IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim) 13/2012
C#03942/2010

The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
(IND 38/2011)

BETWEEN

PHILIP TURNER ROSE

Appellant

-and-

HM THE QUEEN

Respondent

Amelia Fosuhene of Brady Law appeared for the Appellant
Mr Greg Walcolm appeared for the Crown

Hearing and Judgment delivered: 11 November 2015

JUDGMENT

Revised from transcript and Approved – released 29 April 2016

Moses JA:

1. By a judgment given by the Chief Justice, sitting without a jury on 19 December 2011, this appellant was convicted of four counts of rape contrary to s.127 of the Penal Code (2006 Revision), two offences of assault occasioning actual bodily harm contrary to s.215 of the Penal Code (2005 and 2006 Revisions), and abduction contrary to section 215 of the Penal Code (2006 Revision). He had pleaded guilty to use of an ICT network to abuse and

harass contrary to s.90 of the Information and Communication Technology Authority (2006 Revision). This court heard and dismissed his appeal against conviction on 11 November 2015; these are our reasons. He did not pursue his appeal against a total sentence of 14 years imprisonment.

2. All of these offences related to one complainant who had arrived to work in the Cayman Islands between February 2006 and July 2008 when, as she would have it, she escaped the appellant by secretly leaving Grand Cayman. She and the appellant had started a primarily sexual relationship from February 2006; she claimed she ended it on 30 September 2006 once she had found out about relationships he continued to have with other women. Thereafter, she said he pursued her in an obsessive, jealous and violent manner, a "campaign" as the Chief Justice called it, over a space of one and a half years.

3. During that period there were specific occasions of rape, associated with violence, grounding the counts alleged against him on the indictment. On 7 October, 2006 the appellant left three messages on her mobile telephone of an extremely violent nature, demonstrating as the Chief Justice found "violent and obsessive behaviour". These calls were recorded and admitted. On that very day, the complainant alleged he forced his way into her car, punched her , pulled her into his house and raped her (Count 3, rape, Count 2 assault occasioning actual bodily harm). She reported that incident to the police and subsequently to the Family Support Unit, but since no record was kept, the Chief Justice did not rely on the evidence that complaints had been made as evidence of recent complaint. She did not pursue charges because, she said, she feared losing her job and her career. Her failure to do so was an important

feature relied upon by the defence as supporting their case that no such incident of rape took place. Photographs of bruising, taken by a colleague at work, supported her evidence of violence in addition to the evidence of the appellant's threatening telephone calls.

4. The Chief Justice found that, in December 2006, the appellant had pulled her out of her car, drove her to his apartment and raped her (Counts 4 and 5, abduction and rape). There was some evidence to support her account of harassment during this period from the manager of the address where she was living at the time at Laguna del Mar but it also, to some extent, supported the defence. The complainant had alerted the manager, Mr Marcus Montana, to be on the watch for the defendant, who would wait outside the property knocking "for hours" to be let in. The Manager gave evidence that he had seen the defendant there and had called the police. But she had not reported rape to him, even after the police had been called. Nor did she report it to the police.

5. On 10 April 2008, the Chief Justice concluded that the appellant had surprised her outside her house, forced her inside and raped her (Count 7). She did not report this to the police, attributing this failure to their lackadaisical attitude.

6. On 17 May 2008 the appellant pursued the complainant in his father's truck while she was giving a lift to a man she had met at a bar. The appellant forced her to stop, forced the man to leave her, threw her so that she injured her head and fell to the ground, dragged her into her house and at the point of a knife forced her to bed, stripped her and, as the Chief Justice concluded, raped her. (count 8, assault occasioning actual bodily harm and count 9 rape).

7. The appellant kept the complainant locked in her apartment for three days. Photographs she managed to take of her injury and blood on her bed sheets provided support for the violence. The appellant accepted that she had been injured but said that she fallen, because of her drunken state, against a parked car. Dr Richens reported that during a consultation on 22nd May 2008 she was complaining of aches and pains and numbness to the side of her face and had cuts to her elbow and wrist. She blamed a stalker.

8. The appellant denied that sexual intercourse had taken place at all on the occasions of the alleged rapes. He said that injuries seen in photographs in October 2006 and again in May 2008 were the result of accidental falls. His evidence was, in essence, that it was he who was the victim of her jealousy and harassment, and that his undisputed threatening calls were no more than a response to that behaviour and her own equally abusive communications.

9. There is support for that case. It is apparent that from time to time the complainant and the appellant continued to have consensual sexual intercourse; the complainant said it was because she felt she had to submit to avoid continuing harassment, but it was not suggested that on those occasions the appellant had committed rape. The appellant said that those occasions of consensual sexual intercourse were the only occasions on which he had sexual relations with her, within the two and half year period after their first estrangement in September 2006. The "central peculiarity" of the case, as the Chief Justice described it, was that the appellant denied that there had been any sexual intercourse at all on the other occasions when it was alleged he had

raped her, still less that he had, on those occasions an honest belief that she was consenting.

