IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 14/2017
IND. 101/2014
SC#6083/2014

BETWEEN:

ROHAN ANTHONY GIDARISINGH

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Date of Hearing**:** 23rd April 2021

Appearances: Mr Hugh Wildman instructed by Mr Rupert Wheeler of Samson Law, Attorney for Appellant
Ms Candia James-Malcolm, Office of the DPP for the Respondent

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JUDGMENT

Transcript of oral judgment dated 23rd April 2021 and Approved for Release 19th May 2021

Goldring J, President

1. This is another case in which an Applicant seeks to re-open an appeal which previously has been dismissed by this court. On this occasion, the Applicant is essentially saying his previous counsel failed to take all the points he should have at the previous hearing, this court should now permit him to re-argue the case with different, supposedly better, counsel.

2. On 25th April 2017, the Applicant was convicted of rape and possession of a prohibited weapon, namely a knife. Both offences were said to have taken place on 6th November 2014. In short, the

complainant alleged that the Applicant took her to a hotel room and raped her twice, in the course of which he threatened her with a knife.

3. The full facts were set out in the judgment of this court, when on the 14th of November 2018 it refused the Applicant leave to appeal. We shall not set out the facts again.

4. It is now submitted by Mr Wildman, on behalf of the Applicant, that, in short, the trial judge misdirected the jury in respect of the evidential value of the Applicant's interview (Ground 1); failed to direct the jury on the Applicant's defence to the effect that he honestly believed that the complainant was consenting (Ground 2); failed properly to direct the jury on the *mens rea* of rape and its application to the facts of this case (Ground 3); misdirected the jury in respect of his possession of a knife on the night in question, (Ground 4); and, finally, misquoted the evidence, (Ground 5).

5. Mr Wildman also submits that these points, taken cumulatively, and added to the inadequate direction in respect of the Crown's failure properly to disclose evidence, and considered at the previous hearing, render the convictions unsafe. Grounds 1 to 5 could, of course, have been raised by experienced counsel then representing the Applicant before this court on 14th November 2018.

6. We have read the summing up with care. We shall take each ground of appeal briefly.

Ground 1

7. The jury had typed copies of the interview. The judge said the contents of the interview were admissible as evidence, and that the Applicant's answers were:

> "*... merely evidence of his reaction when taxed for the first time with the allegations against him ... is not capable of being evidence that the complainant is not telling the truth. It is simply an assertion made by the defendant on an occasion when he was not giving evidence. The value to be placed on any part of the evidence, including the defendant's interview, is a matter for you to decide. But you are entitled to take into account that his interview is consistent with the evidence .... I have already told you to treat his evidence in the same way as you would any other witness*".

8. It is submitted that the judge should have directed the jury the interview was evidence in the Applicant's favour of the truth of what happened.

9. We are prepared for present purposes to accept, without deciding it, that this interview was not wholly exculpatory, in that the Applicant accepted intercourse, but asserted consent. In those circumstances, we are prepared to accept that the judge should have directed the jury it was evidence of the truth of what had happened. However, we cannot accept the judge's direction could, on the facts of this case, begin to render the conviction unsafe or result in injustice. We can do no better than refer to the observations of the Jamaican Court of Appeal in the case of *Wayne Hamil* [2021] JMCA Crim 12, in which Mr Wildman was counsel for the Appellant.

10. The first ground of appeal in that case was similar to the first ground in the present case. In its conclusion, following a lengthy judgment, the Court of Appeal stated:

> "*If ground one had been his only ground of success, it would not have been sufficient for the conviction to be overturned, given that 1) he testified in largely similar terms to his out of court statement; 2) the learned … judge repeatedly emphasised the applicant's contention that he was acting in self defence to counter the complainant's persistent aggression; and 3) the learned … judge did not suggest that the statement contained an admission that could be used for its truth, but that the exculpatory allegation of his acting in self defence could not. Those factors combined, minimised the prejudice caused by the error made by the learned trial judge, in his classification of the Applicant's statement and resulting directions concerning how the statement was to be assessed."*

11. Here, the Applicant gave evidence. The evidence was consistent with his interview. That is what the judge told the jury. It must too have been obvious to them. They retired with a copy of the interview. The issues for the jury to resolve were clear. It seems to us inconceivable that the judge's direction could have affected the outcome of this case. It cannot affect the safety of the conviction.

12. That deals with Ground 1. We shall deal with the cumulative effect of the grounds raised by Mr Wildman in due course.

Ground 2

13. Ground 2 is wholly unrealistic. It is submitted that the judge failed to direct the jury that the Applicant's case was that he honestly believed the complainant was consenting. This was a case in which there was a complete conflict of evidence. On the one hand, the complainant was saying she was raped at knifepoint. On the other, the Applicant was saying intercourse was consensual. For the jury to convict, they had to be sure the complainant was telling the truth about how sexual intercourse occurred. In reality, there was no room for an honest belief of consent given those facts and that conflict. Moreover, the judge made it clear that to convict the jury had to be sure that the Applicant was at least reckless as to whether there was consent or not (see the summing up at pages 179 to 184).

