IN THE COURT OF APPEAL

SAINT CHRISTOPHER

Criminal Appeal No. 1 of 1972

Between: HUGH SMITH Appellant

and

THE QUEEN Respondent

Before: The Honourable the Ag, Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

C. Dennis Byron for appellant
Lee. L. Moore, Attorney General, for respondent

1973, March 1

JUDGMENT

The judgment of the Court was delivered by -

ST. BERNARD, J.A.

The appellant was convicted of rape on the 4th October, 1972 and sentenced to five years imprisonment. Against that conviction and sentence he has appealed on four grounds. Before this Court, counsel for the appellant has abandoned grounds 2 and 3 and argued grounds one and four.

Ground one is as follows:

> "That the learned trial judge erred in admitting evidence of incidents that had no relevance to the offence charged in the indictment being subsequent to and at a different locality from the offence charged in the said indictment and that the said evidence was prejudicial."

The other ground of appeal argued was that the sentence was excessive.

I will deal shortly with the facts of the case. On the 9th of August, 1972 about 7.30 p.m. the appellant was driving his motor car on the island main road where he met one Morlene Daniel. According to her evidence he forced her into the car and drove away with her. He went to a place called Lodge Project where there was dancing. She went outside

/and .....

and the appellant followed saying,"since you crying come let me take you back up where I take you from." She went into the car and he took her to a lohely place called Ottley's Estate and there he raped her using a gun to force her to consent to sexual intercourse after several acts of indecency. He took her photograph while she was naked and forced her to commit several acts of indecency. Appellant took Morlene back to Lodge Project and as she was getting out he pulled her in and drove off with her and an unidentified man to another part of Ottley's Estate. Again at the point of a gun he forced her to have sexual intercourse with this unidentified man. After this incident she was taken back to the same club and later that night forced her into his car again, and took her to a place called Pond's Pasture. There he, the appellant held her down and forced her to have sexual intercourse with three other men whom he had taken also in the car. He said to them: "Brothers come and have your share of wife". Counsel for the appellant contended that there were three separate and distinct offences of rape on that night. The first offence was where he alone had sexual intercourse with her. The second offence was with the unindentified man and the third was where he invited the three men to have sexual intercourse and they did. The appellant was a party to all these offences.

Counsel submitted that the evidence of the two later offences was inadmissible as it related to other offences and such evidence was not required to prove the offence for which the appellant was charged. To put it another way: those two offences were not so intermingled or intermixed with the other offence so as to make it one transaction. The prejudicial effect of that evidence was very great and no one knows what effect that evidence had on the jury. He cited two cases in support of his contention: Harris v. Director of Public Prosecutions (1952) 1 All E.R. 1044 and The Queen v. Fitzpatrick

/(1962) .....

(1962) 3 All E.R. 840.

In reply to that submission the Attorney General submitted that he would readily admit that in normal circumstances evidence which tend to prove other offences than the offence charged was not admissible but such evidence became admissible if it was an intergral part of a single transaction. The Court agrees with the submission that if other offences are an integral part of another offence and forming one series of transaction the evidence is admissible. The question here, however, is whether in the circumstances of this case the two later offences which were committed were so mingled with the first offence as to form an integral part of it, and therefore a single transaction thus making evidence relating to those offences admissible. Counsel cited a dictum of Ellenborough, C.J. in the case of ~~Town~~ The Crown v. Whiley (1804) 2 Leach 938 at page 985 as follows:-

> "If several and distinct offences intermix and blend themselves with each other the details of the party's whole conduct must be pursued".

This Court agrees with that proposition in law, but on the facts of this case we hold that the offences were not so intermixed nor intermingled as to form an integral part of the first offence. There were three separate offences committed at different times and at different places. If however the indictment charged the accused with committing rape on the first count, and then on a second count he was charged with committing rape along with another man, then on the third count he was charged with committing rape with three other men, then in those circumstances although there are three separate offences the evidence of all the offences may be given to the jury but that was not the case here. The appellant was charged with one offence and evidence of three offences ~~were~~ was given. We think that the prejudicial effect, bearing in mind the type of evidence that was given, was so great that the conviction should not stand, and should be set aside .....

aside. We do not know what effect that prejudicial evidence had on the jury. Counsel for the respondent submitted that if the evidence was so overwhelming that any reasonable jury would have come to the conclusion that he was guilty the Court should uphold the conviction. With that submission we agree, but the evidence is not so in this case. There is no corroboration and in our view it is not a proper case in which the proviso should be applied.

The appeal is allowed, the conviction and sentence are set aside and a new trial order under sub-section 2 of section 22 of Federal Supreme Court Regulations, Cap. 1, which reads: "Subject to the special provisions of this Part of these Regulations the Court shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered or if the interest of justice so require, order a new trial".

New trial ordered. The appellant should be kept in custody pending the new trial.

E.L. St. Bernard
JUSTICE OF APPEAL