(16)

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 of 1985

BETWEEN:

ALFRED MICHAEL - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Mr. Jiustice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Williams (Acting)

Appearances: Cordell Sheppard and Gerard Farara for the Appellant
Jack Smith-Hughes,A.G.and Dawn Hewlett for the Respondent

1986: June 23,27.

JUDGMENT

WILLIAMS, J.A.Acting) delivered the Judgment of the Court

The appellant was charged on an indictment containing five counts, namely - rape, buggery, indecent assault,attempting to choke with intent to rape and assault occasioning actual bodily harm respectively. All the counts related to an incident which occured on the 19th March, 1985.

The appellant was convicted on 18th October, 1985 on count 1 for rape and count 5 of assault occasioning actual bodily harm,but was acquitted on the other counts. He was sentenced to five years imprisonment with hard labour on count 1 and two years imprisonment on the fifth count to run concurrently. He now appeals against his conviction.

The grounds argued by Counsel for the appellant were as follows:-

"6. That the learned trial Judge misdirected the jury when that she failed properly to direct them at page 70 on how to approach the evidence of the distressed condition of the complainant and also failed to direct them on the evidence of Doctor Smith, Smyama Patricia Molyneaux, Delcina Wheatley

/and.....

and Aldona Malona, in so far as the evidence of those witnesses related to the distressed condition of the complainant and how they should evaluate it. And the jury might have given substantial weight to this evidence and found that it had the tendency substantially to support the prosecutrix.

7. The learned trial Judge left the issue whether the complaint was made on the first opportunity which reasonably presented itself after the offence, to the jury, or alternatively, so canvassed the issue as to leave the jury with the impression that it was a question of fact for them to decide and thereby robbed the defence of a vital direction in law.

8. That the joinder of count 2 with the other counts in the indictment prejudiced the fair trial of the accused and was likely to arouse in the minds of the jury hostile feelings against the accused.

9. That the count charging rape ought not to have been joined with counts 3, 4 and 5 in the same indictment as such joinder prejudiced the fair trial of the accused and embarrassed the defence in that the multiplicity of charges created undue prejudice and made a fair trial impossible.

10. The direction by the learned trial Judge that consent was no defence to counts 4 and 5 amounted to a withdrawal of the accused defence on count 1.

11. That inadmissible evidence, viz: the terms of the complaint was left to the jury on counts 4 and 5 and there was no direction from the learned trial Judge that thisevidence was inadmissible on those two counts.

12. That there was no need for the jury to approach the evidence on counts 4 and 5 with the same degree of caution that would be necessary in considering the evidence on count one and in view of the learned trial Judge's directions that no corroboration was necessary on counts 4 and 5 and in the absence of a special direction, the jury might have used the less cautious approach in finding guilt on count one.

/13. The learned.....

13. The learned trial Judge did not direct the jury of the necessity of considering each count separately and the evidence of each count separately and it was therefore difficult for the jury to disentangle the directions which must have led to confusion.

14. There was a failure to direct the jury on how to approach the evidence of the prosecutrix in the event of an acquittal on the charge of rape or buggery and what effect such an acquittal would have on her credibility as it related to the remaining counts.

15. The verdict in all the circumstances constituted a miscarriage of justice or was unsafe or unsatisfactory."

Due to the manner in which the case was argued by Counsel there is no necessity to deal with the facts in detail. The Crown's case was that the appellant lured Pauline Malone upstairs the ZDVI building where he grabbed her around her neck choking her in a "sleep hold", rendering her unconscious, thereafter he took off all her clothes. When she regained consciousness he had sexual intercourse with her - oral, vaginal and anal, without her consent.

The accused admitted to oral and vaginal intercourse with her but said it was with her co-operation and consent and he denied anal intercourse.

The grounds of appeal are many some of which are of merit and others without merit. The Court does not propose to deal with all of them individually as some of them can usefully be dealt with together.

In ground 6 complaint is made with regard to the leanred trial Judge's summing up. In directing the jury on distressed condition the learned trial Judge had this to say:-

> "Now, I must also tell you something, because it came up in the evidence, about the distress of Pauline Malone. Now, it is said that the distress shown by a complainant must not be
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> /overemphasized.....

> overemphasized - in the sense that you should be warned about that - and that except in special circumstances, little weight ought to be given to that evidence. Now the law tells you why. They give a reason for that. You see it is said that sometimes women tend to exaggerate when certain things are done to them - even children. So, you will have to look at the whole evidence.
>
> You remember the evidence of the defence that you were told by the witness that she looked composed (they didn't use the word 'composed', but I put it that way) that she was the same thing, nothing wrong with her, but except as I told you, in special circumstances the evidence of the prosecution with regard to her distress, very little weight ought to be given. I am just directing you on this. On the whole, it is for you to say, on the facts, whether the accused committed that crime...."

Mr. Sheppard's submission is that this is a wrong direction in law and must have left the jury in some doubt and confusion as to what these special circumstances were to which the learned trial Judge alluded. That there was no attempt by the trial Judge to point to the type of circumstances that would lend weight to this type of evidence. The jury must have wondered whether there were special circumstances in this case. The direction should have been whether the distressed condition was real or simulated, and that the jury might have over-emphasized the distressed condition.

