IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 14/15
(Ind. 37/14)
C#2102//2014

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

LINCOLN JOSEPH SILBURN

Appellant

Before:

Hon John Martin QC, Justice of Appeal
Hon Dennis Morrison, Justice of Appeal
Hon Sir Richard Field, Justice of Appeal

Appearances: Mr Crister Brady of Brady Law for the Appellant.
Ms Candia James for the Crown.

Heard and oral judgment delivered: 11 April 2016
Transcript of ruling released: 2 May 2016

Field JA:

JUDGMENT

1. This is the judgment of the court in the appeal against conviction brought by Lincoln Joseph Silburn.

2. On 25 May 2015 after a trial in the Grand Court before Justice Mettyear and a jury, the appellant was convicted by a majority verdict 5 to 2 of one count of rape and on 9 June 2015 he was sentenced to 10 years' imprisonment.

3. The complainant was a lady who resided in the US who arrived in Grand Cayman on holiday with her 18 year son, I, and a male companion, D, on 30 April 2013.

4. It was not in dispute that the appellant had had sexual intercourse with the complainant on 15 May 2013. Semen found in her vagina when she was medically examined on 16 May 2013 was proved by DNA analysis to have come from the appellant.

5. The complainant and D gave evidence by video link from Minnesota. In relevant part, the appellant's evidence was as follows.

6. During the first few days' of her vacation the complainant stayed at Paradise Resort in Rum Point, but later she and the rest of her party moved to the Marriott Hotel on 7 Mile beach.

7. She and her companion met the appellant on the beach along from the Marriott on 14 May 2015. They had not met the appellant before. The appellant was fishing and they had a friendly, albeit brief, conversation with him.

8. The following day between 10.00am and 12 noon the complainant and the other two members of her party saw the appellant walking along the beach. They were sitting facing the beach at the rear of the Marriott on the left. The appellant came over to join them at D's invitation. He pressed the complainant to buy a necklace but she declined; she did not want to go to the cash machine. The appellant was put out but placated by being given cigarettes and some alcohol. The appellant then went snorkeling with the complainant to show her things she might otherwise miss. She was wearing a one piece bathing suit. She then ordered some food and went snorkeling again on her own and on her return she found that two friends of the appellant had joined the party. She had a drink from her canister; it tasted peculiar. She asked who had done this and the appellant said he had put something special in it for her. The group stayed together throughout the afternoon, sitting and socializing with the complainant smoking. Smoking was only allowed outside the front entrance of the hotel and to the far left at the rear on the beach. Eventually, I went up to the room because he was feeling poorly and D fell asleep. At about 5 pm or 6 pm, the complainant went back into the water. She got to a float tethered not very far from the shore. She could still touch the bottom on the tips of her toes. She then realized that the appellant was behind her. He said, "give me your hole". She was holding on to the float. The appellant put his hand inside her swim suit and started messing around whilst she was trying to get on to the float, which was difficult because she was a heavy woman (220 lbs) and she had a shoulder injury.

9. The appellant used his hand or his penis to penetrate her vagina and her anus. The next thing she knew she was on the float looking at the stars. The appellant was inside her having sex with her without her consent. She managed to turn away from him. The appellant got into the water. She did not see him again. She waved towards D and then got off the float. When she got back to D he was asleep. They went up to her room where Imanol was. He was not feeling at all well. This being the last night of the holiday, she had been going to take him to a special dinner but she took D instead. She did not tell D or anybody else what had happened. She tried to tell D what had happened over dinner but could not bring herself to do it. She did not feel well; she felt like a zombie. She went to lie down

outside the restaurant and then returned to her room where she was really sick. D also was not feeling well.

10. On the flight home the next day, she told one of the flight attendants she had been raped. Shortly after landing at Miami she was taken by police officers to Jackson Memorial hospital where she was examined by a doctor and various vaginal swabs were taken.

11. On 21 May 2013, the appellant made a report by telephone to Detective Bradshaw of the Cayman Islands police. In his note of the report, Detective Bradshaw stated that the complainant said she had been raped by an "unknown" man. She also said that had it not been for the hotel policy of no smoking inside the building of the hotel, she would not have been raped. She did not give a description of the complainant or refer to the photograph she took of him in the morning of 15 May 2013.

12. In cross-examination she said she could not remember giving this account to the officer.

13. The complainant was also interviewed on 13 November 2013 by two Cayman Island police officers in the US. In that statement, amongst the other matters therein related, she stated that while she and D were walking back from a bar to the Marriott, D was pushed from the kerb by three men, and a lady who witnessed the incident gave them a lift back to the hotel. She accepted that she did not report this incident to the police and nor did she ask the hotel to report it to the police. She also said that when on the float with the appellant she told him: "D can see us". In her evidence at the trial she stated that she said this to get the appellant to stop what he was doing.

