SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 8 of 1995

BETWEEN:

GILBERT GORDON

Appellant

and

THE QUEEN

Respondent

Before:
The Rt. Hon Sir Vincent Floissac Chief Justice
The Hon. Mr. Justice C.M. Dennis Byron Justice of Appeal
The Hon. Mr. Justice Satrohan Singh Justice of Appeal

Appearances:
Dr. Henry Browne, Miss Karen Hughes with him,
for the Appellant
Mrs. Joan Joyner, Director of Public Prosecutions,
for the Respondent.

1996: April 15, 16:
May 13.

JUDGMENT

SATROHAN SINGH J.A.

On October 12, 1995, the appellant Gilbert Gordon was convicted by a Jury before **Velma Hylton J** of the offences of Rape and Indecent Assault, contrary to Ss 46 and 47(1) respectively of the Offences Against the Person Act Chapter 41 of the Revised Edition 1961 of the Laws of St. Christopher and Nevis. He was ordered to serve consecutive sentences of five years and two years imprisonment with hard labour respectively. He has appealed to this Court and in his appeal he challenges the validity of his convictions on grounds of misdirections by the trial Judge and imbalance in her summing up to

the Jury. The appellant also contends that the sentences imposed on him were unduly severe.

The evidence in this matter disclosed that the complainant and the appellant had a love relationship and lived together for some three or four years. They then fell out and the complainant had a new boyfriend Denis Merchant. According to the evidence of the complainant, on August 25, 1994, when this new relationship was some four months old, the complainant, mistaking a car she saw by the cenotaph on the Bay Road in St.Kitts to be the car of Denis Merchant, went towards the car. As she approached it she realised her mistake and observed it was the appellant in the car. The appellant pointed a gun at her and told her to jump in the car or he will shoot her. Her daughter was also going towards the car. The complainant told her to "go back" and told her friend Sylvia she will be back in ten minutes. She went in the car. The appellant took her to Boyds Village where he transferred her into his jeep. He then drove her to West Farm. There he accused her of ruining his life and he beat her. He then had sexual intercourse with her. At his request, she performed the act of sex whilst on top of him, she then came off and had oral sex with him. He discharged in her mouth and commanded her to swallow it (the alleged Indecent Assault).

The case as advanced by the prosecution showed (1) an abduction at gun point of the complainant by the appellant (2) a beating of the complainant by the appellant because she "had a next boyfriend in her life" as a result of which she received several injuries (3) Rape and Indecent Assault out of fear of the gun but not as a result of the beating.

The defence of the appellant was that he never owned a gun and that on that day he had no gun. His evidence was that the complainant

joined him in the car as a result of a prearranged plan to meet by the cenotaph. He took the complainant to his home at West Farm. He told her he had to do something for his mother. She disbelieved him and accused him of wanting to go with another woman. She attacked him with a cane, there was a struggle and he used the cane on her. He then tended to her injuries received during the struggle. He then fell asleep. He woke up next morning and the complainant told him "two days now she ain't get nutten" and with her consent they had sex. By this defence, the appellant was admitting consensual sexual intercourse with the complainant and denying the charge of rape. His evidence, like that of the complainant, also suggests that the beating received by the complainant had no relevance to her alleged submission to the sexual act. I now propose to deal with the issues raised in this appeal.

THE MISDIRECTIONS

Rape is the unlawful sexual intercourse by a man with a woman without her consent by force, fear or fraud. From the complainant's own admission in her evidence, the alleged rape was committed not by force (the beating) but by fear (the presence of the gun). However, in dealing with the factual aspect of the issues of corroboration and consent, and generally in her summing up to the jury, the Judge presented the case for the prosecution as if the complainant's submission to the sexual act was as a result of the force of the beating and not out of fear of the gun. She quite properly directed the jury that the appellant's admission of intercourse was only corroboration of the complainant's testimony that he had sexual intercourse with her and that there was no corroboration of the complainant's evidence of lack of consent. However, immediately after this direction, the judge interposed the evidence of the injuries

sustained by the complainant from the beating and told the jury in reference thereto:

> "Now, when you consider the evidence of Dr. Laws and I shall remind you of it later it might appear to you that if someone were consenting to sexual intercourse that the male partner or the person would not have to beat them up like that" ....
>
> "You will remember what Dr. Laws said could have caused them. I will remind you of it and you will have to determine if regardless of what had happened if he beat her with an electric cord, with a belt and with a cane, was that sexual intercourse an act of consent between consenting adults."

