

SPECIAL COURT OF APPEAL SITTING

**SAINT LUCIA
15TH DECEMBER 2010**

Date: 15th December 2010

Coram: Hon. Hugh Rawlins, Chief Justice
Hon. Ola Mae Edwards, Justice of Appeal
Hon. Davidson Baptiste, Justice of Appeal

JUDGMENTS

Case Name: Roger Naitram et al v The Queen
[Criminal Appeal Nos. 5, 6, & 8 of 2008]
(Antigua and Barbuda)

Appearances:

Appellant: Mr. Thaddeus Antoine holding papers for Mr. Jason Martin and Mr. Peyton Knight

Respondent: Mr. Horace Fraser holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issues: *Criminal Appeal–Unlawful Carnal Knowledge–Unlawful sexual intercourse–Appeal against conviction and sentence–Caution statement inadmissible–Breach of the Constitution of Antigua and Barbuda–Corroboration–Corroboration warning–Direction on corroboration–Sentence imposed excessive–Joinder of accused–Defence case not properly put to jury– Misstatement of evidence–Defence contained in caution statement–Sentencing guidelines in sexual offence cases*

Result and Reason: Held:–dismissing the appeal of Roger Naitram against conviction and sentence, dismissing the appeal of Lassell Punch against conviction but allowing his appeal against sentence to the extent that it be varied to time served, and allowing the appeal of Leary Matheson against conviction

thereby quashing his conviction and setting his sentence aside:

1. That the joinder of two or more accused in one indictment notwithstanding the absence of a joint charge against them is a matter of practice. Therefore, the Court of Appeal is entitled to dismiss an appeal against conviction advanced on the ground of joinder if there has been no miscarriage of justice especially where there has been a failure by the defence to object to the joint trial. The fact that the offences in the present case were related in time, nature and victim, with all witnesses being common in the case against each appellant, would gravitate towards the exercise of a discretion in favour of joinder.

R v Assim [1966] 2 Q.B. 249 applied; R v Ferguson & Anor [2010] NICA 9 cited.

2. That the judge gave adequate direction on corroboration by warning the jury on several occasions that it is dangerous to convict on the sole testimony of a virtual complainant and by emphasizing that the virtual complainant was a child. Furthermore, the judge reminded the jury that there was no corroboration in the case and went on to tell them that if they believed the virtual complainant's evidence, they could convict. As indicated in Gilbert the question on whether to give a corroboration warning is a matter of discretion for the trial judge and it will only be in clear and exceptional cases that an appellate court will feel justified in interfering with the exercise of this discretion. Having decided that it was an appropriate case to give a corroboration warning, the strength and terms of the warning were matters to be determined by the trial judge, who was in a position to assess the flow of evidence, the firmness of the testimony of the virtual complainant, the quality of the defence proffered as well as other aspects of the trial.

R v Rennie Gilbert [2002] UKPC 17 applied; Kyon Frederick v The Queen HCRAP 2006/008 distinguished.

3. In sexual offence cases, the question of fabrication and lies is the subject matter of the corroboration warning and in that regard, the learned judge was not off the mark when he stated that the underlying reason for the corroboration warning “is that people tell lies for different reasons, children included”.

R v Rennie Gilbert [2002] UKPC 17 applied.

4. That there was no error in principle on the part of the learned trial judge in imposing an eight year sentence on the first appellant and neither was this sentence manifestly excessive. As a result there are no proper grounds for departing from the sentencing guidelines laid down by this Court. The Court will not interfere with the discretion of the sentencing court on the ground that it might have passed a different sentence. While the court is mindful of the general undesirability of imprisoning young offenders, sometimes even in the case of young offenders because of the serious nature of the offence a term of imprisonment will normally be the appropriate disposal.

Attorney General’s Reference No. 29 of 2008 [2008] EWCA Crim. 2026 cited; R v Newsome, R v Browne [1970] 2 Q.B. 711 cited.

5. That the exclusion of the second appellant’s caution statement does not necessarily lead to the quashing of his conviction. In the absence of the caution statement the sole evidence against the appellant would have come from the virtual complainant and the learned judge gave the jury adequate directions on how to treat her evidence. It was a matter for the jury whether or not to believe her evidence. The court has to weigh the public interest as well as that of the individual who has been exposed to an illegal invasion of his right in securing relevant evidence bearing on serious crimes so that justice can be done.

Mohammed (Allie) v Trinidad and Tobago [1999] 2 A.C. 111 cited.

