IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 10 of 1999
(Indictment No. 47 of 1998)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

MURPHY KENCER POWELL

Appellant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice I. D. Rowe, J.A.
The Honourable Mr. Justice M. Taylor, J.A.

Delano Harrison Q.C. and Neville Levy instructed by Neville Levy & Associates for the Appellant.
The Solicitor General, Samuel Bulgin, and Cheryll Richards for the Respondent Crown.

Heard: April 11th 2001 Reasons released: August 24th 2001

REASONS FOR JUDGMENT

ROWE, J.A.

Murphy Kencer Powell was convicted in the Grand Court before Graham J. and a jury of 2 counts of indecent assault, 1 count of attempted rape, 1 count of threatening violence and 1 count of assault occasioning actual bodily harm. Graham J. sentenced the appellant to a total of 15 years imprisonment. From his convictions and sentences he has appealed.

At trial, the appellant was represented by Mr. Howard Hamilton Q.C. and Mr. Neville Levy. Mr. Harrison, who now appears for the appellant, was granted leave to argue eight grounds of appeal and at the end of the hearing we dismissed the appeals and affirmed the convictions and sentences. In addition to the oral reasons given at the time of our decision, we set out below the reasons for our decision.

The appellant was a former member of the Royal Cayman Islands Police Force. He resigned and went to Tampa Technical Institute in Tampa, Florida, where he obtained an associate degree in computer graphics. The prosecution alleged that the appellant met "JG" a female visitor to the island at Sharkey's Bar where they struck up a conversation and at closing time the appellant offered JG a ride home to White Sands. JG said that she accepted the drive but the appellant drove her along a dark road to the "dykes area" under the pretence that he was going to visit a friend. JG said that the appellant asked her for sexual intercourse. She refused his request. JG told him that she had a committed relationship in the United States and that she was not interested in the appellant. She related a horror story of how the appellant held her by her hair, forced her to her knees by controlling her by her hair, and forced her to have oral sex on his erect penis. She was forced to do this twice. Then, she said, the appellant told her to take off her clothes. She refused and the appellant told her that if she did not take off her clothes she would not walk away alive. JG said that she pretended to be about to remove her clothes and the appellant took a step back to watch. She then ran away. He chased her but she eluded

him and jumped into the water by the dykes and submerged herself. Nevertheless the appellant spotted her so she ran from the water into the bushes and hid herself. She was found and rescued by a passing motorist the following morning. JG identified the appellant as her assailant on an identification parade. Evidence was led by the prosecution that the appellant turned up at the police station about 2:00 a.m. He was barefooted and appeared wet and muddy. He reported to the police officer that his car had bogged down and that his girlfriend had refused to have sex with him.

The appellant admitted that he was at Sharkey's Bar but denied that he had taken JG in his car. He said that he had loaned one "John C." his car that night and when he was ready to leave the club John C. had not returned. He therefore got a ride from the club with his sister's boyfriend. His defence to the first two counts of the indictment was therefore a denial that he had any encounter with JG outside of the club.

John C. Bodden was identified as the "John C." to whom the appellant alleged that he had loaned his car. Neither the prosecution nor the defence called John C. Bodden as a witness although the prosecution had a statement from him. The judge exercised his discretion pursuant to section 142 of the Criminal Procedure Code (1995 Revision) (the "CPC"), to call John C. Bodden as a witness. The contents of the statement of John C. Bodden were put to the appellant by the prosecution in cross-examination. When John C. Bodden was called as a witness, the contents of his statement

were put to him. The method by which the appellant was cross-examined on John C. Bodden's statement and also the method by which John C. Bodden was examined, were severely criticised by Mr. Harrison during the hearing of this appeal.

The prosecution led evidence that on the night of September 24th 1998, "IM" a citizen of Honduras who had been in the Island for 5 months, was a bartender at the Country and Western Bar in George Town. She accepted the offer of a ride home from the appellant. He drove in the direction of her home then diverged onto a dark road near Crewe Road on the pretence of seeking a gas station. In the dark road that had bushes on one side and swamp on the other, the appellant stopped the car and exited from the driver's side. He ordered IM to come out of the car and dragged her out. IM ran towards the road. The appellant chased and caught her. He pulled her by her hair and forced her to her knees. In that position the appellant forced IM to perform oral sex. He accompanied his demand with repeated assertions that IM was a whore. He pushed his penis into her mouth and she bit him on his penis. The appellant cried out, fell to the ground, then got up and punched IM in her face several times.