Imprudently juxtaposed as these directions were to the direction by the Judge that there was no corroboration of the complainant's evidence of lack of consent, in my view rendered the latter direction valueless. The Judge dealt with the matter in a manner to suggest to the jury that the evidence of Dr. Laws on the injuries received by the complainant could effectively substitute for the absence of corroboration with respect to lack of consent. The Judge in these directions seemed to have been distinctly indicating to the jury that if the complainant had consented to have sex with the appellant there would have been no need for him to beat her. Indeed, just about the end of her summation, the judge told the jury:

> "I told you there is no corroboration that there was no consent but I told you in that regard you have to consider all the circumstances in particular the evidence of the Doctor as to the condition of the virtual complainant's body. Bear in mind however what the Accused said about how the virtual complainant suffered injuries."

This was a totally erroneous interpretation of the evidence and by its clear and suggestive implication constituted a material misdirection at the trial. At no stage during the summing up did the trial Judge refer the jury to the evidence of the complainant that she was beaten because she had "a next boyfriend in her life".

The appellant was on trial for the offences of Rape and Indecent Assault. The Rape was the vaginal sexual assault and the Indecent Assault

was the oral sexual assault. In directing the jury as to how they should deliberate on the legal aspect of these two offences the trial Judge told the jury:-

> "I tell you as a matter of law however that according to how I see the case both counts stand or fall together."

The result of this direction and her directions generally, was that the verdicts to be returned by the jury, were limited to guilty or not guilty on both counts. The jury was not given the option of returning a guilty verdict on one count and not guilty verdict on the other. I consider this another serious misdirection of the trial Judge. The Prosecution presented the indictment with these two offences as separate and distinct charges. It was therefore incumbent on the trial Judge to deal with the issues of consent and corroboration both as a matter of law and as a matter of fact, separately in relation to each count and to so direct the jury. Unlike the Indecent Assault, which was not admitted by the appellant, sexual intercourse having been admitted by the appellant, it was open to the jury apart from saying guilty or not guilty to both counts, to say guilty of Rape but not guilty of Indecent Assault if they so found. Failure to so direct the jury and to tell them that the verdicts for each count need not be the same having regard to what facts they may have accepted, was a material irregularity at the trial and a misdirection. I now proceed to the issue of imbalance in the summing up.

IMBALANCE

During her summing up of the case to the jury, **Hylton J** told the jury "I do not as you have heard me say bat on anybody's side and consequently I cannot overstress it". Approaching the end of her summation, she said "I am on neither side. Remember I said I do not bat on the side of the Prosecution nor on the side of the defence. I am like the impartial umpire, I tried to do that". I consider these words as advocating the correct approach of a Judge in summing up to a jury, if the scales of justice are to be evenly balanced moreso in the instant matter where the appellant was unrepresented by Counsel.

However, the appellant contends that despite these words of wisdom from the Judge, she did not practice what she preached and that there was imbalance in

the summing up which made it so unfair that it may have produced a miscarriage of justice.

A Judge in adversarial proceedings must always remain impartial and must at all times maintain a proper balance between the two sides. He is entitled to make comments during his summation to the jury. However, his comments must not go beyond the proper bounds of judicial comment which would make it difficult, if not practically impossible for a jury to do other than that which he was plainly suggesting. His comments must not be so weighted against an accused person as to leave the jury little real choice other than to comply with what were obviously the Judge's views or wishes. Where a trial is by jury, a judge ought not to use the jury as a vehicle for his own views. A summing up that is fundamentally unbalanced is not saved by the continued repetition of the phrase that it was a matter for the jury.

