IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

C.I. CRIMINAL APPEAL NO. 31/85

1986

BEFORE: THE HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE HENRY, J.A.

REGINA

V.

PATRICK ALECIA WEBSTER

Mr. Steve McField for the Appellant

Mr. Sharman for the Crown

July 31, 1986 and 1ST DECEMBER, 1986

ZACCA, P.:

On July 31, 1986, we allowed the appeal, quashed the conviction and set aside the sentence. However, in the interest of justice we ordered a new trial. We promised to put our reasons into writing and this we now do.

The appellant was convicted for the offence of rape on September 26, 1985, and sentenced to a term of imprisonment of 4½ years. The jury after retiring twice returned a unaminous verdict of guilty.

The facts briefly as presented by the Crown were that on May 19, 1985, Merline May Boothe after attending church was standing on Crewe Road at about 1:30 p.m. She was waiting for a ride home, and a truck driven by the appellant came by.

She flagged down the truck and the appellant gave her a ride. There was a conversation between the appellant and the lady who was a Jamaican.

The appellant turned off on a road leading to the sea and parked the truck. The appellant began to fondle the lady and subsequently took off her panty hose and then her panties. She attempted to open the door of the truck but the appellant pushed down the lock on the door. She said she began to cry and she was scared. The appellant subsequently had sexual intercourse with her in the front of the truck. This was done without her consent.

After the act of sexual intercourse she put on her panties but not her panty hose. She requested that he take her home but he refused. However, he dropped her off on the main road at Portuguese Point. She said she observed the licence number of the truck and whilst walking home she met a man who was tending to a garden. She spoke to him. She told him what had happened to her. She borrowed a pen from him and wrote down the licence number, Someone in the house asked her whether she wished to call the police. She replied, "Yes". However, she did not wait until the police arrived but left for her home with her cousin who was passing by. She told them that the police could get in touch with her at her employer's home.

She handed over the clothes she was wearing to the police. This included the panties. The panty hose was not torn but the panties "had thread reel out from waist".

Evidence was given by Neville George Richards that he saw Miss Boothe passing by and he spoke with her. She started to cry and told him that she was coming from church and she hitched a ride with a man and the man turned off the road and said, "Stop you noise or I'll shoot you."

Woman Police Constable McLaughlin stated that she took a panty from Miss Boothe. It was the same panty identified by Miss Boothe as the one she was wearing at the time of the alleged

rape. The Police Constable stated in cross-examination that she did not write down anything unusual about the panties. The inference being that there was nothing wrong with the panties. The clothes, including the panties Miss Boothe was wearing, were sent to Mr. Daniel C. Nippes, Chief Criminalist, Regional Crime Laboratory, Florida, for examination. The evidence of Mr. Nippes disclosed that none of the clothes from Miss Boothe contained any unusual cuts, tears or stretching.

The evidence from the Crown also disclosed that an interview was conducted with the appellant at the police station during investigations into the alleged rape of Miss Boothe. At that interview the appellant denied driving the truck on Crewe Road on the afternoon of the alleged rape. He also denied taking up a lady in the truck or forcing her to have sexual intercourse with him. The appellant also stated that the first time he was seeing Miss Boothe was at the Identification Parade.

The appellant gave evidence at his trial. He admitted having sexual intercourse with Miss Boothe but stated that it was with her consent. He also stated that at the interview with the police he had said that he did not drive the truck because he did not have a driver's licence and did not want his employer to know that he had driven the truck. With respect to the denial of taking up Miss Boothe, he said that his reason for denying was that he did not wish his wife to know that he had had sexual intercourse with Miss Boothe.

Counsel for the appellant argued three main grounds of appeal.

(1) that the evidence was such that the verdict was unsafe and unreasonable and could not be supported by the evidence.

The main thrust of the submission was that the evidence did not suggest a lack of consent on the part of Miss Boothe. In view of the order for a new trial we do not propose to say anything about the facts of the case except to say that the facts were an issue for the jury.

(2) The trial judge erred in law when he directed the jury to treat the complainant's panties as corroboration.

In R. v. Eric James [1970] 16 W.I.R. 272, the learned trial judge had directed the jury that medical evidence and what was found on the appellant's clothes could amount to corroboration that sexual intercourse had taken place.

Viscount Dilhorne at page 275 stated:

> "True it is that the medical evidence and the evidence of what was found on Miss Hall's clothing and on the articles taken from her bed confirmed her testimony that intercourse had taken place on her bed but there was no medical evidence that the intercourse had taken place without her consent; and the judge directed the jury that if they accepted that evidence it could amount to corroboration in the sense in which he had already explained to them that the word was to be understood.
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> In their Lordships' view this direction was entirely wrong. Independent evidence that intercourse had taken place is not evidence confirming in some material particular either that the crime of rape had been committed or, if it had been, that it had been committed by the accused. It does not show that the intercourse took place without consent or that the accused was a party to it.
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> There was in this case no evidence capable of amounting to corroboration of Miss Hall's evidence that she had been raped, and raped by the accused. The judge should have told the jury that. His failure to do so was a serious misdirection, so serious as to make it inevitable that the conviction should be quashed."