14. The appellant was interviewed by the police on 25 October 2013 after having been given the standard caution that he did not have to say anything but if he later relied on matters in court not mentioned in the interview this might be held against him. To begin with the appellant said that the only woman tourist he had had sex with in the past was a Canadian woman. He was then told of the DNA evidence in response to which he said that he didn't have any specific memory of any other sex, but if there had been, it would have been with consent.

15. None of the account that the appellant gave in evidence of what happened on 15 May 2013 was mentioned by him in interview. He testified that in the morning of that day he sat drinking with the complainant and D. He saw no-one put anything into the complainant's canister. At about 6.30 pm, the complainant suggested that he go for a walk with her. They walked a little way and then went into the water and swam out to the float. The complainant climbed on board and he followed. She lay down on her front and pulled the bottom of her swimsuit to one side exposing her bottom. Without objection from the complainant he put his penis in her vagina as she lay there for 15 minutes. She wanted to have sex. When

they got back to the beach they made a plan to meet at midnight on the beach side of the hotel. However, he did not turn up for this meeting. He was exhausted. He also said that he frequently had sex with tourists.

16. In the course of talking to the complainant, she said that she wanted to get back at D although she did not say what for.

17. A receptionist on duty at the hotel on the morning of 16 May 2013, Ms Ferreras, testified that that morning the complainant pushed another guest out of the way and said she just wanted her to know that the hotel's smoking policy could lead to women being raped.

18. The evidence of Mr Garcia who was on guest services overnight on 15 May 2013 was agreed. He stated that the complainant rang down just after midnight to request room service and after she was told that only snacks were available she went on to say her son was about to die.

19. Further agreed evidence was given by Mr Courtney Lindsay, another hotel employee. He stated that on 15 May 2015 he was cleaning up the beach area in the late afternoon when he saw the appellant talking to the complainant on the beach. Later he noticed them swimming together and after a while they were facing each other and talking. They were quite close together, about an arm's length apart talking together but not touching.

The Grounds of Appeal.

Ground 1

20. The first ground of appeal is:

The learned judge failed to instruct the jury on the evidential value to be attached by them to any previous inconsistent statements, deliberate omissions and possible lies they found to have been told by the complainant.

21. In advancing this ground on behalf of the appellant, Mr Crister Brady concentrated on the statement the complainant made to Detective Bradshaw on 21 May 2015. In his report of what the complaint said, Detective Bradshaw wrote that she said that she had been raped by an unknown man about whom she gave no description; she also said that had it not been for the hotel policy of no smoking inside the building of the hotel, she would not have been raped.

22. Mr Brady also reminded us in his written submissions that the complainant told the reception desk during the morning of 16 May 2013 that the hotel's smoking policy could lead to women being raped.

23. Mr Brady went on to complain that the judge gave no guidance as to what the jury could infer if they did not accept or believe that the complainant could not remember telling Detective Bradshaw that she had been raped by an unknown man whose description she could not provide; nor were they guided on what to conclude if they believed she had lied to the police in this initial report, or if she had lied in court about anything in particular during her evidence. This was to be contrasted, argued Mr Brady, with the judge's detailed instructions on how the jury ought to approach any lies they found had been told by the appellant. These failures of the judge, submitted Mr Brady, rendered the appellant's conviction unsafe.

24. In our judgment, this ground of appeal is not made out. With respect to Mr Brady, we found his submission that the judge should have given a direction about any lies that the complainant may have told along the lines of the Lucas direction given in respect of the appellant's evidence a surprising one. A Lucas direction is given to protect a defendant from a jury giving inappropriate weight to lies that may be told for innocent reasons such as a desire to protect a third party. Such a direction in respect of evidence given by the complainant would in our view have been wholly inappropriate. For our part, we are entirely satisfied that the jury would have clearly understood the significance for her credibility of any inconsistencies between the evidence of the complainant given in court and what she had said in previous statements. And they would equally have appreciated that their principal task was to decide whether they found the complainant's evidence as to what occurred when she swam to the float at about 6.00 pm on the day in question to be credible and reliable. They were told by the judge that it was for them to decide who to believe and who not to believe, who is accurate and who is inaccurate. Further, much was made of inconsistencies between her testimony in court and what she had said in previous statements in Mr Brady's closing speech which they heard the same day they retired to consider their verdict. In addition, the judge reminded them that the complainant had testified she could not remember telling Detective Bradshaw that she had been raped when she went out to have a cigarette and that she complained to the hotel staff when checking out about their smoking policy. The jury would also would have had well in mind that when reporting to Detective Bradshaw she provided no description of the man who raped her and made no reference to the photograph she had taken of the appellant some hours before she swam to the to float at about 6.00 pm on 15 May 2013.

