1 IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN
3
4 C.I.C.A. 16/96
5 IND. 4/95
6
7 **DAVE KENNEDY EBANKS v REGINA**
8
9 BEFORE: The Rt. Hon. Edward Zacca, President
10 The Rt. Hon. Telford Georges and
11 The Hon. Gerald Collett, Justices of Appeal
12
13
14 Mr. Norman Hill Q.C. instructed by Mr. Keith Collins for the appellant
15 Mr. Adam Roberts for the Crown
16
17 Heard on the 8th day of April 1998 and delivered on the 30th day of July 1998
18
19
20 On 24th April, 1998 we dismissed this appeal and promised to put our reasons into
21 writing. This we now do.
22
23 The appellant was convicted on June 12, 1996 by a unanimous verdict of the jury for the
24 offences of Rape, Robbery and Assault Occasioning Actual Bodily Harm. The offences
25 were alleged to have been committed on 29th October, 1994.
26
27 The case for the prosecution was that Susan Hunt, a visitor to the Cayman Islands, who
28 was staying at the Island Pines Villas on the Seven Mile Beach, went down to the beach
29 at between 5 a.m. and 5:30 a.m. She wore her two-piece swimsuit and took with her a
30 camera, the keys to her apartment and a towel. She wished to take a photograph of the
31 sun coming up over the sea.
32
33 Whilst sitting on a lounge chair on the beach the appellant came towards her and engaged
34 her in conversation. The name Blair came up and it appears that both knew a man called
35 Blair who lived in the United States of America. The appellant took a photograph of her

1 with her camera and she in turn took a photograph of the appellant saying that she would
2 show the photograph to Blair on her return home. The appellant was not known to her
3 prior to that morning.
4
5 She decided to return to her apartment and he asked her not to. She, however, took up
6 her towel, camera and keys intending to leave the beach. The appellant grabbed her and
7 threw her to the ground. He subsequently ordered her to give him the jewelry she was
8 wearing. Thereafter he struck her several blows on her mouth and attempted to choke
9 her. She screamed and he threatened to kill her. He then had sexual intercourse with her
10 without her consent. The appellant had also forced her to have oral sex with him. She
11 stated that she bit him on his penis but he showed no pain. At one stage he gagged her
12 with the towel.
13
14 She eventually got away from him and ran naked to the villa. She knocked on several
15 apartments but got no response. She ran upstairs and knocked on an apartment which
16 was then occupied by one Matthew Dennen. He heard a girl screaming for help and on
17 opening the door saw Susan Hunt who had by then taken a towel from the porch and
18 wrapped it around her. Mr. Dennen confirmed that the towel belonged to him and had
19 been on the porch. She made a report to him and he observed that she was visibly shaken
20 and almost hysterical.
21
22 He observed what appeared to be blood on the side of her face coming from the direction
23 of her ear. She stated in her evidence that the appellant hit her on her ear.
24
25 Mr. Dennen proceeded down to the beach where he recovered her bathing suit, camera,
26 towel and her eye-glasses. He subsequently handed over these items to the police. In his
27 evidence Mr. Dennen stated that he knew the appellant and on the previous night at about
28 11:00 p.m., he had seen him coming up the stairs towards his apartment. The appellant
29 appeared drunk and Mr. Dennen turned him around and ordered him off the property.
30 The appellant then walked towards the beach.
31

1 Police officer Wayne Powell arrived at the Island Pine Villa at about 6 a.m. The camera
2 was handed over to him by Mr. Dennen and at about 2:00 p.m. that same day he handed
3 the camera to Sgt.. Joseph who later developed the film. Powell stated that he saw the
4 photographs at about 4:00 p.m. He had seen Sgt. Joseph remove the film from the
5 camera. Eighteen photographs were developed: Photograph no. 17 was the photograph
6 of Susan Hunt taken by the appellant, and photograph no. 18 was the photograph of the
7 appellant taken by Susan Hunt.
8
9 Vaginal swabs were taken from Susan Hunt and blood taken from the appellant. The
10 DNA evidence was to the effect that the vaginal swab profile when compared with the
11 blood DNA profile, produced a match.
12
13 Susan Hunt was subsequently shown a police book of photographs and she picked out a
14 photograph of the appellant as the man who had sexual intercourse with her.
15
16 The defence of the appellant was an alibi. He denied being on the beach and denied that
17 any photograph was taken of him by Susan Hunt or that he took a photograph of Susan
18 Hunt. In his evidence the appellant states that he was at his mother's home on the Friday
19 night and never left the house. He was at the house at the time that Susan Hunt alleged
20 that she was raped. He called his mother as a witness to support his alibi. Dr. Connolly
21 was also called as a defence witness. He testified that he examined the appellant and
22 found no injury or bite mark to his penis.
23
24 In his evidence, the appellant said that in 1989 he was charged for rape and that samples
25 were taken from him for DNA testing. He was acquitted of the charge. The samples
26 were never returned to him. An attempt was being made to suggest that those samples
27 were used in the present case. No questions were put to any of the prosecution witnesses
28 with respect to this allegation. There was not a shred of evidence to support this
29 allegation. The trial judge was not in error in not pointing out any significant features of
30 this evidence.
31