14. That disposes of ground two.

Ground 3

15. Ground 3 is similarly without merit. The judge, in the pages to which we have referred, plainly adequately directed the jury on the facts of this case.

Ground 4

16. As to Ground 4, we agree that although, as the judge said, there was no defence to Count 2, he should have left that count to the jury. He should not have directed them to convict. However, that direction could not have affected the safety of the conviction for rape. The jury was bound to convict. In the circumstances, the directed conviction did not in substance affect the position facing the Applicant on the allegation of rape. Moreover, the direction resulted in no substantial miscarriage of justice (see the proviso to section 9(1) to the *Criminal Appeal Act (2011 Revision)*).

Ground 5

17. It is said that, at page 191 of the transcript of the summing up, the judge misquoted the Applicant's evidence by suggesting that the Applicant agreed she had given drunken consent. Reading that part of the transcript, it seems to us the judge was probably seeking to summarise a point made by defence counsel to the jury. It is also submitted, at least in the written grounds of appeal, that at page 231 of the transcript, the judge said that in interview the Applicant had agreed the complainant was intoxicated when he had not. As it seems to us, the judge there was probably referring not to the interview, but to something the Applicant said in evidence. In any event, these two comments, in a detailed and comprehensive summing up, could not conceivably have affected the safety of the convictions and led to injustice.

18. None of these grounds have merit. Considering them cumulatively cannot render this conviction for rape arguably unsafe.

Conclusion

19. Although we have considered the submissions made in some detail, this application simply fails to grasp the essential point. There can be no question of reopening a concluded appeal in other than exceptional circumstances. This whole application has, in reality, been launched, and proceeded upon, on the basis that it is a normal application for leave to appeal. This case falls far short of satisfying the demanding criteria of reopening a concluded case. It is a classic case of trying to have a second bite of the cherry. We wish, once again, to make it quite clear what the law of the Cayman Islands is regarding the reopening of concluded appeals.

20. Although unnecessary for the decision in *Anglin* [2018] 2 CILR 409, the approach was foreshadowed in detail. It was repeated and set out in the case of *Leonard Ebanks* Criminal Appeal 13 of 2018. We underline it now. It is only in wholly exceptional circumstances that this court will reopen a concluded case. It is worth setting out what is said in the current edition of *Archbold* at paragraph 7 222b:

> "*The jurisdiction to re-open a final determination was considered in Gohil…EWCA Crim 140. The court confirmed:*
>
> *(a) the court had no general jurisdiction to re hear an appeal;*
>
> *(b) if the previous order is a nullity, the court cannot be functus officio and there is no logical difficulty in having a further hearing;*
>
> *(c) previous authorities on 'defect in procedure which may have led to some real injustice' did not explain the basis or scope of any such exception, the foundation of which lay in Taylor v Lawrence;*
>
> *(d) in criminal cases, there were three interests to be considered: the state, the defendant and the victim, and there was the strongest public interest in finality; thus the jurisdiction is probably confined*

to procedural errors, particularly in light of the alternative remedy for fresh evidence cases through the CCRC."

21. Although the CCRC does not exist in the Cayman Islands, there is a means of correcting a miscarriage of justice.

22. As *Archbold* goes on to observe, the jurisdiction is extremely limited. Assuming the previous proceedings did not amount to a nullity, a previous final determination would only be re-opened where there had been some defect in procedure which may have led to real injustice, it was necessary to re-open the final determination to avoid the real injustice, the circumstances were exceptional and made it appropriate, and there was no alternative effective remedy.

23. There are, in England and Wales, Criminal Procedure Rules which deal with the reopening of the determination of an appeal. Although there are currently no such rules in the Cayman Islands, it may be helpful just to set out what is stated out in paragraph 36.15(3):

> "*The application must —*
> *(a) specify the decision which the Applicant wants the court to re-open; and*
> *(b) explain —*
> *(i) why it is necessary for the court to re-open that decision in order to avoid real injustice,*
> *(ii) how the circumstances are exceptional and make it appropriate to re-open the decision notwithstanding the rights and interests of other participants and the part and the importance of finality,*
> *(iii) why there is no alternative effective remedy among any potentially available, and (iv) any delay in making the application.*"

23. We would expect in any such application those requirements to be followed if in this jurisdiction an Applicant seeks to re-open a concluded appeal.

24. Finally, we observe, that the rule also provides for the views of any victim or family of the victim to be obtained. That was something emphasised in *Yasain* [2015] 2 Cr.App.R. 28 (cited by this

court at length in *Anglin*). That underlines the potential effect on the victim of reopening a concluded appeal, and the importance of finality in assessing the interests of justice in these cases.

25. For the reasons we have given, we refuse leave to re-open this concluded appeal.