6. That the major inconsistencies in the virtual

complainant's evidence referred to by counsel for the second appellant did not go to the heart of the matter. On the critical issue of sexual intercourse, the virtual complainant's evidence was unshaken. As judges of fact, the members of the jury were entitled to accept that evidence and act upon it, which they did by their finding of guilt. Reference to lurking doubt is just one way in which an appeal court addresses the fundamental question of whether or not the conviction is safe.

7. That the learned judge erred in not giving any or sufficient weight to the facts that the second appellant was only fifteen years old at the time of the offence and only a first time offender. This was an appropriate case to depart from the starting point of eight years identified in the guidelines. Having taken the guidelines into account the sentencing judge is enjoined to look at the circumstances of the individual case, particularly the aggravating and mitigating factors that may be present and impose the sentence which is appropriate. Therefore a sentencing judge can depart from the guidelines if adherence would result in an unjust sentence. Where the particular circumstances of a case may dictate deviating from the guidelines, it would be instructive for the sentencing judge to furnish reasons for so departing.

Millberry v R [2002] EWCA Crim. 2091 applied.

8. That the learned judge failed in his duty to put the third appellant's defence which was contained in his caution statement, properly to the jury. This failure was made worse by a critical misstatement of the evidence. The judge's responsibility to summarise the main points made by a defendant in his caution statement is not diminished or made redundant by the fact that the jury would have the caution statement with them upon their retirement. The effect of this failure of the trial judge to put the appellant's defence fairly and properly to the jury renders his conviction unsafe.

R v Curley and Cadwell [2004] EWCA Crim 2395 applied.

Case Name: Carlton and Careem Bedminister v The Queen
[Criminal Appeal Nos. 2 & 3 of 2008]
(Antigua and Barbuda)

Appearances:

Appellant: Mr. Thaddeus Antoine holding papers for Mr. Hugh Marshall Jr.

Respondent: Mr. Horace Fraser holding papers for Mr. Anthony Armstrong, Director of Public Prosecutions

Issues: *Criminal Law-Attempted Murder-appeal against conviction-whether unsafe-whether the judge erred in law when directing the jury on the meaning of attempted murder-Joint enterprise-whether the judge erred in law when directing the jury on joint enterprise-Identification evidence-whether the judge should have withdrawn the case from the jury as the identification evidence was poor-recognition cases-whether the judge misdirected the jury in his summation on identification evidence-whether fatal to conviction-whether the judge misstated the facts and misdirected the jury on the facts-what is the effect of inconsistencies on the reliability of evidence of the virtual complainant-Alibi defence-whether the judge gave no directions to the jury on the unsworn statement which contained the defence of alibi of the appellant-what is the requisite intent for attempted murder-whether a special warning on intent was needed-*

Result and Reason:

Held: allowing the appeal and quashing the conviction of both appellants and setting aside their sentence and ordering that both appellants be retried.

1. That the learned judge adequately summed up to the jury the evidence from which a joint enterprise could be inferred; the fact that it could be formed on the spur of a moment; nothing needed to be said and it may be inferred from the behaviour of the parties. He made it very clear that mere presence at the scene of a crime was insufficient to prove guilt. But if the jury found that the appellants were at the scene of the crime and did by their presence encourage the other in the offence, they both would be guilty. On the evidence presented by the prosecution, the jury could conclude that the two appellants were not merely present but by their actions encouraged each other in the commission of the crime. The appellants were the only occupants in the car which drove at and struck the virtual complainant and when the car stopped, they both emerged from it armed and chased the virtual complainant. The second appellant flung a chop towards the head of the complainant.
2. Having regard to the principle that a summation has to be looked at as a whole the learned judge gave a proper direction on the issue of presence at the scene of the crime in the context of joint enterprise liability and having done so turned to define attempt. Given the facts and circumstances of this case and the issues involved and having regard to the judge's direction on the aspect of presence at the scene of the crime in joint enterprise liability, there is no confusion or error of law in the directions given by the learned judge.
3. That this was clearly a recognition case as the appellants and the virtual complainant were no strangers to one another. The fact that only one witness had identified the appellants as being present does not make the quality of the identification evidence poor; it was not based on a fleeting glance encounter. The quality of the evidence presented was such that the jury could safely be left to assess its value even though there was no supporting evidence of identification.

R v Turnbull (1976) 63 Cr. App. R 132, R v Breslin 80

Cr. App. R 226 and R v Levy [2006] EWCA Crim. 3063 cited.