1 Mr. Norman Hill on behalf of the appellant challenged the way in which the learned trial
2 judge gave his directions to the jury. He argued that the directions were unfair to the
3 appellant in that the judge failed to point out the significant features of the evidence
4 which were favourable to the appellant. This summing up, he submitted, was
5 unbalanced.
6
7 The court was referred to **Mears v Regina** **(1993) 97 CR App R 239**. Mr. Hill relied on
8 this case in support of his submission that the directions to the jury were so
9 fundamentally unbalanced as to deprive the appellant of a fair trial.
10
11 In our view that case can be distinguished from the present case. Here there is no
12 suggestion that the evidence was misquoted or that the judge expressed views which were
13 not warranted by the evidence.
14
15 Mr. Hill submitted that the learned trial judge failed to assist the jury by not pointing out
16 certain significant features in relation to identification. They were:
17
18 (1). The authenticity of the photograph of the appellant allegedly taken
19 by Susan Hunt. It was not disputed that the photograph was that of the
20 appellant. However there was a suggestion by the defence that the
21 photograph was not taken on the beach by Susan Hunt. It was being
22 suggested that it was a photograph of a photograph and that Mr. Dennen
23 may have had in his possession a photograph of the appellant taken on a
24 previous visit. Mr. Dennen recovered the camera from the beach and
25 handed it over to the police shortly after and it was in their possession
26 until the film was developed.
27
28 It could only be that the defence was alleging that the photograph was
29 taken by Mr. Dennen from a photograph in his possession. This would
30 have to have been done between the time the camera was recovered from
31 the beach and handed over to the police. Mr. Dennen denied this

allegation. One may ask the question "Why would he take a photo of the appellant's photograph assuming he had a photograph of the appellant in his possession". There is no evidence that up to the time he had the camera in his possession, the victim had made any identification.

The police photographer also said that the photograph was not a photograph of a photograph. Again Richard Marshall, a professional photographer was called as a witness by the prosecution. He stated that it was unlikely, most difficult and near impossible for Susan Hunt's camera to take a photograph of a photograph. It is clear that the allegation of the defence was mere speculation.

Mr. Hill also pointed to the evidence of Susan Hunt where she stated that her assailant was wearing baggy pants whereas the pants in the photograph appeared to be straight. Also that a photograph of the appellant taken one month after the incident showed a difference in the hair of the appellant as shown in the photograph taken by Susan Hunt.

All of this evidence was left by the trial judge for the jury's consideration. There can be no doubt that the jury must have been aware of what was being alleged by the defence.

(2). Mr. Hill submitted that there was no evidence of the appellant's fingerprints on the camera. The evidence is that the camera was not dusted for fingerprints. It was handled by several persons. The reason for not dusting it for fingerprints was given by a police officer who was called as a prosecution witness. This evidence was before the jury for their consideration and it would be mere speculation on their part to say whether or not the appellant's fingerprint was or was not on the camera.

(3). It was submitted that a cassette tape which Susan Hunt alleged was handled by the appellant did not produce fingerprints of the appellant. The tape was recovered in a Dive shop some time afterwards. The cassette had also been handled by a number of persons. Again this evidence was left to the jury for their consideration by the trial judge.

(4). The identification of the appellant by Susan Hunt from the police Book was also challenged on appeal. It was submitted by Mr. Hill that the police were told by Susan Hunt that she had taken a photograph of the appellant and therefore the procedure adopted by the police was suspect. He criticised the fact that no identification parade was held. It was a matter for the jury to decide whether the appellant had been properly identified and this evidence was left for their consideration. We do not agree that this evidence would make the identification suspect.

(5). The evidence of Dr. Connolly that no injury or bite mark was seen on the appellant's penis. Susan Hunt was not cross-examined as to the extent of the bite but she did state that the appellant showed no pain when she bit his penis. The jury was well aware of this evidence on which directions had been given and it cannot be said that they did not take it into account in their deliberations.

(6). Mr. Hill submitted that if Susan Hunt had taken a photograph of the appellant, it is unlikely that he would not have taken away the camera. This was in fact the evidence and the jury is presumed to have considered it. We do not find that the defence of the appellant was prejudiced by reason of the fact that the trial judge did not specifically direct the jury in those terms. The point would have been made to the jury by defence counsel.