Ground 2.

25. The second ground of appeal is:

The directions to the jury on the law defining rape and the two limbs that would have been relevant for their consideration were inadequate, incomplete or confusing.

26. What the judge said in relevant part is as follows.

> *The charge is rape, let me tell you what rape means. There are some wider definitions on what I'm going to give you but I'm just going to give you the one that's relevant to this case. It's penetration of the vagina by a penis. So the critical point is on the float … because both of them say that there was penile penetration but it's not the only factor, it's penetration in circumstances where these are the two things that you need to be concerned with: One, the woman doesn't consent; two, the man has no reasonable belief that she was consenting.*
>
> *Consent agrees (sic) when a woman agrees by consent and has the freedom and capacity to consent, so that's what's important here, freedom of capacity, particularly capacity that matters here. It is relevant because it is the Crown's case … that the defendant spiked the complainant's drink, said at the same time she was unaware of what was happening.*
>
> *If you believe that, if you come to the conclusion that her drink was spiked in that way by the defendant, then you might readily conclude that she didn't have capacity, the ability to consent.*
>
> *The defence of course rightly point out there is no direct evidence at all that the drink was spiked but in any event the defence case is that the complainant willingly climbed on the raft and arranged her swimming suit in a way that facilitated intercourse. If you are persuaded that that's what happened or may have happened, then that's likely to be strong evidence that she was consenting.*
>
> *So far as the second element is concerned, that is that the man had no reasonable belief he had consent, that's you looking into somebody's else's mind … You have to work out what was in his mind from all the evidence and that should include your consideration of any efforts made by the defendant to ascertain whether [the Complainant] was or wasn't consenting.*

27. Mr Brady argued that the judge could have provided more guidance once he had said:

> *Consent agrees when a woman agrees by consent and has the freedom and capacity to consent, so that's what's important here, freedom of capacity, particularly capacity that matters here.*

28. In Mr Brady's submission, it perhaps would have been helpful to point out that consent was not necessarily confined to verbal permission to have intercourse, but that lack of evidence of any drug, weapon or force being brought to bear on the complainant could also amount to an inference that the appellant was of the view that the complainant was giving consent. Further, there was no evidence of the complainant seeking to raise the alarm, even when she claimed she became aware of her situation.

29. Mr Brady also contended that it was not sufficient for the judge only to point out that:

> *The defence of course rightly point out there is no direct evidence at all that the drink was spiked but in any event the defence case is that the complainant willingly climbed on the raft and arranged her swimming suit in a way that facilitated intercourse. If you are persuaded that that's what happened, or may have happened, then that's likely to be strong evidence that she was consenting.*

30. Instead, submitted Mr Brady, the jury ought to have been directed that there was in fact no direct evidence of any drug having been ingested by the complainant and that they were not to speculate about it. So to instruct the jury would have been consistent with the judge's jury instruction that they should not speculate whether the complainant was planning a legal action against the Marriott Hotel as suggested by Mr Brady in his closing speech. Otherwise, the jury may have been left with the impression that it was only the prosecution that was entitled to a monopoly on the ability to speculate about matters which were neither facts nor evidence, but possibly inferences.

31. In our judgment, the appellant's conviction is not rendered unsafe by any of these complaints made about the judge's summing up under this ground of appeal, whether taken singly or cumulatively.

32. In our opinion, the judge's definition of "rape" was tailored to the issues in the case and despite the slight slip by misusing the word "agrees" at one point, it was not confusing or deficient, but on the contrary it was entirely adequate. It was the Crown's case that the appellant had spiked the complainant's drink based on the evidence of the complainant that: (i) when she tasted the drink poured from her canister it tasted peculiar and the appellant said he had put something special in it for her; (ii) when she stood up to go into the water to wash off the sand she felt wobbly; and (iii) she had no recollection of getting onto the float and when she woke up when the appellant was inside her the stars seemed to be moving and when she went down to dinner she felt like a zombie.

33. In these circumstances, we think that the judge was entitled to say what he did about freedom and capacity to consent. He followed those remarks by immediately reminding the jury of the defence's observation that there was no direct evidence that the complainant's drink was spiked.

34. Earlier, the judge had instructed the jury to concentrate on the evidence they had heard and not to "go off onto flights of speculation." He went further when he told the jury there was no evidence the complainant was planning to sue the hotel and they were not to speculate but to go on the facts. In our judgment, the judge was entitled to take this course, in particular because the suggestion the complainant was planning to sue the hotel was not put to the complainant herself and neither was any

member of the hotel staff who gave evidence asked if the hotel had received notice that the complainant had started or was planning to start an action against hotel.