Counsel for the appellant submitted that the learned trial judge misdirected the jury as to the facts relating to the panties and also as to whether the unravelling of the panties could be treated as corroboration.

In her evidence Miss Boothe stated that the panties had "thread reel out from waist". She later said that she had told the court that those panties were stretched and that it was at the hospital that she noticed this. There was no evidence that when the appellant took off her panty hose and panties that it was done with any force. Indeed there was no evidence that the panty hose, a delicate piece of clothing, was torn or damaged in any way. There was also no evidence from Miss Boothe that the unravelling of the panties took place when the appellant took off her panties. She had stated that after the incident she had left the truck and put on her panties. She apparently did not at that time notice any damage to the panties.

In his directions to the jury in the evidence relating to the panties the learned trial judge stated at page 38 of his summing-up:

> "Now I want to come to the question of the pants, the beige pants. What I want to say to you is this that if you do accept, it's a matter for you, but if you do accept that the pants which have been produced in evidence in this Court, which are here among the exhibits, were the pants which the complainant was wearing at the scene by the truck, on the truck, on this occasion, then I have to tell you that as a matter of law - I'm sorry, and if you also accept that they were torn on that occasion, that that's when that unravelling or tearing as you can see on the pants occurred - if you accept both of those things as being so, proven to your satisfaction, then I have got to tell you that can be corroboration of a lack of consent because that is an independent physical piece of evidence, If you accept those things, indicating the use of force. But I also have to tell you it's for you to decide whether you think it is corroboration, and, in deciding whether you think it is corroboration, in the first place you must be quite satisfied that they were the pants she was wearing, and that the unravelling occurred in the way she said it occurred at the site."

Again at page 40 the learned trial judge said:

> "Now bearing in mind what Woman Police Constable McLaughlin didn't do, bearing in mind what Dr. Nippes report said, are you quite satisfied, satisfied beyond reasonable doubt, that in fact the pants that were produced in this court were the ones which the complainant was wearing; and even if you are, are you satisfied beyond all reasonable doubt that what now appears to be an unravelling in those pants occurred at the scene of this alleged incident? Or do you think it's reasonably possible that it occurred, it occurred some time after I think it is the 6th of June, 5th of June, when Dr. Nippes examined the clothes? And how do you account for the fact that the Crown's forensic expert and a trained woman police constable have made, have not been able to come to court and say, 'This tear was there and it's significant'. So that's a matter I think you must consider in deciding whether you are prepared to treat those pants as being corroboration. And I do. Now this suggest to you that it's a point that deserves careful consideration."

No where in her evidence did Miss Boothe say that the unravelling occurred at the site. In our view, the learned trial judge misdirected the jury as to this important aspect of the evidence. The evidence of Woman Police Constable McLaughlin and Dr. Nippes, would tend to suggest that the unravelling did not take place at the scene of the incident.

In these circumstances we think that it was wrong for the learned trial judge to leave to the jury this evidence as evidence corroborating the complainant evidence as to lack of consent.

There was therefore in this case no evidence capable of amounting to corroboration of Miss Boothe's evidence that she had been raped. The judge should have told the jury that. His failure to do so was a serious misdirection which would lead to a quashing of the conviction.

The third ground of appeal argued was to the following effect:

> "The learned trial judge erred in law when he directed the jury that they could accept the appellant's lies as corroborating the complainant's case."

In his directions to the jury the learned trial judge told them that the defendant had lied to the police as to having used Mr. Hurlestone's truck on the road and of having sexual intercourse with Miss Boothe. Since he had admitted at the trial to having used the truck and of having sexual intercourse with Miss Boothe these were deliberate lies and so the lies were capable of corroborating her evidence.

In the interview with the police the appellant had denied using the truck, and denied picking up Miss Boothe and said that he was seeing her for the first time at the identification parade. He was asked whether he had forced Miss Boothe to have sexual intercourse with him and this he denied.

Whilst not specifically saying that he did not have sexual intercourse, (what he said was that he did not force her), from the fact that he denied picking her up and that he was seeing her for the first time at the identification parade it was open to the jury to infer that he was denying having sexual intercourse with her.

The learned trial judge also directed the jury as to the appellant's explanation as to why he had lied at the police station. He told the jury that the appellant said that he wanted a lawyer before he could make a truthful statement. He said he was denied a lawyer.

However, the learned trial judge failed to tell the jury that the appellant's explanation for lying also included the fact that he did not have a driver's licence and that he did not wish his wife to know that he had sexual intercourse with Miss Boothe. These explanations were plausible and the jury may very well have accepted them.

We are of the view that the learned trial judge should have further directed the jury that if they accepted those explanations and believed that was the reason he lied, then this would not be evidence of corroboration.

It is for these reasons that we allowed the appeal and made the order as stated above.