IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CRIMINAL DIVISION

CICA (Crim) APPEAL No. 0003 of 2023
(Grand Court Cause No. Ind. 0026 of 2022)

BETWEEN

RENATO ROLANDO HARRIS

APPELLANT

AND

HIS MAJESTY THE KING

RESPONDENT

BEFORE:

The Rt Hon Sir John Goldring, President
The Hon Sir Michael Birt, Justice of Appeal
The Hon Clare Montgomery, Justice of Appeal

Appearances: **Ms. Amelia Fosuhene of Brady Law appearing on behalf of the Appellant**

Ms. Sarah Lewis of the Office of the DPP appearing on behalf of the Respondent

Date of hearing: **9th September 2024**

Judgment delivered: **26th September 2024**

JUDGMENT

1. On 9 December 2022 the Appellant was convicted by the Hon Justice Carter (Acting) (the trial judge) of two offences of rape contrary to s 127 of the Penal Code following

a trial by judge alone pursuant to s 129 of the Criminal Procedure Code. The Appellant was sentenced to 16 years imprisonment. He seeks leave to appeal his conviction. At the hearing on 9 September 2024, the Court of Appeal granted him leave to appeal but dismissed the appeal for the reasons that we set out below.

2. The offences in the indictment concerned the same complainant. The relevant events took place in the first-floor bedroom of the Appellant's home in George Town in the early hours and morning of 14 July 2018. The first count charged an act of rape when the complainant was incapacitated by drink. The circumstances of the rape, on the complainant's account, taking place at some point after 3 am, gave rise to the inference that the complainant had not consented to sexual intercourse and the Appellant knew that. On her account the Appellant had plied the complainant with drink and then during a trip elsewhere, diverted his car to his own home and there asked the complainant to go inside. She says she was drunk to the point of nausea and initially refused to come inside. She has no memory of going up to the Appellant's bedroom and no knowledge of events until she woke just after 7 am in the Appellant's bed and realised that she had been raped. The second offence charged a rape at some time in the morning after 7 am when the complainant says she tried to leave the bed and the Appellant forced himself on her and raped her despite her resistance and asking him to stop.

3. The case for the Appellant was that the complainant was not drunk at any point. He agreed that he had sexual intercourse with her on the two occasions she identified but he said that she had by her actions made it clear that she was consenting to intercourse both times.

4. Given this conflict of evidence, the case was entirely dependent on the view that the trial judge took of the credibility and reliability of the complainant and of the Appellant, who both gave evidence. The trial judge in her Verdict Judgment made it clear that she did not believe the Appellant. She gave several reasons for disbelieving his account. The trial judge also set out in her judgment her reasons for accepting the evidence of the complainant.

5. Notwithstanding the clarity of the central evidential issue at trial, grounds of appeal have been prepared that seek to test the reasoning of the trial judge by reference to a number of issues, none of which were raised at trial.

6. In relation to count 1 the trial judge is criticised for failing to consider whether (even if the complainant did not consent) the Appellant may have believed that she had done so. Ground 1 of the grounds of appeal criticises the trial judge for failing to consider the parameters of drunken consent and to distinguish between physical blackout and memory loss in the reasons for verdict. This issue was not raised at trial. The case for the Appellant was that the complainant was not drunk and no question of drunken consent or belief in drunken consent arose.

7. The trial judge considered the question of consciousness and whether the complainant may have consented to sexual intercourse [70]. Specific reference was made to the decision in R v Kamki [2013] EWCA Crim 2335 which deals with drunken consent. However, it is clear that the trial judge accepted the complainant's account that she had not consented nor appeared to consent. The evidence of the complainant was that the last thing she remembered saying was that she did not want to go into the Appellant's house.

8. The trial judge was entitled to conclude that, in the state the complainant said she was in, she was physically unable to consent to sexual intercourse with the Appellant. In those circumstances there was no evidence that would have warranted consideration of the hypothetical possibility of a drunken consent having been sought and given. The complainant said in her ABE that she had blacked out shortly after she said she did not want to go into the house. No suggestion was made that the blacking out she described was merely a memory black out, masking a case of drunken consent, as opposed to a physical blackout. The Appellant gave no such evidence. He did not say this was a case of drunken consent.

9. In the Appellant's skeleton argument, complaint is also made that the evidence on count 2 may have bolstered the evidence on count 1. This submission is made without any regard to the fact that the counts were of a broadly similar nature and involved the same

victim in each case. Not only were they properly joined on one indictment, the evidence on one count could have been used to support the evidence on the other count, (see R v C, The Times, 4 February 1993). The evidence on count 2 was potentially relevant by establishing a propensity on the part of the Appellant to disregard the need for consent in his sexual encounters. It was therefore potentially admissible and relevant under section 18(d)(i) of the Evidence Act. Adapting the language of Latham LJ in Freeman and Crawford [2008] EWCA Crim 1863 at [20], a trial judge is entitled, in determining guilt in respect of any count, to have regard to the evidence in relation to any other count, or any other bad character evidence, if that evidence is admissible and relevant.