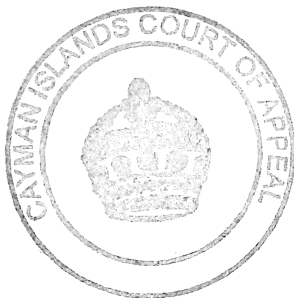
We have considered the issues raised by Mr. Hill and we are of the view that the directions of the judge to the jury were not unfair or unbalanced. He clearly directed the jury on the evidence and whilst the judge may not have specifically directed the jury n the manner suggested by Mr. Hill, it cannot be said that the jury would not have considered those issues

Mr. Hill relies on a fourth submission that the trial judge was in error in telling the jury that the photograph No. 18 of the appellant was evidence which was capable of amounting to corroboration. He submitted that the photograph having been taken by Susan Hunt cannot be independent evidence and therefore not capable of being corroboration. He, however, conceded that the evidence of the photograph may support her evidence and may be confirmation of her evidence that the appellant was the person who attacked her on the beach.

It is clear that the evidence of the photograph of the appellant was very strong evidence which tended to support Susan Hunt's identification of the appellant as the man who raped her. This would be so if the jury accepted the evidence of Susan Hunt that she took the photograph on the beach on the morning of the incident. Having regard to the evidence before the jury, it is reasonable to infer that they were satisfied with the authenticity of the photograph.

We agree with Mr. Hill that the evidence of the photograph was not corroboration of Susan Hunt's evidence. However it was very strong evidence supporting her identification of the appellant.

The case presented by the prosecution was a very strong one. Properly directed we are satisfied that the jury would have come to the same verdict. There has been no miscarriage of justice. In the circumstances we will apply the proviso under Section 9 of the Court of Appeal Law and dismiss the appeal.



IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN

CIVIL APPEAL NO. M2 OF 1998
(GRAND COURT CAUSE NO. 401 OF 1996

BETWEEN: (1) SEASKY LIMITED
(2) MICHAEL BROWN
(3) KENT GREEEN
(4) BIG KAHUNA LIMITED
DEFENDANTS/APPELLANTS

AND: (1) MATTHEW VOLKEL
(2) DAVID KEEDY
PLAINTIFFS/RESPONDENTS

R. N. A. Henriques Q.C. and Steve Barrie instructed by Messrs. C. S. Gill and Company for the Fourth Defendant/Appellant.
The Plaintiffs/Respondents not appearing nor being represented.

BEFORE: Rt. Hon. Edward Zacca, President,
Rt. Hon. Telford Georges and Hon. James Kerr
Justices of Appeal

REASONS FOR ORDER

This is an appeal from an order refusing leave to set aside a default judgment entered against the fourth defendant. The order was made on an application by the respondents dated 30th September 1997. It reads in part:

> "And upon reading the affidavit of James Chapman filed on the 30th day of September 1997,
> And no defence having been filed by the Fourth Defendant prior the date of the Plaintiffs' said application it is this day adjudged..."

The statement that no defence had been filed by the Fourth Defendant prior to the Plaintiffs' application was inaccurate. A defence had been filed on 26th September 1997 – four days before the date of the summons applying for the default judgment. This had been brought to the attention of Mr. Chapman, solicitor for the applicants in a memorandum dated 2nd October 1997. That defence it would appear was served on the plaintiff on 3rd October 1997. The default judgment was entered on 3rd November 1997.

The basis for the entry of the default judgment is Grand Court Rules Order 19 rule 3 which is in near identical terms with order 19 rule 3 of the English rules.

The comment under the reference 19/2/2 on order 19 rule 2 which in our view is equally applicable to order 19 rule 3 reads:-

> "If before judgment is entered the defendant serves a defence even though it be out of time judgment in default cannot be entered"

The language of Grand Court Rule O.19 r.3 is clear-

> "Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

The power to enter a default judgment does not arise unless the defendant has failed to serve a defence on the plaintiff and the period for service has expired. In his notes of the hearing of the application to set aside the judge states-

> "Leave is sought by 4th defendant to set aside aside judgment in default of defence. Draft defence and counter claim but filed out of time"

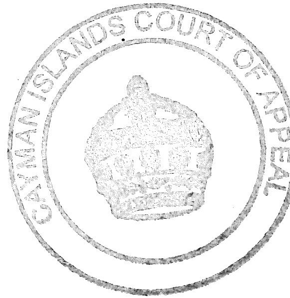
The prerequisites for entering a default judgment had not been established with the consequence that the default judgment entered was irregular and should have been set aside ex debito justitiae.

For these reasons we set aside the judgment at the close of the arguments and made the following order:

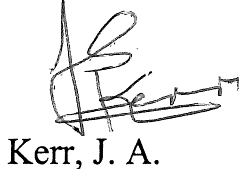
Application for leave to appeal is granted.
Application treated as the hearing of the appeal.
The appeal is allowed.
Order of Mr. Justice Graham with respect to the Fourth Defendant is vacated.
Default Judgment set aside.
Costs below to be costs in the cause.
Defence and Counterclaim restored.
Costs of the appeal to be to the appellants to be agreed or taxed.

The 5th day of August 1998

Zacca, P



Georges, J. A.



Kerr, J. A.