The view of this Court is tht the direction given was in keeping with the recognized direction given to juries as to how they should deal with evidence relating to distressed condition - see R v Tom Wilson (1973) 58 Cr. App. R. 304.

We disagree with Counsel for the appellant that there was any need in this case to give any further explanation on what amounted to special circumstances.

With regard to ground 7 concerning recent complaint very little need be said. It does not mean that the complaint is to be made to the first person seen by the prosecutrix after the offence has been

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committed, but the first opportunity which reasonably presented itself after the ofence. This can only be determined with respect to the facts and circumstances with regard to each case. This submission therefore fails.

Mr. Sheppard on ground 8 submitted that the accused would suffer prejudice by the joinder of count 2 with the other counts in the indictemnt and as such the verdict would be unsafe. We do not agree with Mr. Sheppard's submission. One must look at the reality of the situation. The jury acquitted the appellant on the charge of buggery and it would appear, that they came to that conclusion because they were not satisfied on the evidence adduced by the prosecution with respect to that charge. The evidence supportive of that charge was quite weak and it is difficult in those circumstances to say that there was any prejudice. Further we observe that there was no objection taken at the trial on such joinder.

Ground 9 is similar to ground 8. It was submitted that the indictment contained five counts arising out of the same incident. That there were no separate acts of indecency other than those that related to the rape of the prosecutrix. That the acts are intertwined and form part of that offence and it was wrong to indict for those acts separately which constitute and form part of the rape and this may well have led to the conclusion that the accused was a bad person. As a result prejudice would have been created in the minds of the jury.

Further that counts 4 and 5 or at least count 5 is a different offence from the other offences. The violence or the force is related to the choking; buggery is a diferent offence and asault occasioning actual bodily harm is a diferent offence.

In support of his argument Counsel cited R v Harris(1969) Cr. App R. 599, in this case the accused was charged with buggery on a boy age 1[illegible]

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and of indecent assault on the same boy arising out of the same incident. On the facts of this case Edmund Davies, L.J. had this to say:

> "It is perfectly clear on reading the transcript that the two charges related to one and the same incident. There is no suggestion of any indecent assault on this same boy except that which formed the preliminary to and was followed very shortly thereafter by the commission of the full act of buggery."

This case must be looked at in its context, buggery was the graver of of the two offences and the act of buggery in itself involved an act of indecency, it would not therefore have been right in those circumstances for there to be a conviction on both those offences.

In the case before this Court the accused was convicted of rape but acquitted of buggery and indecent assault. The case of Harris does not therefore asist us on this point. It should also be noted that no objection was taken at the trial to the joinder. In our view, the trial of the accused was in no way prejudiced and this ground also fails.

In the view of this Court grounds 10,11,12 and 14 are wholly without merit; save to add that when the learned trial Judge directed the jury on the count of rape it was made abundantly clear to the jury that the issue of consent was essential and cardinal to that charge, and her direction to the jury so far as it related to counts 4 and 5 that consent was not a relevant issue in respect to those charges could have caused no confusion in the minds of the jury in there consideration of consent to count 1.

We now turn our attention to ground 13. Mr. Sheppard submitted that there was no direction by the learned trial Judge to the jury to consider each count spearately and the evidence with respect to each count separately. That it is difficult to disentangle the direction which must have led to confusion of the jury when dealing with the evidence. That

/the evidence.....

the evidence was all lumped together and that the jury were not told what evidence they ought to use with respect to each count. In such a situation the jury might have looked at all the evidence and relate it to each count and that this was a serious misdirection bearing in mind that the offence of rape is always treated with the utmost caution.

The learned Attorney General conceded that the learned trial Judge did not give that specific direction but pointed out that she did deal with each count separately and the evidence with respect to each count separately.

In our view the matter must be looked at in its context. We agree that such a specific direction was not given and that it would have been more desirable to do so, but in actual fact although the jury were not told those specific words the format used by the learned trial Judge produced the same effect.

The learned trial Judge dealt with each count separately and the evidence with respect to each count separately she also pointed out to the jury the verdicts that were open to them. In our opinion in those circumstances the jury could not have been confused.

We are of the view that the evidence shows one continuous incident and the appellant having been convicted of the offence of rape we are not satisfied that the convictio on assault occasioining actual bodily harm should stand along with the conviction of rape. We consider this to be undesirable in these circumstances where the conviction for the lesser offence really merged into the conviction for the graver offence.

Consequently the conviction on count 5 is quashed and the conviction and sentence set aside. The appeal in respect of count 1 is dismissed and the conviction and sentence affirmed.

/In conclusion.....

In conclusion we would wish to say that where there are alternative counts in an indictment and there is a conviction for the graver charge the jury should be discharged from giving a verdict on the lesser charge.

L. WILLIAMS,
Justice of Appeal (Acting)

E.H.A. BISHOP,
Chief Justice (Acting)

G.C.R. MOE,
Justice ofAppeal.