10. The complaint however has even less substance than its legal merit suggests, since the trial judge did not in fact rely on the evidence on count 2 as being admissible on count 1. The reasons for verdict made it clear that the counts were considered separately [90].

11. Ground 2 of the appeal makes a complaint about the admission of evidence that the complainant terminated a pregnancy. In our judgment, questions about the complainant's pregnancy and the paternity of the foetus did not advance the case for the Crown or for the defence since all sides agreed that unprotected sexual intercourse had taken place in circumstances that could have led to pregnancy.

12. Moreover, the evidence of the complainant's pregnancy was relevant and admissible for another reason. The pregnancy formed the basis of the Appellant's principal attack on the complainant's credibility. Variously it was suggested that she was making the allegation of rape because the Appellant had ejaculated in her and then refused to help pay for her to return to Canada. It was also suggested she was angry because the Appellant had suggested it was not his child. At trial it was also said that the complainant became particularly angry when the Appellant asked why she had not shown him the positive pregnancy test. In any event the pregnancy was referred to in a WhatsApp message that was admissible as an admission against interest by the Appellant.

13. In any event the Crown did not contend that the trial judge should conclude that the Appellant was the father of the foetus. The paternity of the foetus was not relied on

against the Appellant. The complainant believed the Appellant was the father, but that belief was only relevant for the purpose of giving context to the exchange of WhatsApp messages.

14. Insofar as it is said the calculated length of gestation was inconsistent with the stated date of the intercourse, the calculations of the Crown make it clear this is not correct.

15. Ground 3 raises a generic complaint about delay causing prejudice. Although the trial was significantly delayed, in part due to the Covid pandemic, there is no evidence that prejudice was occasioned to the Appellant, and the issue was not raised at trial.

16. Complaint is now made about the limited police enquiries in relation to witnesses who might have spoken to the surrounding events. However, such witnesses would not have advanced the defence case since there was no substantial dispute about the surrounding events. The Crown was entitled in any event to decide what evidence was to be called as part of the prosecution case, see R v Russell-Jones [1995] 1 Cr App R 538.

17. In addition, the Appellant was legally represented at interview on 3 December 2018 so that any relevant defence witnesses could and should have been identified promptly by his lawyers if they had relevance to the defence case.

18. There is also no evidence, insofar as the complainant deleted any messages exchanged with the Appellant, that the deletion was caused by the delay or led to any difficulties for the defence, since the Appellant would himself have been aware of their contents and their relevance if any.

19. Finally ground 4 questions the admission of the evidence of Susan Johnson and the failure by the Crown to call other witness to more immediate complaints by the complainant. As we have observed above, it was a matter for the Crown to decide whether to call those other witnesses. The Crown did call the evidence of Jennifer Peters. It also admitted an email written by the complainant to an ex-boyfriend on 15 July 2018.

20. The primary reason for calling the evidence of Susan Johnson was to describe the condition of the complainant on 25 July 2018. Susan Johnson was a university staff member who was invigilating a university exam on that date which the complainant was unable to complete due to visible agitation. The evidence was admitted in chief without objection. Contrary to the submissions of the Appellant, it was not expert evidence, but factual evidence of visible distress. The subsequent involvement of Susan Johnson in treating the complainant was adventitious.

21. In the course of her evidence, it became apparent that Susan Johnson had made notes of what had been said by the complainant on 25 July 2018 and in due course she was cross examined on those notes. It was therefore the Appellant who made the forensic choice to put the complaint by the complainant before the Court.

22. It did not in those circumstances have to be established that the evidence qualified as recent complaint. If it was necessary for the evidence to meet the threshold for recent complaint, in our judgment, it was an account given at the first reasonable opportunity the complainant had to interact with the faculty staff. The account was given 9 days after the event, but the complainant explained that before then she had hidden away from university "skipping classes, just sleeping all day … stay in my room … then we had the practical clinical exam".

23. Even if the evidence of Susan Johnson was not admitted as a recent complaint, the evidence was admissible to deal with the distress of the complainant. In addition, it was potentially relevant to the claim of fabrication that underpinned the Appellant's case on the complainant's claim only being advanced on account of the discovery of her pregnancy.

24. In any event the evidence was of marginal value. The trial judge rightly recognised the value of the evidence as relevant only to consistency. We do not consider the evidence had any effect on the fairness of the trial or the safety of the conviction.

25. There is in this case no proper ground to disturb the finding of fact made by the trial judge. The case involved a direct clash of evidence. After a lengthy trial the trial judge

was entitled to decide as she did; that she was sure the complainant was an honest and reliable witness, and the Appellant was not. In R v Crawford [2015] UKPC 44, the Privy Council emphasised that it is only in rare cases that an appeal court should be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. This is not only because the trial judge has the advantage of seeing and hearing a witness. It goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or their powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, they may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations. There is nothing in this case to suggest the trial judge's verdict was wrong or based on any legal error. Accordingly, although leave to appeal is granted, we would refuse this application for leave to appeal conviction.