk, very drunk, can't remember events.*" Ms M's account was put to him. "*I can't remember anything relative to all these things, Ma'am.*"

9. In short, he did not deny he had raped Ms M. He said he could not remember what had happened.

The trial

Ms M's cross-*examination*

10. As the judge later put it, Mr Brady asked many probing questions seeking to discredit Ms M. Among other things, he went into great detail about the movements of Ms M and the Appellant and how intercourse came to take place. He suggested she could have bitten his hands, screamed or shouted loudly, he questioned the absence of bruising or scratching on both of them as a result of the struggle she was alleging, he put to her some alleged inconsistencies between her account in her police interview and her evidence, he pressed her on what she meant by struggling, he went into detail about how her clothes came to be removed. However, at no time did Mr Brady put the detail of the Appellant's account as set out in his proof of evidence, although he did make it clear the Appellant's case was that intercourse was consensual: see pages 113-119 of the cross-examination.

11. At one stage during the cross-examination, the judge asked to see counsel in chambers. The judge subsequently said this about what had happened:

> "*…the court rose to speak to counsel during Mr Brady's cross-examination, just to inform counsel that I was a little concerned as to whether he was putting the defendant's case, and that because the questioning seemed to be getting a little excessive of the complainant…*"

12. Mr Brady agreed with that summary.

13. Unfortunately, it seems no shorthand writer was present. Mr Davies, not surprisingly, submitted that the judge was clearly questioning Mr Brady's failure to put the Appellant's case. While that may be so, it could also be she was concerned that in what was undoubtedly robust questioning, Mr Brady was going too far in his attack on Ms M and raising matters which were not part of the Appellant's account. Be that as it may, the judge should not have seen counsel in chambers in the

absence of the Appellant and without a shorthand writer. We see no reason why she could not have raised any concerns she had in court sitting as chambers.

14. Throughout the cross-examination Ms M said intercourse was not consensual.

The Appellant's evidence

15. The Appellant gave evidence. His case was that Ms M had consented to sexual intercourse. He gave an account in similar, but more detailed terms, to that set out in his proof of evidence. Among other things, he described Ms M looking at him seductively, the consensual removal of her clothing, having intercourse "*until both of us orgasm.*" He said Ms M's only concern was not getting pregnant.

16. As to his arrest, he said the police woke him and accused him of rape. He said he told them, "*I don't know. What I meant was, I don't know I rape her. I mean, we have sex.*"

17. Mr Ferguson, who represented the Respondent before us, cross-examined the Appellant in some detail and at length. He spent some time, wholly unproductively, putting to the Appellant the detail of what he had said in chief and making the point it had not been put to Ms M in cross-examination. More pertinently, he put to the Appellant that at no time during the police interview did he say Ms M had consented to sexual intercourse. The Appellant's response was that he was very nervous, confused and afraid and he could not express himself properly. Mr Ferguson put it to the Appellant that, "*the first time that you are making this account that sex was consensual was here, when you gave your evidence.*" The Appellant agreed. When asked why, he said that in prison he tried to recall every detail, that he never raped her. Of course, whatever criticisms may be made of Mr Brady, he had by then made it plain the Appellant's case was that sex was consensual.

The judgment

18. The judge analysed the evidence with care. She found Ms M's evidence to be essentially consistent. She referred to the evidence of recent complaint. She rejected the submission that the lack of screaming and scratching by Ms M called into question the truthfulness of her account. She said she believed Ms M (see paragraph 32 below).

19. As to the police interview, she said (paragraphs 62-3):

"*62. I have had the benefit of viewing the recording of the Defendant's interview. There was no challenge to the admissibility of the record of interview at trial. The Defendant had the benefit of speaking to counsel before the interview commenced and one of the officers interviewing the Defendant was able to speak to him in his native language. There did not appear to be any point at which the Defendant did not fully understand what was being asked of him. He never complained of such. He answered freely. I am not persuaded by the Defendant's statements that he was confused and unable to express himself and therefore unable to state…what had occurred between himself and the Complainant was consensual.*

63. The Defendant admitted that he was offered many opportunities during that interview to explain what had happened between himself and the Complainant and he did not. I note that he made no explanation when first confronted with the allegation…upon arrest."

