C 9,9 (12)

SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 3 of 1987

BETWEEN:

SELWYN WILSON - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Mr. Sydney Bennett for the Appellant
Miss d'Auvergne - D.P.P. for the State

1988; Jan. 25,
May 9.

JUEGMENT

SIR LASCELLES ROBOTHAM Chief Justice

On 15th October 1987, the appellant, a member of the St. Lucia Constabulary Force, was convicted for rape and sentenced to imprisonment for a term of 7 years.

The complainant was a girl 16 years of age who on psychological examination by Dr. Raju, a consultant psychiatrist was found to be suffering from mild mental retardation, with an I.Q. about 55. The Doctor was quite sure that she was not an imbecile, that the average person would regard her as normal, and that it is possible for a mentally retarded person to express consent or dissent to sexual intercourse.

The defence of the appellant at the trial was a complete denial of the allegation.

The evidence of the complainant was that on a day in February 1987, she went to the house of the appellant whom she knew to be a Police Corporal. The appellant lived with the complainant's Aunt Nancy (Theresa Francis) the purpose of the visit was to deliver some sour oranges to Aunt Nancy. The Aunt however was not there on her arrival with the sour oranges. In fact there was no one there apart from the complainant and the appellant and her evidence at the trial was that the appellant told her to put the sour oranges in the cupboard, which she did.

/Having done....

Having done this, the appellant pulled her by the right hand and put her to lie down on a settee. He then pulled up her dress, pulled down her panties, and proceeded to have sexual intercourse with her. In the course of this act, he told her not to tell her mother, and if she did tell, he would be giving her a blow with the gun behind her head. At this time she said, she saw that the appellant had a gun in his hand.

The witness further testified:-

> "When he put his penis in my vagina he wined on me. I am sure he put his penis in my vagina. I saw it. I told him I did not like it. I shake myself for him (witness demonstrates) I did not like this because I did not want what he did me. When he was holding my hand I told him to drop me..... I did not have sex with anyone before Corporal Wilson put his penis in my vagina. I have not had sex with anyone since Corporal Wilson put his penis in my vagina. I am pregnant for Corporal Wilson....."

It should be mentioned at this stage that this girl was giving evidence on oath, and there was no contest or objection to her being sworn. At the time of the trial, she was in a very advanced state of pregnancy.

She was cross-examined and a reading of the record does not show that she had any difficulty in answering the questions put to her by defence Counsel. The cross-examinations revealed that she did not make any report of the incident to either her mother or her father Gilbert Francis or to Aunt Nancy with whom the appellant lived.

When it was suspected that she might have been pregnant, she was taken to the Doctor about 30th March, 1987. He confirmed the fact of her pregnancy. Despite being beaten by her father, and cajoled by her mother to say for whom she was pregnant, she refused to tell. The reason she gave for so refusing to tell, was "because Corporal Wilson told me not to tell. If I tell he will hit me with the gun behind my head". In answer to a question from the Jury she said "I did not shout because Corporal Wilson told me he is giving me one with the gun behind my head". I told Aunt Anastasia I was pregnant for Corporal Wilson". Aunt Anastasia (Mathurin) gave evidence that on 30th March 1987 she went to the home of complainant's mother Hanesca Francis, and her father Gilbert Francis. She observed that Gilbert Francis had put his daughter out of the house with 2 packed bags. Anastasia took complainant to her home, and on arrival there she spoke with her. Having spoken with complainant she returned with her to the home of her father Gilbert Francis, and in her presence complainant spoke to her father and mother. Anastasia left, leaving complainant in her father's home.

Gilbert Francis the father gave evidence that on 30th March 1987, his wife spoke to him. As a result he gave his daughter a beating. He later

/that day.....

that day saw his wife's sister Anastasia, and spoke with her. Having spoken with Anastasia and with his daughter he went to the home of the appellant, but he was not there.