In **Regina v Gilbey (unreported), 26th January, 1990 Lloyd LJ** stated:

> "A judge ... is not entitled to comment in such a way as to make the summing up as a whole unbalanced ... It cannot be said too often or too strongly that a summing up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury."

In **Mears v The queen** (1993) WLR 818 **Lord Lane at p.** 822 observed:

> "Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes."

I would now examine the summing up of **Hylton J** to see how the judge put the matter to the Jury.

Shortly after the commencement of the summing up, the Judge quite properly told the jury that she was the judge of the law and that they should take the law from her as she gave it to them and apply that law to the facts. In dealing with the law on the concept of corroboration, and, having correctly told the jury the reason for the danger in acting on the uncorroborated testimony of the complainant, that is "it is not every time that somebody says rape that it is

rape" and that "a woman or a girl will cry rape for a number of reasons", she interjected this comment "This is not my experience". In dealing with the issue of "distressed condition" the judge gave this direction to the jury:

> "Now I tell you the authorities say that women could fake an appearance. I must tell you again that I disagree with that but that is the law so I must tell you. My own views does not coincide with that, but I tell you the law because I do not understand why the law provides that only woman will fake it that it is my own personal view but the law is that I am required to warn you that women can fake it to give a false impression if they are found out and I so warn you."

On the issue of what constituted the offence of Rape the judge told the jury:

> "I am sure, that each of you knows what Rape is but I am obliged to define it to you because I am sure you have heard me say that lawyers like to put definitions on everything may be sometimes to confuse the ordinary populace and let them believe that we are more learned than we are. But law is simple and rape is simply this, it is the offence which is committed when any man above a certain age, because the law I think says below the age of t 4 a boy cannot commit rape. As a woman I dispute that, but as a lawyer I am obliged to say that that is what the law says."

In my view these three personal opinions expressed by the Judge, demonstrate an unfortunate and unhappy point of view of the law as it relates to sexual offences. They ridicule and demonstrate rebellion to laws that have been long established. The third opinion expressed by the Judge was in the context of this case really unnecessary and irrelevant, the appellant being an adult. I consider all three opinions to be injudicious comments of the judge, that were capable of diluting or destroying her directions of the jury on issues of corroboration and "distressed condition". Having told the jury that she was the Judge of the law and that they should take the law from her, it is not unreasonable to assume that the jury would have been minded to cast aside her proper directions on the law on the above two subjects and to follow her own personal opinion as to what the law should be. These comments of the judge

also seem to demonstrate an imbalance in her state of mind with respect to sexual offences generally. That may account for her statement at the commencement of the summing up where she expressed a preference not to try The Director of Public Prosecutions more or less these types of cases conceded, and I agree with her, that the Judge perhaps went beyond the limit of legitimate comment when she spoke as she did on the law as it related to "distressed condition".

On the factual aspect of the summing up, Dr. Browne for the appellant contended that the Judge gave an unbalanced version of the evidence, that she put strained and injudicious interpretation to it that effectively negated any benefit to the appellant, that she so dramatised the injuries received by the complainant that such dramatization inflamed the passions of the jury and deflected their minds from the true issue in the case, the issue of consent. Learned counsel further contended that throughout her summing up, the Judge persisted in casting doubt and cynicism on the appellant's case and made burlesque of any explanation given by the appellant. As a result he submitted, the jury improperly disregarded the appellant's defence or was amused by same to the detriment and prejudice of the appellant.

There is no doubt, as I have already found, that the judge embarked on a wrong factual premise when she summed up to the jury to the effect that the complainant submitted to the rape as a result of violence from the appellant. It is also patent from a reading of the summing up as a whole that the Judge emphasized and dramatised this violence as the most important factor of the case. Given these circumstances, I am minded to agree with Dr. Browne that such dramatization could have inflamed the passions of the jury and could have deflected their minds as to the true facts relevant to the issue of consent, that is, the presence of the gun.