IM testified that the appellant punched her until she fell to the ground in a weakened state. He pulled off her pants and threw it into the trees. He dragged her by her feet to the side of his car. He pulled her up by her hair to face the car then pulled down her panties and started rubbing his penis in the region of her anus. Then he threw

her to the ground on her back and demanded that she "kiss his dick" if she did not want to die. He removed her blouse and threw it into the trees. The appellant came on top of her and was attempting to insert his penis into her vagina with the aid of his hands. He could not maintain an erection. She said that the appellant repeatedly said nobody loved him and started to cry. She assured the appellant that Jesus loved him. When the appellant realised that he could not penetrate the vagina of IM he got up off her. She begged him to release her so that she could walk home. The appellant lifted IM by her hair and placed her in the car and drove to the main road. He turned the car in the direction away from her home. IM was then dressed only in her panties. She jumped from the appellant's car in front of an oncoming car and was rescued by Sean Bachet, the driver.

The appellant's defence was that he had known IM for about six weeks and had taken her home from Country and Western Bar on several occasions. He had never entered her apartment. He testified that on two occasions prior to September 23rd 1998 he has sexual intercourse with IM. The appellant continued by saying that on September 23rd 1998 he visited the Country and Western Bar during the day and IM requested him to pick her up at closing time. He went to the bar at 1:00 a.m. and IM entered his vehicle. On the way she told him that she had changed her residence but did not wish to go home right away. The appellant said that he drove off the main road in the region known as Spotts and stopped the car. IM began to undress spontaneously. She removed her jeans. Just then an argument about money developed between them. She was demanding

money from him. He explained to her that he had given her money the previous Friday and owed her nothing. IM, he said, told him that her friends had told her that, he, the appellant, was no good to which he responded that he was good enough to give her money for sex. The appellant said that it was in those circumstances that he called her a whore. IM became incensed and hit him in his face. He gave her a left-handed back slap. That infuriated her further and she began to throw things at him including pens, cassette tapes, her jeans pants, her shirt and her shoes. Some of these objects hit him in the face and to avoid being hit again by the same objects he threw each one through the window as soon as he was hit with the object. He then drove off, but at the request of IM returned to permit her to search for her clothes. She did not find them and he drove her to the main road, dressed only in her panties. She told him that she did not wish him to take her home and he stopped the car so that she could get out to hail an oncoming car. His defence to counts 3, 4, and 5 was that there was a consensual arrangement for him to have sex with IM but that before he could make any attempt to do so the altercation occurred and apart from the single slap which he gave IM, he did not commit any of the acts as alleged by her.

Mr. Harrison argued grounds of appeal numbered 1 and 2 together. In summary these grounds alleged that the trial judge fatally erred in law in permitting cross-examination of the appellant by the prosecution based on the contents of a statement of John C. Bodden, who had not yet been called as a witness, (albeit that the parties had

agreed that the judge could call John C. Bodden at the close of the evidence for the appellant) and that the method used by the court in permitting John C. Bodden to read out the contents of his witness statement to the jury violated the rule against hearsay and the rule against introducing evidence by narrative.

For the first time, during the course of his evidence in chief, the appellant stated that he had loaned his motor car to John C. Bodden on the night of March 17th 1998 and further that John C. Bodden had paid the towing fee to extricate the car from the bog. The trial judge, with the approval of counsel for the prosecution and for the defence, determined that he would call John C. Bodden as a witness at the close of the evidence for the prosecution pursuant to section 142 of the CPC. The judge had before him a copy of the statement that was allegedly given by John C. Bodden to the prosecution. At page 744 of the record it is recorded that the trial judge invited prosecuting counsel to deal with the contents of paragraphs 1, 2, and 3 on page 3 of John C. Bodden's statement before the appellant left the witness-box so that he would have a chance to deal with those allegations. It is well to set out the colloquy of what transpired in the absence of the jury as to the manner in which it was determined that the appellant ought to be cross-examined on the statement:

> "The Court: I would have thought that precisely, but of course you can at the same time because you are putting a case that is adverse to that; adopt it as you own, if you so choose.

Mr. Roberts: Yes.

The Court: However, that is where I will not –

Mr. Hamilton: I prefer the original method suggested by my learned friend.

The Court: Anyway, there it is. I don't mind as long as it is done and he has a chance to deal with it.

Mr. Hamilton: Yes.

The Court: Thank you very much. Otherwise I think I would be seriously at fault. And of course, Mr. Hamilton, you must have to deal with it in cross-examination as you see fit.

Mr. Hamilton: I see. I'm much obliged."

