ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 2 & 3 OF 2002

BETWEEN:

GREG ROBERTS
IAN WILLIAMS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal [Ag.]
The Hon. Mr. Adrian Saunders	Justice of Appeal [Ag.]

Appearances:

Mr. R. Francis for the Appellant Roberts
Mr. D. Hamilton for the Appellant Williams
Mr. C. Cumberbatch – Director of Public Prosecutions

2003: February 7;
September 22.

JUDGMENT

[1] REDHEAD, J.A.: I have read the draft judgment of Saunders J.A. [Ag.]. Saunders J.A.[Ag.] has adequately outlined the facts. It is not necessary therefore for me to refer to the facts.

[2] At the hearing of both Appeals we agreed to allow the appeal in respect of the second named appellant who was convicted for the offence of procuring a minor to have sexual intercourse with Greg Roberts, the first named appellant. The second named appellant's appeal having being allowed his sentence was set aside and

his conviction was quashed. Three grounds of appeal were filed on behalf of the second named appellant.

[3] We unanimously agreed that the appeal should be allowed having regard to the arguments advanced on behalf of this appellant that the learned trial judge never explained to the jury the meaning of procuring or what in law constitutes procuring. That argument was in my view supported by an absence from the record of any such direction. It was also contended by learned Counsel, Mr. Hamilton, that once the jury felt that the first named appellant was guilty of the offence of rape they having been given no direction on the offence of procuring, would automatically convict the second named appellant.

[4] Mr. Hamilton contended that this is emphasised by the fact that the jury took only thirty-five [35] minutes to arrive at their verdict. He argued this shows that the jury had not given any consideration to the appellant's case.

[5] Learned Counsel also argued that the learned trial Judge, failed to give the jury any direction on the issue of lies.

[6] The second named appellant in a statement from the dock said that he took the virtual complainant and her two female friends in his jeep to Blackman's estate where he met the first named appellant. His evidence was to the effect that his meeting with the first-named appellant was a chance meeting.

[7] However the learned trial Judge at page 111 of the record instructed the jury as follows:

> "So that is the opposite side, was it a chance meeting? Here he rode up in Greg's yellow jeep with three school girls 14 years of age at half past 12-1 o'clock. It is by chance they are meeting and whatsoever transpired later on was something that happened spontaneously, without it having been arranged? You asked yourself what is the motive? What is the intention? What is the purpose? Having regard to all the surrounding circumstances on the evidence, which you have heard. At some stage Sheen said that they are friends – Sheen and Ian Williams – that he said

that boss it is not time for that kind of business. So he is exonerating himself. He is saying I never planned to bring those girls there for Greg to have sex. That is what he is saying in effect."

[8] In the interview with the second named appellant by the police as recorded at pages 109 and 110 of the record, it is shown that the appellant told lies to the police. For instance when he was asked if he went to Blackman's estate on 24th November, 1999 he said no. He also told the police that he did not know either of the three girls.

[9] Learned Counsel pointed to the fact that answers given in the interview were at variance with his statement from the dock. He contended that the whole purpose of the exercise was to show to the jury that he lied to the police.

[10] Learned counsel submitted that while it is accepted that a special direction on lies [The Lucas direction] [R v Lucas (1981) 2 ALL ER 1008] is not required in all cases. But he argued where attention is drawn to the admitted lies so as to make them an important feature of the prosecution's case bearing upon the credibility of the appellant and the reliance on the lies by the prosecution as evidence of guilt, them the judge ought to give a direction on lies. I agree.

[11] Having regard to the foregoing we allowed the appeal. We set aside the conviction and quashed the sentence imposed on the second named appellant.

[12] I however dissented from the majority in respect of the charge of procuring a minor, "R", to have sexual intercourse with Greg Roberts.

[13] At the commencement of the trial the appellant, Ian William was charged on the above single count on a three-count indictment. Greg Roberts was charged on the same indictment with two counts:-

(i) Sexual intercourse with a female under the age of 16 contrary to Section 6(1) of the Sexual Offences Act
(ii) Rape contrary to Section 3(1) of the Offences against Person Act No. 9 of 1995.

[15] The Director of Public Prosecutions, however opted to proceed against the appellant, Greg Roberts on the rape charge only. The particulars of that charge read as follows:-

> "Greg Roberts on 24th day of November, 1999 in the Parish of St. Peter in Antigua and Barbuda had sexual intercourse with Rochel Harvey without her consent or was reckless as to whether or not she consented to such intercourse."