10. The evidence primarily but not exclusively depended on the credibility of the complainant. Her behaviour had not been consistent in demonstrating that she did not want to have anything more to do with the appellant after September 2006. She had, from time to time, approached him to tax him with his relationships with others; she had contacted his wife in Miami, she had, plainly out of jealousy, confronted another woman with the appellant on a beach at Christmas, 2007 and at the same time had retained a private investigator to obtain information about the appellant's relationships with other women. There was also evidence of at least 17 texts, demonstrating her jealousy, which she sent him and to which we will have to refer again. Taken with her important admissions that during this period she did have consensual sexual intercourse, it is clear that there was no consistent picture of a woman seeking throughout to end the relationship, despite the appellant's insistent and jealous pursuit.

11. That she was the victim of violence and was fearful of the appellant did not depend, however, solely on her own evidence. In March 2008, Tony M, who was visiting her on the island, reported the behaviour of the appellant who "had rudely interrupted" the complainant and him and threatened him to the extent that in fear he had fled upstairs and called the police. The police supported that evidence: there had been a 911 call. However, the evidence cuts both ways since the complainant refused to name the appellant, whom Tony M described as her boyfriend in his call to the police.

12. There was further evidence of consistency, so the prosecution said, in the evidence of a clinical psychologist, Ms Shannon Seymour whom the complainant visited on 29 April 2007. The Chief Justice's admission of her evidence is relevant to the second and third grounds of appeal. Ms Seymour's evidence detailed the complainant's account of an abusive relationship, speaking of stalking, and harassment on the 'phone. She appeared distressed, anxious and fearful and blamed herself, in a manner, so Ms Seymour said, common in abusive relationships. The Chief Justice recorded and accepted Ms Seymour's view that there is no standard or rational response to be expected of an alleged victim of sustained abuse. This accorded with the Chief Justice's own experience of victims before the courts.

13. Ms Fosuhene argued, on behalf of the appellant that this evidence ought not to have been admitted. First, pursuant to the third ground of appeal, it was not admissible to rebut recent fabrication. The Crown did not dispute the proposition that Ms Seymour's evidence was only admissible on that basis. If it was not, then it should have been excluded as no more than evidence of a previous consistent statement, inadmissible under Cayman Islands law unless it is evidence of recent complaint in a case of rape or other sexual offence. Counsel for the Crown did not seek to sustain the admission of this evidence on that basis and it was not the basis on which the Chief Justice permitted it to be adduced. We prefer to say nothing more as to whether its admissibility, though on its face directed at violence might be argued to be relating to the sexual offences alleged in this case.

14. The question thus arises as to whether the defence had alleged recent fabrication: the Chief Justice said that was implicit in the defence. We agree with the view of the Chief Justice, who was far better placed than we are to assess the gravamen of the defence throughout the substantial cross-examination of the complainant and during the course of the appellant's own evidence. It was an important part of the appellant's case that she had made no allegation of rape until she had left the island, that she had despite many opportunities brought no charges against him, until she had left but, on the contrary, had exhibited jealousy herself and had been a willing partner to consensual sexual relations. She had only changed her attitude, out of jealousy and vindictiveness later, said he.

15. That she had complained to a psychologist, exhibiting the signs described in April 2007 long before she left the island, seemed to the Chief Justice, and in our judgement rightly, to rebut this line of defence. Moreover that defence can, in our view properly be described as one of recent fabrication. In those circumstances we reject this ground of appeal.

16. We should add that, although in her written argument Ms Fosuhene argued that the judge erroneously permitted Ms Seymour to give evidence as an expert as to the behaviour of victims of sexual abuse, she was not called as an expert and should not, therefore, have been permitted to give that opinion. The opinion she gave was no more than evidence with which judges are familiar, and could have been relied upon by the Chief Justice, whether it had been given by this witness or not, since it was, as he said, common sense and within his own experience.

17. We observe that, although given the opportunity to object to the admissibility of this evidence, counsel then instructed on behalf of the defendant, Mr Ben Tonner chose not to avail himself of this opportunity. This feature needs to be considered in the context of the second ground of appeal, that there was unexplained late disclosure of this and other evidence to the extent that the defence were hampered and deprived of a fair trial. We shall deal with this ground, in full, subsequently, confining ourselves at this stage to Ms Seymour's evidence.

