IN THE COURT OF APPEAL

ST. VINCENT

High Court Criminal Appeal
No. 6 of 1972

Between: ERROL SMITH Appellant

and

THE QUEEN Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice Cecil Lewis
The Honourable Mr. Justice St. Bernard

G. Isaacs for appellant
A.T. Warner Q.C. (Attorney General), Miss M. Joseph with him, for respondent

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1972, May 17

JUDGMENT

The judgment of the Court was delivered by -

LEWIS, C.J.

The Court is indebted to Mr. Isaacs for the arguments which he has put forward in this case today, and, although some of his submissions have not met with favourable reception the Court nevertheless bears in mind that leave was granted to the appellant and that learned counsel quite readily accepted the Court's assignment to argue the case.

The appellant was convicted on the 18th February, 1972 of the offence of rape in respect of a young woman named Marie Mc Kie. It is not necessary to go into all the details of what was a rather unsavoury incident. The young woman said that she was going home carrying a bag with some bread in it and she felt a man, who turned out to be the appellant, hold her by the throat. He was wearing only a bathsuit and he pulled her into the bush, rather high lemon grass bush, threw her to the ground and had sexual intercourse with her twice against her consent. She was at the time having her period and the two panties which he, according to her evidence forcibly removed from

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her body and the pad which she was wearing were all saturated with blood which the laboratory technician said might be menstrual blood.

When she came out of the bush she was seen by a witness, Jacqueline James, to be crying, her dress was rumpled, there were bits of grass in her hair and Jacqueline James inquired of her why she was crying. She then made a report to Jacqueline James about the incident which had occured between herself and the appellant.

Subsequently, she made a report to a woman police who accompanied her back to the scene as well as another corporal of police, and one of the panties and the pad was found there.

Certain aspects of her conduct could be considered as somewhat unusual for a person who had been assaulted in the way that she says she was. For example, it was elicited from her in cross-examination that at one stage after she had dressed, there were people passing and that at the instance of the appellant she remained in the bush. It was also elicited from her that in the course of the scuffle or struggle - whatever took place - she lost her watch and that the appellant looked for it and found it and gave it to her. These aspects of her conduct - her delay in leaving the scene after the incident - were left to the jury on the question of consent, and the judge quite properly pointed out that one explanation might be that she was still under fear of the appellant, because she said that on more than one occasion when she attempted to scream out he threatened, to use her words, "to ram a stick down my throat".

At an identification parade which took place on the following day she identified the appellant as the person who had raped her.

The police went in search of the appellant after they received the report from this girl, and when he was told of

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the complaint his first reply was that he knew nothing at all about this incident. Subsequently, after he had been identified by the prosecutrix and his bathing trunk had been found at his house blood-stained, and after some prolonged questioning by the police, he gave a story. He said that he knew the girl before and that on the day in question he saw her pass near to the Post Office; he called out to her to wait and she promptly began to run away from him, but he followed her, met her talking to two girls by the Preparatory School and on her seeing him she ran off again, but she fell in the grass and he got on top of her and asked her to have sex with him. She refused, but he led her into the bush and there he began to disrobe her. He says that at that stage she herself took off her panties. The rest of his evidence amounts to a suggestion that she acquiesced, having at first refused she eventually acquiesced, in having sexual intercourse with him. At the trial he gave evidence to the same effect.

The learned Judge gave the jury a proper warning about the need for corroboration and he pointed out to them some matters which might be considered as corroboration. It is in respect of this direction that the first ground of appeal was taken. The Judge told the jury that the fact that when the girl came out of the bush she was seen to be crying was capable of amounting to corroboration. Learned counsel for the appellant has submitted that this was wrong, that the crying which took place was part and parcel of the complaint which was made to Jacqueline. The Court is unable to accept that submission because she was seen to be crying before she made that complaint; and, indeed, the evidence is that it is the fact that she was crying that caused Jacqueline to ask her why she was crying. Then, the Judge said that the evidence that the accused himself gave as to her running after he had called her is evidence which is capable of being corroboration. Here again, learned counsel first submitted that

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that evidence if taken with the rest of the appellant's evidence that she took off her panties and so on could not be capable of amounting to corroboration; but he quite frankly conceded that it was a matter for the jury to say how much of his evidence they accepted, and if they accepted that he did run after her and that, according to the statement that he gave, she fell down and he got on top of her, and rejected the rest of his evidence about her acquiescing, then this would be very strong corroboration indeed. When one adds to that fact the fact that her watch came off of her wrist, although the cold print does not indicate that there was any violent struggle between these parties, it is obvious that there must have been a struggle during the course of which this watch came off of the girl's wrist. The judge also told the jury that the evidence that there was grass in the girl's hair might be corroboration. Well, here the Court thinks the Judge was in error because obviously even if she had consented she might very well have grass in her hair having regard to the place where the incident occurred.

The sort of corroboration which was required here was corroboration of her statement that she did not consent, because the appellant having eventually put himself on the scene merely put in issue the question of consent. He said that he did have intercourse with her but that she consented; that was virtually his defence and the Court feels that these other matters to which we have referred were capable of amounting to corroboration on this issue.

There is also the fact that when the complaint was first put to him he denied that he knew anything about the matter. This denial was an admitted lie because he subsequently admitted to having had intercourse with her, and that lie, it is well known, may also amount to corroboration of the girl's story.

The other ground of appeal was that the verdict of the jury

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was unsafe and unsatisfactory. Learned counsel referred to the portion of the evidence - in fact, he read from the judge's summing up where the judge particularly drew the attention of the jury to those portions of the woman's story which he told them they might regard as unusual. But the jury had to look at at the whole of the evidence, her evidence that she was unwilling, his evidence which indicated that she was unwilling, the loss of the watch, the fact that when she came out she was crying, that she persisted in her reports which she made to various people including the police and to balance those facts against what might be considered as unusual aspects of her conduct. They must have come to the conclusion that they believed her story substantially, for they found the appellant guilty, and the Court sees no reason to interfere with that verdict.

For these reasons the appeal is dismissed.

Allen Lewis
CHIEF JUSTICE