On the following morning he returned to the home of the appellant at about 6.00 a.m. I now quote his evidence from the record:-

> "I met him there. I spoke with him. I told him my daughter has brought a complaint saying that he had raped her (emphasis mine). He said he would not do a thing like that. I told him I am going to get the child and take her back to his house. I took complainant and brought her back to Corporal Wilson's home. I asked her to tell Corporal Wilson what happened. My sister Nancy was present standing at the back of the chair on which Corporal Wilson was sitting. Complainant told him what happened. Complainant told him on Friday afternoon her mother gave her to bring sour oranges to her Aunt Nancy but Aunt Nancy was not there. Corporal Wilson came to her, held her right hand and brought her on the settee, took off her panty, pull off her dress. He put his private part in her private part and he wined on her. A few days later she went to Corporal Wilson's home. Corporal Wilson asked her if she had seen her period. She said no. Then I asked her to go home. I stayed there with Corporal Wilson. I told him I want to hear what he is telling me about this. He said to me "I will take full responsibility of the girl and the baby....."

Francis then went on to testify that he told the appellant that he was claiming $10,000 from him, and an agreement to maintain the child when born. They came to an agreement, and appellant asked for a respite of two days after which Francis returned to him, only to be told by the appellant that he is owing the bank some money and he cannot pay him now. Appellant then asked him to wait until August, but Francis invited him to write a letter to that effect, then go to a lawyer. Appellant declined and asked Francis what he was going to do. His reply was, "You shall hear from me".

In cross-examination it was suggested to Francis that he was using his daughter's pregnancy to try and extort $10,000 from the appellant. Francis however, in his blissful ignorance of the possible legal repercussions to him, honestly told the Court that if he had got the $10,000 the case would not have been pursued in Court. When he did not get it, he went to the Police.

The appellant gave evidence in which he admitted that the complainant brought sour oranges to his home on a Saturday in March 1987. He said however he only spoke with her and she left without answering him.

On 30th March 1987, on his return from a political meeting his girl friend Nancy told him that Gilbert Francis told her that the complainant

/was pregnant,.....

was pregnant, and she said the child was his. He replied that it was "a joke". He then admitted the visit of Gilbert Francis to his home, ... that Gilbert made the accusation of rape to him, which he denied. He admitted that Francis left and returned with the complainant, and that Francis told the complainant to tell him exactly what she had previously told him. He admitted that the girl related in patois to him what had happened and that Nancy translated it for him. The substance of the report was in essence what has already been recounted earlier in this Judgment. He then attempted to address the complainant and Francis stopped him and sent her home. He admitted that Francis demanded $10,000, but he told him he is not going to pay him anything as he never had sex with the girl. After further threats, Francis left.

Theresa Francis (Nancy) gave evidence supportive of the appellant but it is not necessary to recount the evidence any further in view of the nature of the grounds of appeal.

These were:-

(1) The verdict is unsafe, unreasonable and against the weight of the evidence.

(2) The learned trial Judge failed adequately to put the defence to the Jury.

(3) The learned trial Judge failed to direct the Jury on the need for corroboration of the evidence of Gilbert Francis, he being a person with an interest to serve in the outcome of the case.

(4) The learned trial Judge failed properly to direct the Jury on the issue of corroboration of the evidence of the complainant and in particular failed to direct the Jury that there was no evidence capable of corroborating her evidence.

(5) The learned trial Judge misdirected the Jury in holding that the evidence of Gilbert Francis was capable of corroborating the evidence of the complainant.

(6) The learned trial Judge erred in hearing the submission of "No case" hearing in the presence of the Jury.

Grounds 4 & 5 - Corroboration

Counsel for the appellant argued grounds 4 and 5 together, on corroboration. He submitted that on any perusal of the record, there was no evidence capable of amounting to corroboration. In a case of rape he said, the corroboration must conform in a material particular (1) that sexual intercourse took.....

course took place, (2) that it took place without the complainant's consent and (3) that the accused was the person who did it. He referred to the case of R. v James (1971) 55 CAR. 299 (P.C.). This is a correct statement of the law.