On the issue of consent, the complainant discounts the beating as the

cause of her submission to the sexual assault. The appellant denied possession of any gun. Prosecution witness Alphonso Evans who saw them together at one time during the period of the alleged abduction, testified that he did not see the appellant with anything in his hand, that the accused and the complainant looked "OK", and that he did not see the appellant holding or pushing the complainant. Prosecution' witness Steve Percival testified that the appellant came to his home (during the period of the alleged abduction) to use the phone. He said the appellant went in first and the complainant followed. He said the appellant was not holding the complainant and that the complainant looked normal. These bits of evidence, in my view, were vital to the appellant's case on the issue of the presence of the gun and on the broader issue of consent. The only reference made by the Judge of the gun in her summing up was when she read it in the complainant's evidence and in appellant's statement (without comment). Regarding the other bits of evidence abovementioned from Percival and Evans, at no stage was any reference made to them in the Judge's summation to the Jury. These were aspects of the case which could be seen as deficiencies in the case for the prosecution and efficiencies in the case for the appellant. It is my view that this was grossly unfair to the appellant.

The material advanced in favour of the defence was the appellant's statement to the police under caution and his statement from the dock. In his statement under caution made two days after the alleged incident the appellant said:

> "She called me Thursday morning, asked me to pick her up by the war memorial in the evening. I went and pick her up in a car. We went to my place at West Farm. We talked and she started an argument. It came to a fight. After the fight we talked again. We slept together for the rest of the night at Boyds. Then I took her home in the morning. That's it I did not rape her."

This statement coincides with the complainant's evidence that the beating she

received was not the reason for her submission to the sexual act. This is how the Judge dealt with this statement:

> "The statement is in, it was read to you you make what you will of it. What he is saying there is that he did have sexual intercourse with her but it was with her consent. Matter for you."

Surely, in a summing that lasted some two hours, and with the appellant **being**

unrepresented, the Judge should not have dealt with this statement as flippantly as she did. She ought to have brought into the focus of the Jury that the statement was made just two days after the incident and was consistent with the complainant's evidence that she was beaten because she had another boyfriend (and not for the purpose of raping her).

In dealing with the appellant's statement from the Dock, the Judge read it to the jury. In that statement the appellant sought to show that because of the relationship he had with the complainant it was unbelievable that he would even think of raping her. He said he had a relationship with the complainant over four years. The complainant's evidence was three years. The Judge made this strange observation on this discrepancy:

> "Remember she said three (3) Years. He never suggested to her four (4) years. I ask a question again make what you will of it, banish it, if it does not find favour with you. Is it so that he is adding a year to put the incident within the relationship period? A matter for you."

His statement continued that the complainant had two children with no father supporting them. At this point, the judge for some mind boggling reason, went off on the following unnecessary tangent which did no justice to the appellant's case:-

> "Mr. Foreman and members of the jury that ain't singular at all it is the same with whole heap of Caribbean men and men from other countries. That is not singular to Caribbean **men - from** Jamaica in the north to Trinidad in the South. Some men don't want to support their children because and this is my view now, they know that the mothers will even do without food to give the children. So they spite the mother, so she would have to do

> without to look after the child. It is not really the children that the men set out to spite it's the woman because he feels if he don't support the children, the man feels if he does not support the children the woman would have to. So don't think that the virtual complainant's situation is singular, that happens every day everywhere and not just in the Caribbean either; it happens same way in England because we get our laws from there - up there we get it from and they have it up there too. That is why long ago before they had a faculty at UWI Caribbean people used to going to England to learn. They have it up there too don't let any body fool you, English men don't support their children either, so that is not singular, some of them that is.

The appellant then said lee was going to stay by the complainant's side and take care of her and her two babies. To this the Judge made this cynical comment. "And I say very big of him, if that is so, there are few men who do that A matter for you". The appellant continued that his mother had cautioned him to tread with care because of something in the complainant's past. Here the judge made this comment:

> "You know anybody who ain't got a past. Every human being has a past the moment a baby is born, ten seconds after a baby is born every single one of us have a past."

