ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 2 of 1995

BETWEEN:

JOSEPH SHANE MERCHANT

Appellant

and

THE QUEEN

Respondent

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

Appearances:
Mr Cosmos Charles for the Appellant
Miss Carol Malcolm DPP, Mr Thorn with her for the Respondent

1996: June 10, 11, 24.

JUDGMENT

SATROHAN SINGH, J.A.

On February 27, 1 995, the appellant was convicted by a Jury before Benjamin J of the offence of Indecent Assault on an indictment that charged him for the offence of Rape. He was sentenced to imprisonment for four years with hard labour. Before this Court he challenges the fairness of his conviction on grounds that involve issues pertaining to (1) an alleged irregularity during the deliberations of the jury (2) the reason for the need for corroboration (3) the alternative offence of Indecent Assault and (4) the reasonableness of the verdict. He has also appealed against his sentence. Learned Counsel for the appellant, after being enlightened by the Court that no "complaint" was made in this matter, abandoned his ground of appeal that involved that issue.

1. **The Alleged Irregularity**

At the end of the addresses to the jury by both lawyers at the trial of this matter, the trial Judge did his summation to the jury and then invited them to retire and deliberate on their verdict. In that summation he inadvertently omitted to deal with the defence of the appellant. After some forty-four minutes of deliberations, the learned Judge recalled the jury and then for some twenty minutes dealt with the defence of the appellant. The jury again retired and after another two hours and nine minutes of deliberations returned a majority verdict of guilty of Indecent Assault.

Learned Counsel for the appellant describes what happened there as a material procedural irregularity and relied on the case of **Tilman (1982) Cr L R 261** in support thereof. In my view in the context of this matter, **Tilman** is of no assistance. In **Tilman,** the substantial miscarriage of justice was that the defence of the appellant was never put by the Judge to the jury. In the instant matter, the appellant's defence was eventually left with the jury.

On this issue, the general principle of law as summed up by **Lord Widgery CJ in R v Davis 62 Cr. App. R. 164** at p.201, is that a jury may not when they have once retired to consider their verdict be given any additional evidence, any additional matter or material to assist them. They can ask for further directions on the evidence which has been given, but they cannot ask for anything new and it would be a material irregularity at the trial if a Judge were to allow them to have anything new. In **Blackstone's Criminal Practice 1993** it is stated at p.1 301 that it might be proper for a Judge to give a supplementary direction where a matter canvassed at the trial had accidentally been omitted from the summing up but, when this is done, it must be carried out with utmost caution.

In the instant matter, the trial Judge, according to what is stated in the summing up, inadvertently (or accidentally) omitted to deal with the defence of the appellant. Having discovered his omission, he sought to do justice to the appellant's cause by recalling the jury and for the next twenty minutes direct them on the appellant's defence. The jury having already deliberated for some forty-four minutes then deliberated for another two hours or more, with the defence of the appellant being the last thing told to them. Given these circumstances, I do not see the injustice to the appellant's cause as suggested by Counsel for the appellant. The law permitted the Judge to rectify his inadvertent omission and that is what Benjamin J did. He did not give the jury any additional evidence, matter or material for their consideration

de hors what was already led at the trial. In my view, there was no miscarriage of justice. This ground of appeal therefore fails.

2. **Corroboration**

On the issue of corroboration, Mr. Charles for the appellant submitted that the Judge omitted to explain to the jury "why it is dangerous to convict on the uncorroborated evidence of the complainant in a sexual offence case in that such cases such allegations can easily be made and feigned" and argued that such an omission amounted to a material misdirection.

I do not find merit in this submission. In his summation to the jury on the issue of corroboration the learned Judge gave these directions to the jury:-

> "For two reasons I must address you on corroboration. 1. The law says in sexual offences, it is dangerous and unsafe to convict the accused on the uncorroborated evidence of the virtual complainant, that is Emeka Roberts. Why in sexual offence? Because experience has shown that it is a charge that can be easily made, fabricated and difficult to refute."
> "The second reason I must warn you is that it is dangerous to convict the Accused on the uncorroborated evidence of Emeka Roberts in that she is a young girl, and experience has shown that there is a danger that fantasy may supplement genuine recollection. So, for these two reasons I must warn you. That it is dangerous and unsafe to convict on Emeka's evidence alone."

These directions in my view are in keeping with the reason for the corroboration rule as stated by **Salmon LJ in R v Henry, R v Manning (1969) 53 Cr. App. R. 150** and restated by this Court in **Anthony Pivotte v The Queen Criminal Appeal No. 11 of 1994 Grenada** (unreported). That reason is so well-known that I do not propose to repeat it here. This ground of appeal also fails.

3. **Indecent Assault**

The indictment charged the appellant for the offence of Rape. The offence of Indecent Assault was not made a separate or alternative count in the indictment. The learned Judge in his summing up left with the jury for their consideration the alternative verdict of Indecent Assault. The record of appeal does not show that before he did so that he had specifically indicated this intention to the appellant or his legal advisor.

Counsel for the appellant contends that the Judge's omission to advise the appellant of his intention to leave Indecent Assault as an alternative verdict with the jury constituted a grave irregularity as it did not give the appellant a fair opportunity of dealing with this alternative verdict in an

address to the jury or more importantly before the close of the case for the defence. As I understand this submission of Mr. Charles, the complaint is not that Indecent Assault could not have been left with the jury as an alternative verdict but that it should not have been left without the Judge so advising the appellant beforehand.