20. As to the failure to put the details of the defence case to Ms M, the judge said (paragraphs 64-5):

"*64. At trial the Defendant related in great detail what he says transpired between himself and the Complainant, yet many of these specifics were not put to the Complainant when she was being cross-examined, raising the spectre of recent fabrication.*

65. I do not believe the account given by the Defendant. His lack of response when first taxed with the allegation, the changing versions of what occurred between himself and the Complainant, and the fact that many details were not put to the Complainant cause me to doubt his version of the events of the evening of 3rd September 2018. I remind myself that I cannot convict the Defendant simply because I do not believe his testimony of what happened that evening. I must go back to consider the prosecution's case."

The grounds of appeal

The admission of the police interview

21. Mr Davies submitted that Mr Brady should have objected to the admission of the interview in evidence. There should have been a *voire dire*. Mr Furness, submitted Mr Davies, was not able fully to advise the Appellant before the interview began. Such advice as he gave was in English without any interpretation. The law was not fully explained. At the interview itself, there should have been an independent interpreter able to speak Ilocano. There was no proper check as to

whether the Appellant understood the caution. The right to free and independent legal advice was not sufficiently clearly explained. In the circumstances, what happened amounted to a denial of the right to free and independent advice as guaranteed by s.7(2) of the *Cayman Islands Constitution Order 2009*.

Mr Brady's failure to put the case

22. Mr Davies' submission came to this. Mr Brady should have put to Ms M the Appellant's detailed case as set out in his September proof of evidence. That was particularly so after, as Mr Davies submitted, the judge in chambers had expressed concern. Had he done so, the Appellant could not have been cross-examined on the basis that his account had been fabricated after Ms M had given evidence in order to meet the case against him, the essence, as we understand it, of the suggestion of recent fabrication. Mr Brady furthermore should have made it plain during the course of cross-examination that the account had not recently been fabricated but was set out in the Appellant's proof of evidence; that prosecution counsel was cross-examining on a false basis.

23. The consequence of Mr Brady's serious incompetence, submitted Mr Davies, was that the judge rejected the Appellant's account on the false basis that it had recently been fabricated: see paragraph 19 above. In the result, submitted Mr Davies, the conviction was, or may be, unsafe.

Analysis

24. By section 9 of the *Criminal Appeal Act (2011 Revision)*:

> *(1) Subject to section 12* [irrelevant]*, the Court shall allow an appeal against conviction if it thinks-*
>
> *(a) that the verdict…should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory;*
>
> *(b) …*
>
> *(c) that there was a material irregularity in the course of the trial, and*
>
> *in any other case shall dismiss the appeal:*
>
> *Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred.*"

The admission of the interview

25. Mr Brady has explained why he did not seek to exclude the interview. Having had considerable contact with the Appellant, he questions whether his grasp of English is as rudimentary as is now suggested. The Appellant had confirmed to him that he understood the questions asked, including the caution, although he had been nervous having been arrested for the first time and had consumed liquor over a protracted period. It was Mr Brady's view that, "*any application to exclude the interview would be [sic] difficult and without a sufficient legal basis*."

26. In our judgment, Mr Brady was entitled to come to that view he did. In short, the Appellant did not dispute the contents of the interview. He understood what he was being asked. He understood he was not obliged to answer any questions and that he could seek legal advice at any time. What he said was accurately recorded and reflected his understanding of events at that time. The judge saw and heard what had taken place at the interview. She was plainly entitled to come to the findings she did (see paragraph 19 above).

27. We cannot accept that in those circumstances the interview was wrongly admitted: that its admission renders the conviction unsafe.