18. There can be no dispute but that this evidence was served far too late, on 26 October 2011, five days before the trial began. Since the statement was dated 4 March 2011, this was inexcusable and no explanation was offered by the Crown. The Chief Justice was aware of this gross dereliction of the prosecution's responsibilities. He described the prosecution as "slipshod". When the witness Ms Seymour came to give evidence, some four days into the trial, Mr Tonner for the defence did not ask for further time, but he did reserve his position as to arguments as to admissibility. The Chief Justice admitted the evidence but only on the basis that it would be open to the defence to raise issues of admissibility as well as weight subsequently. Mr Tonner did not do so.

19. Ms Fosuhene, who was not trial counsel, now suggests that counsel's failure to do so may have been attributable to late disclosure. But in our view, now that we are satisfied it was properly admitted, there is no basis for this suggestion. Mr Tonner could have objected to its admissibility subsequently but, rightly in our view, decided not to do so.

20. Ms Seymour's evidence was not the only evidence to be disclosed and served far too late. There was late disclosure of the evidence of the manager of the Laguna del Mar, Mr Montana, and of officers dealing with complaints and of tapes of calls made by the appellant. To call this "lackadaisical", as Ms Fosuhene did, was an understatement. It is the prosecution's duty to disclose all material evidence as soon as possible. It is unfair and impermissible to sit on evidence, once obtained, disclose it piecemeal late before and during the trial and then to hope that defence counsel is of sufficient experience and skill to deal with it. As Ms Fosuhene pointed out, the position of the defendant himself is of importance. It is difficult and stressful enough to approach and participate in a trial without the unnecessary stress imposed unfairly by the late production of additional evidence. A defendant will need to be assisted in unharassed consideration of the evidence against him, so that he has a fair opportunity to give what relevant instructions he can. He is deprived of that opportunity if there is unnecessarily late disclosure.

21. Although the late disclosure of relevant evidence was inexcusable in this case, it does not necessarily follow that the trial, looked at as a whole, was unfair or that it can be said that the convictions were unsafe or unsatisfactory. Analysis of the transcripts and of the cross-examination by Mr Tonner does not suggest that the defence was in fact hampered by the late disclosure. The cogency of the evidence of Ms Shannon depended on the credibility of the complainant and that the defendant had every fair opportunity to challenge and rebut. The medical evidence of Dr Vernon dated 13 July 2009 and of Dr Richens dated 16 February 2009, both served on 31st October 2012 without any explanation dealt with injuries that were not denied, although the explanation as to how

they came about was disputed. DCI Brady and DC Boxhall's statements producing the tapes of admitted conversations added nothing since the contents were admitted and led to a plea of guilty.

22. In the result, while we re-iterate that the prosecution's disclosure was woefully and inexcusably late, it did not lead to such unfairness in this case as to undermine the fairness of the trial as a whole or the verdicts which followed. We reject ground two of the appeal.

23. This leaves the first ground of appeal. By this ground Ms Fosuhene attributes to trial counsel, Mr Ben Tonner, such a level of incompetence that the appellant was deprived of a fair trial. In particular, she contends that he failed to gather or request specific evidence in accordance with instructions of the appellant and further he failed to speak to or call certain witnesses as to the credibility of the complainant.

24. Before dealing with the detail of these contentions, as they were developed in oral argument, we should remind ourselves of some well-settled principles. The impact of the incompetence must have been so severe as to have rendered the trial process unfair and unsafe *(R v Day* [2003] EWCA Crim 1060*)*. A lawyer should not put forward allegations of incompetence, based only on the statements of a convicted appellant, but must take proper steps to ascertain by independent means, which includes contact with those previously instructed, as to whether there is any "objective and independent basis" for this ground of appeal, *R v OA* [2014] EWCA Crim 567, paragraph 16.

25. That principle is particularly important in this case. We should underline the damage to an adversarial criminal justice system of pursuing unfounded

allegations of incompetence against trial counsel or questioning counsels' conduct in circumstances where there is little or no prospect of demonstrating that the trial was unfair, let alone of showing that the verdict was unsafe or unsatisfactory. To pursue such allegations without taking the utmost care to see that they are well-founded undermines confidence in the system. If trials are to be re-run in the course of analysis of a previous lawyer's judgments, from time to time taken in the heat of the adversarial process, there is a real danger that trial counsel will themselves adopt an over-cautious approach, fearful of making independent judgments, a mere slave to the instructions of their own client, lest that they subsequently be criticised on appeal by a disappointed, convicted defendant.

26. It needs no emphasis from us to remind those who seek to pursue an appeal on this ground that a fair and just criminal process depends upon independent and courageous judgment by defence lawyers: that is the way they best serve their clients. They are not the mere mouthpiece of their clients; neither at trial nor on appeal. A defendant is not entitled to expect his counsel to parrot his instructions or do other than exercise independent judgment as to the wisdom of adopting some particular course, or as to the production of evidence. "The line to take" is for counsel, of course in consultation with his client, but not for the client.