- 4. That the learned trial judge brought to the jury's attention the fundamental requirement of the special need for caution before convicting on the identification evidence, he instructed the jury as to the reason for such a need and instructed the jury that an apparently convincing witness can be mistaken.**
- 5. That it was incumbent upon the learned judge to tailor his summing-up so that the jury could clearly appreciate and weigh the strengths and weaknesses of the identification evidence in reaching their verdict. In this case it became even greater as the virtual complainant was the only person to recognize or identify the appellants. The cumulative effect of the inconsistencies in the evidence and the inadequate assistance given by the learned judge to the jury in relation to the identification would render the conviction unsafe.**

Langford & Anor v The State (Dominica) 2009 UKPC 20 and Fuller v The State (1995) 52 WIR 42 at 433 applied.

- 6. That there was no infringement of the hearsay rule neither did the appellant suffer any prejudice when the learned judge directed that the virtual complainant said that "he had seen these persons from time to time around. In fact he had some friends who knew them"**
- 7. In giving a character direction to the jury the learned judge tied in the unsworn statement which raised the defence of alibi and essentially told the jury that they should consider what weight should be given to it bearing in mind the good character of the accused. Consequently the 1st appellant suffered no injustice by the judge not directing the jury that if they believe the unsworn statement or had doubts about it they should acquit. It would not have been possible for the jury to reject the alibi and either believe or have doubt about the unsworn statement.**

8. That nothing has been presented to persuade this court that this is one of the rare cases in which the simple direction on intent would be insufficient. It seems unlikely that the jury would have lost sight of the evidence that the car was driven at the virtual complainant and of both appellants emerging from the car armed after it came to a stop and chasing the virtual complainant. These circumstances do not fall into an exceptional category requiring a special direction on intent.

R v Nedrick 83 C.A.R. 267 at 270 applied.

Case Name: Roland Browne v The Police Service Commission
[Civil Appeal No. 23 of 2010]
(Saint Lucia)

Appearances:

Appellant: Mr. Horace Fraser

Respondent: Mrs. Grace Ward-Glasgow

Issues: *Civil appeal – Judicial review – Undue delay in applying for leave to file claim for judicial review – Unreasonable delay in applying for leave to file a claim for judicial review – Rule 56.5 Civil Procedure Rules 2000 – Substantial Hardship – Detriment to good administration – Section 31(6) of the English Supreme Court Act 1981 – Order 53 rule 4 of the Rules of the Supreme Court – Promptness in applying for leave to file a claim for judicial review – Time limit in applying for leave to file a claim for judicial review – Striking out claim for judicial review on ground of unreasonable delay – Refusing relief sought on claim for judicial review having merit*

Result and Reason: Held: granting the applicant the leave requested to appeal the decision made by the learned trial judge in her ruling of 6th August 2010, treating the hearing of the application as the hearing of the appeal, allowing the appeal and setting

aside the order of the judge striking out the claim, and remitting the matter to the court below for the judicial review claim to be case managed and determined on its merits, that:

1. With the presence of the words “or grant relief in any case” in CPR 56.5(1) that CPR 56.5(1) applies to applications for leave to apply for judicial review and also to the substantive judicial review claim for relief. The Court’s previously canvassed view at the hearing that the words “or grant relief in any case” would apply only to interim relief contemplated in CPR 56.4(8) and (9) cannot stand, in light of the existing similarity in the provisions in section 31(6) of the English Supreme Court Act 1981 and our CPR 56.5 as well as the existing case law on the interpretation of section 31(6).

R v Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell [1990] 2 A.C. 738 applied.

2. That at the hearing of the judicial review claim, apart from considering the merits of the claim (usually on the grounds of either illegality, irrationality, and or unfairness) the judge may revisit the issue of unreasonable delay where the claim has merit, in determining whether to grant the relief sought. Where the claim lacks merit there is no need to apply the considerations under CPR 56.5. Even if the court accepts that the defendant has acted unlawfully, there is no unqualified right to any of the remedies claimed. In exercising its discretion as to whether to grant any relief the court can take into account other factors including that there was unreasonable delay before making the application, whether the claimant acted promptly, or whether it would be detrimental to good administration or cause substantial hardship to the rights of any person, or substantially prejudice the rights of any person. Therefore, despite the success of the judicial review claim, the relief may be refused where the judge applies CPR 56.5 and makes a positive finding under that rule.
3. At the first hearing, which is for case management under the CPR, the learned judge went behind her order granting leave. By striking out the claim, she

was communicating that she was either wrong in granting leave to apply for judicial review, or that she had jurisdiction to review her earlier order granting leave, and effectively set it aside because of unreasonable delay by striking out the claim, which is not what CPR 56.5 envisaged. Striking out the claim for unreasonable delay in applying for judicial review is not the same thing as refusing the relief sought on a claim having merit on grounds of unreasonable delay or the reasons under CPR 56.5(2).