His main complaint was that the Judge directed the Jury that the evidence of Gilbert Francis was capable of corroboration of the girl's evidence in that it disclosed an admission by the appellant that he had raped the complainant. He submitted further that "even if it did amount to an admission could it be said to amount to an admission that he had raped. There is nothing in the passage, which even if he had admitted intercourse, could make it an admission of non-consent". Counsel was here of course referring to the statement attributed to appellant by Gilbert Francis, after the confrontation by the complainant, namely "I will take full responsibility of the girl and the baby".

In order to determine whether or not this submission of Counsel is well founded, it is first necessary to examine carefully and somewhat fully the directions given by the trial Judge to the Jury on corroboration. Secondly, the alleged statement by Francis must be examined to ascertain the scope, extent and meaning of the admission, and thirdly, whether or not that meaning is embraced in the directions given by the trial Judge on corroboration.

He properly directed them that whether evidence is capable of amounting to corroboration is a question of law for him, and for them as judges of the facts to decide whether or not they can accept it as such. He then said:-

> ".....I tell you that the evidence of Gilbert Francis is capable of being corroborative. It is for you to determine whether or not it is corroboration in this case. But if you do not accept Gilbert Francis' evidence, then you will have to consider the ~~meaning~~ WARNING because if you reject Gilbert Francis' evidence there will be no corroboration and then you will have to consider the ~~meaning~~ WARNING which I told you about. The warning how dangerous it would be to convict without corroboration..... You must look at the particular facts of the case and if having given full thought to the warning that it is dangerous to convict, if you come to the conclusion that the complainant is without any doubt speaking the truth then the fact that there is no corroboration does not matter and you are entitled to convict....."

Counsel could not complain and indeed did not, that the Judge's directions on corroboration were otherwise correct. The alternative situations arising depending on whether there was corroboration or not were repeated more than once in the course of the summing up. Before us Counsel admitted that whether or not the alleged statement of the appellant to Francis

/amounted.....

amounted to an admission was a question of fact for the Jury, [illegible] on what interpretation they placed on it.

Having referred to the relevant portion of the summing up, the next question to be asked is what is the scope, extent and meaning of the admission. The first thing to be taken into consideration is that the appellant is a police officer with the rank of Corporal. He should have therefore even a rudimentary knowledge of the law, and what constitutes Rape. The average school girl 12 years and over would I venture to say, know what is Rape and there could have been no doubt in the minds of the Jury that a Corporal of Police would also know what constitutes Rape, i.e. sexual intercourse without consent, as they had been told by the trial Judge.

One must ask one's self, what was the accusation made by Francis, and the answer is that of raping his daughter the complainant. At first it is denied but the matter does not end there because Francis decided to confront him with the daughter and does in fact do so.

When the confrontation took place, the accusation of "raping" his daughter was still a very live issue - so live as almost to be comtemporaneous. The response of the appellant to this accusation of Rape was "I will take full responsibility of the girl and the baby". This followed immediately on the departure of the complainant from the scene after she made the accusation. There was no denial by the defence that this confrontation took place. It is the alleged admission which is strongly refuted, and a denial that any act of sexual intercourse took place with the complainant. That was the substance of the defence.

This Court is of the view that the entire incident inclusive of the confrontation and the response must be viewed as a whole. It started out with the father Gilbert Francis accusing the appellant of rape of his daughter. It ended with his statement which I need not repeat. We are of the view that it could amount to an admission of Rape and that the trial Judge was quite correct in directing the Jury as he did. It was capable of amounting to corroboration on all three limbs and having so directed the Jury, it was a matter for them to decide whether they were going to accept it as such. If they did not accept it was corroboration then the trial Judge had properly directed them and warned them on the alternative course open to them if they were minded to convict in the absence of corroboration. Whichever line they adopted, the fact remains that they returned a unanimous verdict of guilty. We are of the view that the Judge adequately directed the Jury on this aspect of the case, and these grounds therefore fail.