27. It seems to us that this important feature of the relationship between client and lawyer in a criminal case was in danger of being over-looked in this appeal. Serious allegations were made against counsel, without proper foundation and had to be withdrawn. From time to time, counsel, forcefully and bravely

though she conducted this appeal, merely seemed to express the complaints of her client, understandably disappointed that he had been convicted.

28. We turn to the specific contentions to which Mr Tonner has given a full response, both by letter and affidavit, the appellant having had to waive privilege in order to pursue this ground. It was alleged that he had failed to adduce evidence which was contained in a bundle, hand-delivered to Samson and McGrath, the defendant's lawyers by his sister, Carol Thomas in 2011. We observe that the only evidence that the contents of the bundle were delivered is in a letter, signed by Carol Thomas, dated 6 July 2015, which only refers to the year 2011. There is no signed receipt from the office. Mr Tonner remembers some mention of some of the witnesses whose names appear in that bundle but that is all.

29. We are quite unable to accept that this bundle was delivered. Indeed, since it contains statements dated 28 March 2012, 9 March 2012, 5 June 2012, and 8 February 2012 before a statement dated 22nd June 2011, the letter at the front of what purports to be in the bundle delivered in 2011 is obviously wrong.

30. Ms Fosuhene said that the contents of the bundle, to be found in divider 9 of the file she submitted must have been wrongly put together. But that does not help since the only index we have behind the letter from Carol Thomas is vague, itemises a number of items before referring to "3 written statements all notarized". There is only one notarized statement, the statement from Ximena Posada. She speaks of the incident when she and the appellant were approached on the beach by the complainant, about which evidence was given at trial.

31. There was no proper evidential basis for asserting that the contents of the bundle were delivered. Properly sworn evidence of delivery was fundamental, as a precursor to making these allegations. In its absence the allegations should never have been made.

32. Even if these statements were proved to have been delivered to counsel prior to the trial, there is no basis whatever for saying that he should have adduced any of the evidence or that it could have made the slightest difference. We have already referred to the witness Posada, whose evidence that she and the appellant were approached on the beach by a jealous complainant was not in dispute. The other evidence in the main spoke of happy relationships with this defendant or witnesses who saw no arguments let alone violence between the defendant and the complainant. Since it was accepted that there were occasions when the relationship persisted without violence, after September 2006, this added nothing. Even if he had been shown these statements, counsel would have acted properly in declining to call them.

33. We should add, in particular, a matter which causes us concern. One of the statements in the bundle allegedly delivered on which it is said counsel incompetently failed to act is a statement from Mario Ebanks, concerning the complainant's work on the island. Counsel now says, in his affidavit, that his client quite specifically agreed that he should not be called, for fear he would give adverse evidence and signed a note to that effect. This allegation of incompetence should never have been made and adds to our doubts as to the underlying reliability of this ground of appeal.

34. Ms Fosuhene then contends that counsel should have obtained telephone records from the local telephone company to show that the appellant's undisputed text messages were in response to those which were equally abusive from the complainant. Mr Tonner made considerable headway in establishing that the complainant had been sending texts which she had failed to disclose to the police and which were not retained on her telephone. He made a conscious decision, he believes with the appellant, not to apply for the records lest they do more harm than good.

35. This was a decision within the range of reasonable judgment for defence counsel to take. Requests for further evidence might well have done more harm and undermined the points already available to the defence without the records, namely that the complainant must have had good reason for not being forthcoming as to her own texts to the appellant. The mere fact that a different judgment could have been made by counsel is miles away from establishing incompetence.

36. It is then alleged that in cross-examination Mr Tonner misrepresented his instructions by suggesting that sexual intercourse was consensual when the appellant's case was to deny that on the occasions of alleged rape sexual intercourse had taken place. It is clear that Mr Tonner did suggest that consensual sexual intercourse took place but only in relation to an allegation of threatening violence on 13 May 2008. This was entirely in accord with his signed instructions from which Mr Tonner quoted in his affidavit.

37. We dismiss this ground of appeal for these reasons. Other particulars of incompetence had been advanced earlier and answered either by letter or

affidavit. They were not pursued orally and they do not merit repetition. We can do no better than quote Mr Tonner himself from his affidavit :

" Having been a litigation attorney for approximately 14 years, it does not surprise me that a convicted man should make a false allegation against former counsel. It is, however, disappointing that the appellant's counsel should settle grounds of appeal which are patently without merit".

We agree and dismiss this appeal. Counsel rightly did not pursue the appeal against sentence.

Martin JA

Field JA

Moses JA