Mr. Harrison submitted that John C. Bodden's statement was inadmissible against the appellant. He relied on the decision of the English Court of Appeal in *Windass v. R.*, (1989) 89 Cr. App. R. 258. In that case the court held that the trial judge was wrong to permit prosecuting counsel to ask the appellant to explain what a third party meant by a document written by the third party and that it was quite improper for counsel and the jury to hold in their hands a document that was inadmissible *vis-à-vis* the appellant and who was cross-examined about it. As the prosecution submitted in its skeleton argument, this case is distinguishable from that of *Windass* in that the trial judge expressly warned the jury that the statement of John C. Bodden was not an exhibit. At page 768 of the record, the trial judge told the jury:

"Ladies and gentlemen, at this moment, I can't make this an exhibit for legal reasons".

Then on page 837 of the record during the cross-examination of the appellant by prosecuting counsel, the judge specifically instructed the jury that questions from counsel are not evidence in the case. He said:

"Ladies and gentleman, counsel's questions are not evidence, do you understand that? The answer that a witness gives is evidence. Whether you accept an answer or not is a matter of drawing reasonable deductions from facts; do you see the difference".

In our view, the contents of the statement of John C. Bodden were not inadmissible hearsay and the only fair way to confront the appellant with what this proposed witness might say, was to identify the source of the information and to ask him if he accepted or rejected those assertions. In *Windass* the diary had been made by a co-accused who did not give evidence and there was no clear direction from the judge as to the effect of the contents of the diary. In our view, in this case the trial judge fashioned a unique procedure that was fair to the appellant and to which no objection had been taken at any stage by the defence.

In ground 2, Mr. Harrison concentrated on the manner in which John C. Bodden was examined in chief when he was called by the court. When a witness is called by the court it is essential that he be examined in a fair manner so that there be no prejudice to

the defendant. The information that had been made available to the court was that John C. Bodden had given a statement to the police and that in an interview with a member of the Legal Department of the prosecution John C. Bodden had said if he was called as a witness he would give an alibi for the appellant. The trial judge put the earlier statement that John C. Bodden had given to the police into his hands and asked him if the contents of that statement were true. John C. Bodden was placed under no improper or unfair pressure whatever to admit or deny the contents of that statement. In fact he admitted that the contents were true. If his evidence was believed by the jury it could effectively destroy the alibi defence raised in relation to Counts 1 and 2 of the indictment. We were not persuaded that the method of examination of this witness that was adopted by the learned trial judge in any way affected the fairness of the trial and we therefore found no merit in grounds 1 and 2 of the grounds of appeal.

In ground 3 of the grounds of appeal, the appellant complained that the learned trial judge gravely misdirected the jury by leaving for their consideration, as potentially corroborative of the complainant's evidence of the offence, matters not capable of amounting to corroboration. We can dispose of this ground in a summary manner. The appellant had gone to the police station in the dead of night dressed in an unusual manner which attracted the attention of police constable Vasquez. He was barefooted and wet. He complained that his girlfriend did not want to have sex with him. The victim in relation to counts 3 through 5 of the indictment had visible injuries. Dr. Bryan saw an

abrasion on the big toe of her left foot, abrasions to her left elbow and in the region of the skin overlying the scapula bone on the left side. She had contusions and swellings around both eyes and the zygomatic area, and there was marked tenderness and a contusion over the bridge of the nose with some swelling and marked tenderness and marked swelling to the bridge of the nose. Her upper lip was swollen and she had small lacerations on the inner surface of both the upper and lower lip. Her scalp was tender in the neck region on both the left and right sides to the back of the neck and also on the left side of her neck. The victim was seen to jump from the moving vehicle driven by the appellant and she ran to the vehicle of Sean Bachet dressed in her panties. He observed her hair all over her face, there were bruises to her face and she was bleeding from her nose and she could not talk. She was crying incessantly.

The appellant stated that he gave IM one backhanded slap when she attacked him in his vehicle. That slap could not have accounted for all the injuries that the doctor and Mr. Bachet observed on IM. The judge was perfectly correct to give the *Lucas* instruction that lies can amount to corroboration. He was perfectly right to direct the jury that the woman's injuries were capable of amounting to corroboration. He was generous to the appellant when he told them at page 1122 of the record that the distressed condition of IM as observed by Mr. Bachet was something that they could marginally take into consideration in assessing the overall picture as to whether there was independent evidence in confirmation of the complainant's evidence. There was in our

view abundant evidence to be left for the jury's consideration as to corroboration and there was no merit whatever in this complaint in ground 3.