The appellant then spoke of the complainant "giving away" one of her children.

Here the judge made this comment:

> "Many, many ladies give children up for adoption if they can't support them. Do not hold that against her because the Accused said she gave away one of leer children. You only give away animals you give up children for adoption. A matter for you."

The appellant in his statement then produced a copy of a money order to show that he sent weekly support to the complainant. On this evidence the judge made this comment:

"He told you he used to send money to her and he presented to the court a document which he said is the copy of a money **order** that he sent for her. I say to you it does not mean that a man because a man supports a woman that he can **have sexual** intercourse with her whenever, wherever and however he pleases.

Because it is the inalienable piglet of every woman to decide if they will, with whom she will, or when she will, where she will **and under** what circumstances she will leave sexual intercourse. However I put the document to you and you may take it with you in the Jury room."

He then produced another document to show that the complainant's evidence

that they broke up four months before the incident could not be true because in June 1994 some two months before the alleged rape they had opened an account together to get things to build a house. The judge commented thus on this evidence:

> "He is undefended and you may also take it with you - the document which is presented does suggest that on 7th of June, 1994 an account was opened by the accused and virtual complainant at TDC but I tell you this is a copy it is not the original."

Of what relevance is this distinction to the jury except for the purpose of unfairly diluting the cogency of this evidence.

Having read the summing up as a whole, I consider that the Judge's flippant treatment of the appellant's statement to the police, and her abovementioned unfortunate and unnecessary comments on the above aspects of his statement from the dock, would have had the effect of negating any benefit the appellant may have had from such material. In my view, the comments cast doubt and cynicism on the appellant's case. The impression that is had from a reading of the summing up as a whole was that the Judge personally believed the evidence of the complainant and disbelieved the case of the appellant and sought to use the jury as something akin to a vehicle for her own views. At every convenient stage of the **summing up she caustically** criticised the case for the appellant thereby bolstering the credibility of the complainant.

Because of these observations, I am compelled to hold that the judge's comments exceeded the permissible limits of judicial comment and that the summing up was fundamentally unbalanced. I also hold that the fact that on every occasion when she commented she may have used the words "matter absolutely and totally for you" did not remedy the very patent unfairness in the summing up which in my view produced a miscarriage of justice.

Looking at the summing up as a whole I would conclude this issue by following the words of **Lord Summer in Ibrahim v The King (1914) AC 599**

at **p. 615** and say that what the judge did in this summing up was something which deprived the appellant of the substance of fair trial and the protection of the law, or which, in general, tended to direct the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future. I would also adopt the words of **Lord Lane in Mear's** case when he said at **p. 822**:

> "Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views."

THE PROVISO:

The appellant has therefore been successful on both limbs of his appeal.

The learned Director of Public Prosecutions in the event of the Court so finding, sought assistance to maintain the conviction from the proviso to **S39(1) of the West Indies Associated States Supreme Court (Saint Christopher, Nevis and Anguilla Act) 1975** which provides as follows:

> "Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

With regard to this proviso, the question to be decided is whether the jury (acting reasonably and properly), would inevitably have returned the same verdict had the judge's summing up been impeccable, circumspect and evenly balanced. Having regard to the complainant's testimony that sexual intercourse was not induced by the beating but was induced by the presence of the gun which may not have been proved beyond a reasonable doubt (for reasons already mentioned in this judgment), and, having regard, as a consequence, to the plausibility of the appellant's evidence relating to consent, I cannot be certain that had the jury been properly directed that the same verdict would have been returned. For this reason I could not assert

with confidence that there has been no miscarriage of justice. I must therefore decline to apply the proviso.

The appeal is allowed. The convictions are quashed and the sentences set aside.

SATROHAN SINGH
Justice of Appeal

I concur

SIR VINCENT FLOISSAC
Chief Justice

I concur

C.M. DENNIS BYRON
Justice of Appeal