Leymon Strachan v The Gleaner Company Limited and Dudley Stokes (Privy Council Appeal No. 22 of 2004) applied.

Case Name: Michael Laudat et al v Danny Ambo
[Civil Appeal No. 6 of 2010]
(Dominica)

Appearances:

Appellant: Mr. Thaddeus Antoine holding papers for Mrs. Wynante Adrien-Roberts, Solicitor General and Ms. Sherma Dalrymple for the Applicants/Defendants/Intended Appellants

Respondent: Mr. Dexter Theodore holding papers for Mrs. Dawn Yearwood-Stewart

Issues: *Civil Appeal - leave to appeal against order of a Master - assessment of damages after default judgment entered - assessment of damages after admission of liability on claim for unspecified sum - can a defendant against whom a default judgment has been granted appeal the order of the Master made at an assessment hearing - Civil Procedure Rules 2000 Rules 12.10, 12.13, 14.1, 14.8, 16.2, 16.3, 16.4, English Civil Procedure Rules Practice Direction 26.*

Result and Reason: Held: granting leave to appeal, treating the application for leave to appeal as the appeal, and allowing the appeal,

setting aside the order of the Master made on 23rd September 2010 and remitting the matter to the court below for damages to be assessed with no order as to costs:

1. At an assessment of damages hearing the court is not required to go behind the default judgment order and enquire into matters of liability because the defendant by failing to file an acknowledgment of service and/or defence is taken to admit liability as pleaded. The only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of general damages and any special damages claimed. Generally the claimant would not be entitled to damages pleaded in the cause of action if not proven by evidence.
2. A claimant's failure to prove damages under a pleaded head of claim in the evidence adduced is not a matter which a court of its own initiative should put right by an order which gives the claimant a further opportunity to prove such damages. Regardless of whether or not the defendant is permitted to be heard on the issue of quantum, the court should critically carry out the assessment on the scheduled date on the evidence adduced, with the overriding objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously, and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages on the claim.
3. A defendant against whom a default judgment has been entered would not be prevented from appealing an interlocutory order made at an assessment hearing despite the provisions of CPR 12.13.

Ex p. Davis (1872) L.R. 7 Ch. App 526 applied

HIGH COURT CIVIL APPEALS

Coram: Hon. Hugh Rawlins, Chief Justice
Hon. Ola Mae Edwards, Justice of Appeal
Hon. Davidson Baptiste, Justice of Appeal

Case Name: Bonifacia Noel v Gertrude Payne
[Civil Appeal No. 33 of 2007]

Appearances:
Appellant: Mr. Horace Fraser with him Isabella Shillingford
Respondent: Mrs. Wauneen Louis-Harris

Issues: Adverse possession – title of property - prescription

Result: IT IS ORDERED THAT:
1. The appeal is allowed
2. The decision of trial judge made on 10th July 2000 is set aside with no order as to costs

Reason: The question as to whether the appellant had prescriptive right was not an issue in the court below, therefore the trial judge erred in law to premise her decision on prescriptive title and that the appellant was a trespasser.

Coram: Hon. Ola Mae Edwards, Justice of Appeal
Hon. Janice George-Creque, Justice of Appeal
Hon. Davidson Baptiste, Justice of Appeal

Case Name: Robert Auguste et al Alexander George et al
[Civil Appeal No. 30 of 2005]

Appearances:
Appellant: Mr. Dexter Theodore
Respondent: Mrs. Lydia Faisal

Issues: Defence of prescription – trespass – where does the common boundary of two parcels of land fall physically

Result: The appeal is allowed and the order of the learned judge pronounced on 22nd June 2005 is set aside with no order as to costs.

Reason: Rule 64.6 (6) is applied, therefore no costs order as to costs made.

Case Name: Imbert Simon v Charles Anthony
[Civil Appeal No. 30 of 2010]

Appearances:
Appellant: Ms. Diana Thomas
Respondent: Mr. Gerard Williams

Issues: Whether the defendant's affidavit evidence should be considered having regards to the Rules for the purposes of assessment of damages – objection by counsel for the respondent

Result: IT IS ORDERED THAT:
1. The hearing is part heard to be completed upon the appellant filing and transmitting the transcript of proceedings of 17th February 2010 and 14th April 2010.
2. The completion of the hearing to be at the next sitting of the court in Saint Lucia in February 2011