IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CACR021/2012
IND 22/11
#10560/2010

BETWEEN: **TYRONE ROSWELL EBANKS** **APPELLANT**

and

THE QUEEN **RESPONDENT**

Before:

The Honorable Mr. Justice Mottley, Justice of Appeal

The Honorable Mr. Justice Campbell, Justice of Appeal

The Honorable Mr. Justice Martin, Justice of Appeal

Apperances: Mr. Nicholas Dixey of Nelson and Co for the Appellant and Mr. Greg Walcolm, Crown Counsel for Director of Public Prosecutions

Heard and Judgment delivered: 3 April 2014
Reasons released: 19 September 2014

Mottley J.A.

Reasons for Judgment

1. At the conclusion of the application for leave to appeal against conviction and sentence, the Court indicated that leave would be refused. The conviction and sentence were

affirmed. At that time, the Court promised to put its decision into writing. These are those reasons.

2. Following a trial before judge alone, the Applicant was convicted on 20 September 2012 and sentenced to a term of imprisonment of 12 years. He was originally charged on an indictment containing two counts. In count 1, he was charged with rape; it was alleged that on 27 December 2010, he had unlawful sexual intercourse with P.E. without her consent. The second count, which was an alternative count, charged defilement of P.E., who was under the age of 16. The judge was not required to give a verdict on this count.

3. The prosecution's case was that on 27 December 2010, P.E. the complainant, was riding her bicycle in West Bay area near the home of the Applicant. The complainant was dragged from her bicycle by the Applicant and taken to his home. The complainant was taken to the Applicant's bedroom where she was pushed on the bed. The Applicant removed her jeans and raped the complainant. During the course of this ordeal in the bedroom, the complainant was threatened by the Applicant with a kitchen knife which was held to her throat. Subsequently, the complainant was able to escape from the house. Before escaping, the complainant grabbed a pair of shorts from the bedroom floor and put them on. She rode to her home wearing these shorts. On arriving home, the complainant told her grandmother and her uncle's girlfriend what had taken place. The matter was reported to the police later that day.

   The medical examiner took swabs from the complainant's vagina. The DNA evidence from the semen showed that the semen on the swabs taken from her vagina came from the Applicant. The Applicant washed the bed sheet on the evening of the rape. The

prosecution invited the judge to say that in doing this, the Applicant sought to destroy any incriminating evidence which may have been present.

4. The case for the defence was that the Applicant did not have any sexual relations with the complainant. It was accepted by the Applicant that he had met the complainant on 27 December 2010 and that she had gone to his home. He denied that he had sexual intercourse with the complainant. The Applicant's shorts, which the complainant was wearing when she left his home, had not been analyzed for the presence of semen. The defence contended that the semen had been present on the shorts and may have been transferred unto the complainant's vagina as she rode her bicycle home. In addition, the defence pointed to the inconsistencies in the evidence and the absence of injuries on the complainant as tending to undermine her credibility.

5. The sole ground of the application for leave to appeal against conviction is that the judge failed to consider adequately whether the prosecution had proven to the requisite standard that the complainant did not consent to intercourse and as such gave insufficient or no weight to the inconsistencies in the prosecution's case to the extent that the trial was unfair and the conviction is unsafe.

6. Mr. Dixey submitted that, having found that sexual intercourse took place and thereby rejecting the Applicant's account, the judge gave only cursory consideration to the issue of consent to the extent that it is unclear whether he applied his mind properly to the element of consent. He contended that in order to prove the offence of rape, the prosecution must prove three ingredients viz (a) the defendant penetrated the vagina of

the complainant with his penis; (b) the complainant did not consent and (c) the defendant did not reasonably believe that the complainant was consenting.

7. The judge rejected the Defendant's evidence that no sexual intercourse took place between the complainant and himself. The DNA evidence from the semen which was found on the high vagina swab which was taken by the doctor during his examination of the complainant, indicated that it came from the Defendant. Thus he was entitled to reject the defence of lack of intercourse. That however was not the end of the matter. As Mr. Dixey correctly pointed out, the judge had to look at the evidence of the prosecution to see whether there was any evidence from which it could be said or inferred that the complainant consented or from which it may be said that he could not be satisfied beyond reasonable doubt that the complainant did not consent. The judge had also to be satisfied that the defendant did not reasonably believe that the complainant was consenting.

8. In his reasons for his judgment on the issue of consent, the judge stated:

> "83.Having concluded that sexual intercourse did take place between these two, there remains the question of consent. Here the evidence is all one way.
>
> 84. The evidence from [PE] is that she verbally and physically resisted until a point came when she realized that further physical resistance was pointless.
>
> 85. I accept Mr. Tonner's submission that it would be possible to accept the evidence of the Complainant at one point – sexual intercourse having

> occurred – and yet reject it on the question of consent. However there would have to be some justifiable reason for doing so. Here there is none.
>
> 86. Without hesitation I am sure that the sexual intercourse was without her consent. In such circumstances the Defendant is guilty of the offence of rape and I so find."

9. Mr. Dixey submitted that in concluding at para 83 that the issue of whether the complainant consented to having intercourse with the complainant was all one way, the judge accepted the complainant's evidence without subjecting it to any scrutiny.

10. Counsel, in our view, correctly submitted that even though the Applicant denied that he had intercourse with the complainant, the judge was obliged to proceed on the basis that the second element, consent, was in issue and that the prosecution had to prove that the sexual intercourse took place without her consent.

11. The judge in his judgment reviewed the relevant evidence. He concluded that, on the question of consent, the evidence "is all one way". He did not at this stage, set out what that evidence was; indeed there was no need to repeat the evidence which he had earlier reviewed.