Mr Brady's failure to put the Appellant's case

28. Mr Brady has sought to justify his failure to put his client's case, at least in greater detail than a (lengthy) series of assertions that intercourse was consensual. He states that putting the Appellant's version of events "*would only have resulted in a denial, a fact already accepted in the generality of his defence. My view was that putting specific suggestions to her would also serve to strengthen her evidence…*" Mr Brady says to go further would have underlined the contrast between the account in evidence and that in interview. This was a trial before an experienced single judge. Consent and credibility were central. During the interchange in the judge's chambers, he had told the judge he had some instructions that he might eventually put, but the Appellant would give evidence in any event. "*The issue as to whether he had provided written instructions as to his account of the encounter some weeks before or had provided a dock brief seemed moot in the circumstances as his credibility was always going to be an uphill climb given the police interview.*"

29. A fair trial process requires that a witness whose account is to be challenged has the opportunity to deal with what will be said against him. Counsel has a duty in such circumstances to put his client's

account to the witness. It is no answer to that obligation to say that putting that account may be counterproductive. We cannot accept Mr Brady's justification for failing, in other than the most general terms, to put his client's case. Moreover, if it becomes apparent, that the failure to put the case may lead to a false understanding of events, counsel has a duty to correct that misunderstanding, whether or not it may seem "*moot*" to him in the circumstances.

30. As the judge set out in paragraphs 64 and 65 of her judgment (paragraph 20 above), a factor in rejecting the Appellant's account was "*the spectre of recent fabrication,*" many details not having been put to Ms M in cross-examination. The judge also referred to the "*changing versions of what occurred between himself and the Complainant.*" The "s*pectre of recent fabrication*" was based on a misunderstanding of when the Appellant first gave the account he had given in evidence. The comment made regarding "*changing versions*" is not easy to follow. The versions of what occurred between the Appellant and Ms M did not change. The change was from no recollection of what happened, to a detailed recollection of consensual intercourse. It seems to us the judge probably had in mind the change from '*no recall*' to a detailed recall of consensual sex. We cannot see what otherwise she was intending to refer to. That plainly cannot affect the safety of the conviction.

31. As to recent fabrication, it seems to us the crucial issue going to the Appellant's detailed account given in evidence was not when it was first given, but the fact it was not given when the police asked him about these matters shortly after the events. Once it is accepted the later account was not given at the outset, it is in our judgment neither here nor there whether it first saw the light of day during the course of the trial, or at some time before then. The credibility of the Appellant was equally adversely affected.

32. It does not stop there. The judge believed Ms M's evidence. As she put it in her judgment (paragraph 66):

> "*On the evidence presented by the prosecution the Complainant was clear in her words and by actions that she did not consent to sexual intercourse with the Defendant. I believe her evidence. She gave a very detailed account of what transpired. She maintained her account under cross-examination and the evidence of [two witnesses] bolster her evidence by supporting the consistency of her account…*"

33. In *Stafford v The State (Note)* [1999] 1 WLR 2026, Lord Hope said (at 2029-2030);

> "The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see *Woolmington v Director of Public Prosecutions* **[1935] AC 462,** 482-483, *per* Viscount Sankey LC. In *Stirland v Director of Public Prosecutions* [1944] AC 315, 321 Viscount Simon LC said that the provision assumed: '*a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict*'…Where the verdict is criticised on the ground of a misdirection…the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence."

34. Although we accept Mr Brady's failure to put his case ultimately resulted in the judge wrongly regarding the fabrication of the Appellant's account as recent, on a proper analysis of the facts, the Appellant's credibility was inevitably significantly damaged by the inconsistency between the interview and his ultimate account, irrespective of whether that account had recently been fabricated. Moreover, the fact that the judge accepted Ms M's evidence as true, inevitably meant his account was not. In other words, on a proper analysis the judge would have been driven to reach the same conclusion about the Appellant's credibility, irrespective of whether any fabrication was recent. We have no doubt that had the judge correctly understood the position, she would have been driven to find the Appellant was guilty. In spite of Mr Davies' well-argued submissions, it is clear no miscarriage of justice has occurred. We are unable to conclude that the conviction was, or may have been, unsafe.

35. We therefore dismiss the appeal against conviction.