35. We are also quite satisfied that, the judge having told the jury in general terms that they should "not go off onto flights of speculation" there was no appreciable risk that the jury would form the impression that they could speculate about aspects of the prosecution's case but not about the defence case.

Ground 3

36. Ground 3 is:

The learned judge usurped the role of the jury on issues that ought properly to have been left within their judgment by expressing his opinion and views in summing up in a manner that may have left the jury with the impression that their role may have been to all come to a verdict that they believed he was expecting.

37. This ground of appeal is aimed at two distinct passages in the summing up. The first of these passages is the conclusion at the end of the following extract:

This lady didn't complain of rape straight away to any sort of authority, be it hotel, or to the police. The natural instinct of people, everybody says they will, you would, complain straight away and no doubt that's true that most of you would, most of us would but international experience and international research means that that isn't necessarily the case. People do respond differently to things happening to them, including especially rape and sexual assault victims. Sometimes people take weeks, months or even years to find the strength and courage to complain. So, although it's a perfectly proper thing for Mr Brady to submit to you that it's an important feature that she didn't, don't give it overweight because there are those circumstances which can deter a person or persuade a person that immediate complaint isn't necessary.

38. Mr Brady submitted that the weight the jury chose to give to the fact the complainant did not report being raped right away ought to have been left entirely up to the jury based on all the evidence they heard from the different witnesses including the complainant. What the judge was doing was usurping the proper function of the jury and this may have caused them to give less weight than they would have done, but for this direction, to the failure to report the offence straight away.

39. Mr Brady further submitted that the judge ought to have instructed the jury on what inferences they could draw from the fact that the complainant was unable to describe her attacker within 5 days of the

incident and was not able to provide a name or description or recount her conversations with the appellant until some five months later.

40. We reject the submission that the appellant's conviction is unsafe for the reasons advanced by Mr Brady in support of this ground of appeal. In our judgment, the judge was entitled to take judicial notice of the well-known fact that complainants in sexual cases can respond differently to being assaulted. The judge did not instruct the jury not to disregard the circumstances in which the complainant at different times reported that she had been raped. Instead, he was advising the jury that a lack of an immediate complaint did not necessarily invalidate her allegations. And he went on in his summing up to remind the jury of her evidence of when and in what terms she informed third parties that she had been raped by the appellant, this being relevant evidence for them to consider when reaching their verdict.

41. Nor was it necessary for the judge to instruct the jury on what inferences they could draw from the fact that the complainant was unable to describe her attacker within 5 days of the incident and was not able to provide a name or description or recount her conversations with the appellant until some five months later. In our judgment, the potential relevance of these matters to the complainant's credibility would have been obvious to the jury, particularly after having heard Mr Brady's closing speech.

42. The second passage of the summing up complained about under this ground are these words used when the judge was reminding the jury that the complainant had had some mental health issues.

    We don't know what the diagnosis is, we don't know any details of it. It's not something that you should be troubled by, members of the jury, in my judgment. Lots of people have mental health issues at some time in their life, doesn't make them more likely to have sex with a stranger or to make things up. So again, be careful about stereotyping mental illness.

43. Mr Brady argued that the judge erred in making these observations because they meant that the jury were not left free to form an impression of the complainant's demeanour when giving evidence for fear of stereotyping mental illness. In Mr Brady's submission, there was a real chance the jury may have substituted the judge's views and perhaps sympathy on mental illness for their own and returned a verdict that did not reflect the view they would otherwise have taken of the complainant's demeanour and declarations while giving evidence. In short there was a risk that the judge dissuaded the jury from believing that she could have made things up or had sex with a stranger after admitting to having mental problems in 2012.

44. In our opinion, there is nothing in these submissions of Mr Brady. There was no evidence that the complainant suffered from a mental condition

that impacted on her sexual behavior or her capacity to tell the truth. It was therefore appropriate for the judge to instruct the jury to be careful about stereotyping mental illness. His remarks did not in our view have a tendency to inhibit the jury in taking into account the manner in which the complainant gave evidence, which included, at times a tendency to go off at tangents when answering straightforward questions. We reject therefore the contention that this second passage in the summing up renders the appellant's conviction unsafe.

Conclusion

45. For the reasons we have given, we dismiss this appeal. None of the submissions advanced on the appellant's behalf by Mr Brady persuade us that the jury's guilty verdict is unsafe.

Martin JA

Field JA

Morrison JA