12. At para 15 of his judgment, the judge referred to the evidence of the complainant. The complainant said that she saw the Applicant who was near to his house. He said to her "come here" and she said no. She indicated that she continued riding her bicycle when the Applicant grabbed her by her collar and pulled her off the bicycle. She started "to fight him off and started punching him". The Applicant however, kept holding on to her collar. She attempted to punch him in his chest and face but she did not make any

contact. She said she could not handle him. The Applicant was dragging her towards his house. The complainant said that the Applicant pushed her inside the house and locked the door. The Applicant then pushed her into the bedroom. She asked him to leave her alone. She started "fighting him to get to the door". He blocked her and pushed her onto the bed. The complainant got up off the bed but the Applicant pushed her back unto the bed. She was then on her back; he removed her jeans and underwear; despite that she tried unsuccessfully to prevent him from taking them off. The complainant again asked him to leave her alone. When he inserted his penis into her vagina, she "tried to fight him off her and was crying." After he finished having intercourse with her the Applicant picked up a knife from the floor on the side of the bed. The knife had a blue handle and a six inch blade. He held the knife to her throat and told her she must not say anything to anyone. The complainant was scared.

13. This is evidence from which the judge could properly reach the conclusion that the complainant did not consent to the Applicant having sexual intercourse with her and from which it could be said that the Applicant did not reasonably believe that the complainant was consenting to the sexual act. This evidence clearly demonstrated that the complainant did not consent to being subjected to the ordeal. Her conduct is consistent with a person who did not consent to having sexual intercourse with the Applicant. Her conduct of putting on the oversized pair of shorts she found on the floor and riding home and making the complaint to her grandmother is consistent with the inference that she did not consent to the sexual act. Faced with such evidence, it is unsurprising that the judge concluded that the evidence in relation to the issue of consent "is all one way".

14. Having reviewed the evidence earlier in his judgment, there is no necessity for the judge to rehearse the evidence in detail. The judge in reaching the conclusion that the complainant did not consent had earlier set out the evidence upon which his decision was based.

15. It was for these reasons that the Court refused the application for leave to appeal against his conviction.

16. Turning to the application for leave to appeal against sentence, the Applicant was sentenced to 12 years' imprisonment. The Applicant submitted that the judge had fallen into error in treating the age of the victim and that she was a virgin as two aggravating features. He argued that where the victim is a child, the loss of the victim's virginity as a factor is subsumed by the aggravating feature of the victim's youth. Counsel contended that the effect of the judge treating them as separate aggravating features amounted to double accounting. This led the judge to pass a higher sentence than otherwise would have been the case. In the circumstances, counsel said sentence must be reduced by a modest amount to correct this anomaly.

17. Counsel for the Crown submitted that the judge had correctly considered the appropriate principles and authorities in arriving at the sentence. These authorities included (a) the Chief Justice's Statement on Tariff and Guideline for Sentencing for Certain Offences dated 16th January 2002,(b) the Sentencing Guidelines Council Sexual Offences Definitive Guideline; (c) and *Dilbert & Samuel v R* 2010 (1) CILR 10.

18. In *Dilbert & Samuel v R*, this Court reviewed the Guidelines for sentencing in sexual offences cases. The court said:

"21. Nor have we any doubt that the tariff for rape set by the 2002 Statement is intended to indicate an appropriate sentence in a case where there are no special features. That is the meaning to be given to the direction, in the introductory paragraphs of the 2002 Statement, that "…a tariff means a sentence to be applied in a typical case. Mitigating factors will reduce it and aggravating factors will increase it."

22. The spread indicated by the tariff (between 10 and 12 years) recognizes that, within the category of a "typical case" with no special features, cases will differ: some offences will call for a higher sentence than others. We reject, as obviously untenable, the proposition that the spread of 10 to 12 years is intended to confine sentences for rape (whatever the mitigating or aggravating factors) to a term of between 10 and 12 years. In fairness to counsel for the appellants, we should add that we did not understand that proposition to be advanced.

23. The presence of the aggravating factors can be expected to take the appropriate sentence not merely to the upper end of the 10 to 12 year bracket, but above that bracket. So, also, the presence of mitigating factors may take the appropriate sentence below the lower end of that bracket. This is likely to be the result in a "typical case" where there has been an early guilty plea as the 2002 Statement itself recognizes."

19. In passing sentence the judge observed:

> "It is quite clear that there are a number of aggravating features in the case, the principal of which are as follows: The age of the girl, the fact that she was a virgin, the fact that you ejaculated, the fact that you have a poor record of committing criminal offences and that you were on licence at the time this offence was committed."

20. The aggravating features which were present in this case are (i) the complainant was abducted by the Applicant while she was riding her bicycle along a public road; (ii) the Applicant took her to his home against her will; (iii) she was under the age of 16;(iv) the complainant pleaded with the Applicant not to rape her; (v) he held a knife with a six inch blade to her throat and told her she must not say anything to anyone; (vi) the mental effect on the victim as set out in the victim's impact statement; and (vii) the Applicant's history of violence as set out in his antecedents.

21. We agree with the submission by the Crown that the treatment by the judge of the victim as a child and virgin as two separate aggravating features, did not in the circumstances result in double accounting. The aggravating factors set out in the previous paragraph would take the sentence to the upper limit of the range.

22. In our opinion the judge was fully aware of the Statement on Guideline for Sentencing for Sexual Offence and the principles enunciated in Dilbert & Samuel. The judge took them into consideration and was guided by them in imposing sentence on the Applicant.

23. The Court is unable to say that the sentence imposed was manifestly excessive.

Mottley JA

Campbell JA

Martin JA