Directing a jury as to alternative offences is a matter within a Judge's power. The bottom-line of the exercise of this power is that it must involve no risk of injustice to the accused and that the accused would have had the opportunity of fully meeting that alternative in the course of his defence. Blackstone's Criminal Practice 1993 suggests from the case of Hazel (1985) RTR 369 that "at the very least, a judge intending to leave an alternative verdict to the jury should warn counsel beforehand and should give them the opportunity of making representations about the propriety or otherwise of the proposed course. Counsel should also have an opportunity to address the jury about the alternative verdict, assuming it is to be left." This view endorses the bottom line referred to above.

It is accepted that in the instant matter, the learned Judge did not warn the appellant beforehand of his intention to leave Indecent Assault with the jury. In my view however, in the context of this case such a warning, though it might have been given ex abundante cautela, was not necessary. My reasons for so concluding are that (1) the appellant was represented by experienced Counsel Mr. John Eli Fuller (2) every charge of rape contained the essential ingredients of indecent assault (3) the cross-examination of the complainant dealt with the evidence of indecent assault when the complainant disagreed with a suggestion from Mr. Fuller that the accused did not touch her. Her evidence was that the appellant touched her legs, breasts and vagina (4) in giving his defence, the appellant dealt with the issue when he testified "it is a lie that I touched her on her breast, thighs and vagina" and (5) given the nature of the case, this aspect of the evidence must have been the focal point of the address to the jury by Mr Fuller.

Given these factors, I would hold that the omission of the trial Judge to forewarn the appellant involved no risk of injustice to the appellant. This ground of appeal also fails.

4. **Verdict unsafe and unsatisfactory**

Counsel for the appellant contends that the verdict of the jury was obviously and palpably wrong. Learned Counsel submits that where, as in this case, the Prosecutrix evidence stood alone and uncorroborated and it spoke

of all the elements constituting rape and a jury returned a verdict of not guilty of rape but guilty of indecent assault, then the verdict is wrong because the jury by their verdict was expressing disbelief in the story of the prosecutrix. I do not agree with this proposition as being a general propostion of the law. A jury is entitled to accept a part of a witness' testimony and reject a part. The evidence and circumstances in each case would have to be considered individually.

In the matter before us, the complainant at the time of the commission of the alleged offence was thirteen years old. The appellant was her mother's boyfriend. The offence allegedly happened in May 1 1994. She alone testified as to the facts of the offence. There was no medical testimony and no police investigative testimony. Her mother's testimony was negligible. According to the complainant's testimony, she was at home in her bedroom one day in May 1994 in the afternoon. Her mother was at work and her two year old sister was in her mother's bedroom. The appellant went in her bedroom, sat next to her on the bed and tried to push her down on the bed and take off her clothes. She wrestled with him. He took off her clothes. He touched her legs, breast and vagina. His penis had on a condom. He tried to push his penis in her vagina. He overpowered her. She told him to stop. He stopped. Her evidence was that his penis was "a bit in her vagina", she felt pain. She went to bathe and saw blood coming from her vagina. The evidence also disclosed that she told no one of the incident until some two months later, that she did not want to testify in the matter, that she was forced to do so and that she told the truth. The appellant's defence was that the evidence of the complainant that he touched her breast, thigh and vagina and had sex with her "forcibly or otherwise" was totally untrue.

Such then was the evidence before the jury. By their verdict they obviously rejected the evidence of the appellant and accepted part of the evidence of the complainant. This they are permitted by law to do. There was evidence from which they could have found rape. There was also evidence from which they could have found indecent assault if they were not sure on the issue of penetration. They returned a verdict of guilty of indecent assault. We are not permitted to inquire of the jury as to their reasoning in arriving at their verdict and we are not permitted to speculate as to their reason. The issue is whether the verdict can be said to be legally right. The factual and

legal elements that constitute the offence of indecent assault are present. There were no misdirections by the Judge or any form of miscarriage of justice during the trial that may have prejudiced the fair trial of this appellant. This was not a case where the complainant was saying she was forced to lie. Her evidence was that the pressure exerted on her was for her to testify but that she spoke the truth. I have no lurking doubt as to the correctness of the jury's verdict and I can find no reason to say it is not legally right. This ground also fails.

Consequent upon these observations, the appeal against conviction is dismissed.

5. **Sentence**

Learned Counsel for the appellant thought that the sentence of four years hard labour for indecent assault was excessive. Looking at the matter from both sides I do not disagree. Section 50 of the offences against the Person Act Chapter 300 of the Laws of Antigua and Barbuda prescribes a maximum penalty of five years imprisonment for indecent assault. The appellant's record is unblemished, he is 35 years old and he manages a bakery. By the jury's verdict there was no penetration of victim's vagina. On these facts, I consider the imposition of a penalty equivalent to four-fifths of the prescribed maximum to be excessive. I would accordingly quash the sentence of 4 years and substitute therefore a sentence of imprisonment for 18 months.

6. Conclusion

The appeal against conviction is therefore dismissed. The conviction is affirmed. The sentence of imprisonment for four years is quashed and a sentence of 1 8 months imprisonment substituted therefore.

SATROHAN SINGH
Justice of Appeal

I concur. SIR VINCENT FLOISSAC
Chief Justice

I concur. C.M.DENNIS BYRON

Justice of Appeal