Ground 3 - Interest to serve

Counsel submitted on this that when Gilbert Francis demanded money for

/the assault.....

the assault on his daughter, he had an "interest in the case". [illegible] words). The Jury therefore should have been warned that the evidence of a witness with an interest such as this ought to have been corroborated. The whole background of his evidence he said showed that Francis [illegible] interest to serve. Counsel was here trying to get himself under the umbrella of R v. Prater(1960) 1 All E.R. 298. That case decided that [illegible] a witness in a criminal case may be regarded as having some purpose of his own to serve, whether he be a fellow prisoner or a witness for the prosecution, it is desirable that the Judge should warn the jury on the danger of convicting on that witness's evidence alone unless it is corroborated. The principle however, is an extension of the rule relating to accomplices or persons who could possibly be "particeps criminis" in respect of a crime. It has been applied whether the witness is a co-accused, or a witness for the prosecution. In Prater's case it had been suggested in cross-examination that Mr. Truman a witness for the Crown had acted fraudently and was an accomplice of Phillip Goodman, one of the accused or at least was a person with some purpose of his own to serve. The Court in a judgment by Edmund Davies J (as he then was) said that every case must be looked at in the light of its own facts and dismissed the appeal.

Prater's case considered in R v Stannard - 1964 - 1 All E.R. 34 at [illegible] where WINN J said "The rule, if it be a rule, is no more than a rule of practice..... It is certainly not a rule of law". Again this case was concerned with evidence as between co-accused. The Privy Council in R v. Beck 1982 - 1 All E.R. 807 considered the cases of Prater and Stannard and held that:

> "Although a Judge was obliged to advise a Jury to proceed with caution where there was material to suggest that a witness's evidence may be tainted by improper motive, he is not bound to give an "accomplice warning" in respect of that witness's testimony unless there were grounds for believing that he was some way involved in the crime which was the subject matter of the trial."

See also Archbold's 42 edition - 4 - 340.

There is nothing to suggest here that Gilbert Francis was an accomplice to anything, and there is therefore no merit in this ground of appeal.

Ground 6 - No case submission

Here Counsel complained that the Judge failed to have the Jury out of Court whilst the submission of no case was being made. He referred to the case of R v.Falcon-Attlee (1972) 58 C.A.R. 348 at 353. This headnote read:

> When a submission of no case to go to the Jury is made either on the ground that the evidence is insufficient to justify a conviction or on the ground that it would be unsafe to leave the case to the Jury, the submission should as a general rule be made in the absence of the Jury."

/This was...

This was a sweeping statement made by Roskill L.J. but the rationale behind it was that inevitably the Judge may express a view on a matter of fact, which is within the province of the Jury, or it may hamper freedom of discussion between Counsel and the Judge.

In this case Counsel admitted before us that he made no request of the Judge for the Jury to withdraw. There is nothing to suggest that the submissions on the evidence which the Jury had already heard were of a sensitive nature, or that Counsel was in any way embarrassed in making the submission. The Judge expressed no view on the facts and merely announced at the end of the submissions "there is evidence to go to the Jury". He directed them in his summing up that this ruling in no way usurped their functions as judges of facts.

An application for the Jury to withdraw normally came from the defence, and the usual practice is that a jury is never asked to withdraw without the consent of the defence. In all the circumstances, we do not consider that any prejudice arose here, and there is no merit in the ground of appeal.

Ground 1 - Verdict unsafe

The mainstay of the submission was that the girl made no complaint about the alleged assault on her, even after being beaten by her father. That is not disputed, but she did give in evidence her reasons, i.e., fear of the appellant and his gun, for not having done so.

On an overall consideration of the evidence in the case and the directions to the Jury and having considered carefully the arguments of Counsel, we see no reason to interfere with the verdict of the Jury.

The appeal is dismissed and the conviction and sentence affirmed.

L.L. ROBOTHAM,
Chief Justice

E.H.A. BISHOP,
Justice of Appeal

G.C.R. MOE,
Justice of Appeal.