Ground 8 alleged that the learned trial judge gravely prejudiced the appellant's chance of acquittal on counts 3 and 4 of the indictment by instructing the jury, before the appellant was given in charge to them, that the latter's defence respecting the second of "two episodes involving alleged sexual assaults on women" was consent and further that in any event, he utterly misrepresented the appellant's defence to counts 3 and 4. At pages 9 - 10 of the record, the learned trial judge addressed the jury as follows:

> "Ladies and gentlemen, if you looked at the court room list, you would have seen that this case was estimated to last ten working days. As a result of the discussions we've been having by counsel on both sides, it's more like a week – thereabouts – and I express my gratitude to counsel. It's important that it is done this way because, of course, what one needs to have are the issues defined for you to decide, and with the leave of both counsel, let me tell you, the charges are two episodes involving alleged sexual assaults on women. In respect of the first matter, the defence is, it is not me.
>
> On the second occasion the defence is, what happened was with consent, do you follow? So you can keep in mind when cross-examination takes place, what issue is being dealt with, so that you know what issue you have to decide".

The actual defence offered by the appellant at trial on counts 3 and 4 was that the complainant was undressing in preparation for having consensual sex with him when an acrimonious argument about money arose between them and which led to a physical

attack by her upon him. The appellant admitted that he inflicted a single blow on her. It was his case that IM used her clothing as weapons with which to hit him and he caught them and threw out through the window.

On October 28th 1997 the Chief Justice issued the Plea and Directions Hearing (PDH) Practice Directions. The questionnaire is modelled after that which appears in the Practice Direction (Crown Court: Plea and Directions Hearings) [1995] 1. W.L.R. 1318, Archbold 2001, para. 4-85 *et seq.* In the questionnaire, counsel are requested to identify the issues. That was done in this case. In England there is a formal Plea and Directions Hearing at which the defendant is arraigned. If the defendant pleads not guilty, the prosecution and the defence are expected to inform the court of the issues in the case. See Archbold para. 4-87.10(a). There is no procedure sanctioned by the PDH rules whereby the trial judge, using the information contained in the questionnaire, determines the issues to be tried in the case and can so inform the jury.

The trial judge was greatly distressed when during the trial of this case, he realised that the defence to counts 3 and 4 was not consent. He had made his statement to the jury about the defence that the defendant would offer in respect of counts 3 and 4 of the Indictment in the presence of counsel, he had told the jury he did so with the consent of both counsel and defence counsel had not voiced any objection. In *Levy*, Criminal Appeal 29 of 1998, we disapproved of the practice whereby the trial judge told the jury

prior to the opening of the case by the prosecution what were the issues to be tried. There is nothing in the PDH which sanctions the practice of the judge telling the jury that the issues have been narrowed with the consent of counsel on both sides and which permits the judge then to go on to tell the jury what will be the defence of the accused. In our view the purpose of the PDH is to enable the judge to more efficiently manage the case before him. When he has been advised in the PDH what are the issues, he can prevent time wasting in the examination and cross-examination of witness or in the calling of new witnesses not identified by either side in their witness lists. He can streamline the introduction of exhibits which must be pre-marked and available and he can be assured before the commencement of the case that all necessary witnesses will be available. He can prepare himself for the issues of law which are likely to arise and to tailor his summing up to meet those issues having regard to the evidence. The PDH is for the assistance of the judge. The PDH is not to be taken to incorporate formal admissions by the accused nor to relieve the Crown of proving any ingredient of the crime alleged, nor to inhibit the right of defence counsel to frame the case for the accused as counsel sees fit in opening or in closing address to the jury. We disapprove of the practice by which the trial judge addresses the jury on the issues that are likely to arise prior to the time that the accused is put in charge of the jury or at any time prior to the summing up of the case.

In this case the accused was represented by very senior counsel. The nature of the defence had been identified by defence counsel in the questionnaire and when the trial

judge embarked upon his initial instructions to the jury, there was no objection whatever from defence counsel. The jury returned a verdict of guilty of attempted rape on count 3 and of indecent assault on Count 4 on overwhelming evidence. There is no reason to believe they may have been mislead by anything that the trial judge told them as to what defence the appellant would be offering to the charges on counts 3 and 4. Notwithstanding our strong disapproval of the practice of telling the jury that the issues had been narrowed and what the defence of the defendant will be, in this case we can safely say that there was no prejudice whatever to the appellant by what transpired on that first morning of the trial.

We entirely approve of the sentencing remarks made by the learned trial judge and confirm his sentence of 7 years on count 1 of the indictment and of 8 years on count 3. The second set of offences was committed while the appellant was on bail and we therefore confirm the decision of the trial judge that the sentences on counts 1 and 3 should run consecutively. All other sentences are confirmed.

It was for the reasons contained herein that we dismissed the appeal against convictions and affirmed the sentences.

Zacca P.

Rowe J.A.

Collett J.A.