[16] Greg Roberts was convicted of the offence of rape. Mr. Hamilton referred to Section 16(b) of the Sexual Offences Act with provides:-

(a) A person who
(b) Procures a minor under the age of sixteen years of ages to have sexual intercourse with any person either in Antigua and Barbuda or elsewhere, is guilty of an offence and is liable on conviction to imprisonment for fifteen [15] years.

[17] Section 6(1) creates the offence of sexual intercourse with a female between the age of 14 and 16 years:

> "Where a male person has sexual intercourse with a female person who is not his wife with her consent and who have attained the age of fourteen years but has not yet attained the age of sixteen hears, he is guilty of an offence and liable on conviction to imprisonment for ten years"

[18] Mr. Hamilton submitted that at common law and in subsequent statutory enactments, the essence of the offence of rape has always been expressed as "having sexual intercourse with a female without her consent." The main ingredient of the offence he argued is the lack of consent.

[19] Learned counsel, contended that an indictment for rape where the alleged victim is a girl under sixteen [16] years of age, whether or not her age is averred in the indictment a jury may not return an alternative verdict of the offence of having sexual intercourse with a girl under sixteen [16] years of age. In support of that proposition he referred to-

R v Mochan and Others 54 Cr. App R. 5

R v Hodgson and Others 57Cr. App. R 502

[20] In Mochan and Others [supra] the indictment on which the accused was tried charged the defendants with a single count of rape. The indictment did not include any alternative counts or state the age of the virtual complainant.

[21] It was argued that it was open to the jury to acquit the defendant of rape and to convict him of the unlawful sexual intercourse as the girl was in fact only fourteen years of age. Her age was formally admitted on behalf of all those concerned.

[22] Cusack J. in rejecting that argument said at page 7 of the judgment:-

> "… it is clear that the provision of the Sexual Offence Act 1956 permitting an indictment for rape the alternative verdict of unlawful sexual intercourse has ceased to have effect " … I am however, satisfied that on an indictment for rape there is no direct statutory authority for an alternative verdict of indecent assault or unlawful sexual intercourse unless it is under Section 6 (3) of the Criminal Law Act 1967. The material part of Section 6 reads: "Where … the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence … the jury may find him guilty of the other offence …" Thus any valid alternative verdict which is not the subject of a separate count must be founded on the allegations in the indictment … The allegations in the indictment here are proper to rape and do not include an allegation of unlawful sexual intercourse …"

[23] Mr. Hamilton submitted that it follows therefore the principal offender in this matter, Greg Roberts, being tried for the offences of rape on the election of the prosecution, he could not be convicted for the offence of unlawful sexual intercourse with Rochel Harvey, a girl under the age of 16 years.

[24] Mr. Hamilton further submitted that given the two counts of the indictment proceeded on by the prosecution, to convict the appellant, Williams, it was essential that the principal offender Greg Roberts be charged with the offence of having sexual intercourse with a female under the age of 16 years, consent [not] being an issue.

[25] Learned Counsel referred to R v Broadfoot (1977) 64 Cv App R. 21. This case dealt with the offence "to procure a woman to become … a common prostitute."

[26] Cusack J. defined the word "procure" at page 14:-

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. "Procuring" could perhaps be regarded as bringing about a course of conduct which the girl in question would not have embarked upon spontaneously of her own volition"

[27] Mr. Hamilton argued that under Section 16(a) the next essential ingredient of the offence is:-

> "A minor under 16 years to have sexual intercourse."

[28] Mr. Hamilton contended that this relates back to offence under Sections 5(1) and 6(1). Section 5(1) prohibits sexual intercourse with a female person who is under the age of fourteen years of age.

[29] Section 6(1) prohibits sexual intercourse with a female person between the ages of 14 and 16 years. Under both sections the defence of consent is not available to an accused person. Mr. Hamilton makes the obvious point, in my view, when he argued that once you procure a minor under sixteen years to have sexual intercourse you are guilty. Consent by the minor is not an issue.

[30] He further submitted, however, one may procure sexual intercourse with a consenting minor under the age of 16 years but not have procured the rape of the minor by the principal. [my underlining].

[31] I have difficulty with the concept of "consenting minor" because although a female under 16 years of age may say 'yes' to an act of sexual intercourse, the law says that she cannot consent lawfully to an act of intercourse. Can this be regarded as consent?

[32] At first blush the argument seems to me to say that a person could have lawful sexual intercourse with a consenting female under the age of 16 years but could not procure the rape of a consenting minor by the principal if the principal is charged with rape. Mr. Hamilton further submitted that if the procurer orders or advises on a particular crime and the principal intentionally commits another the secondary party cannot be found guilty for procuring.

[33] He argued that there must be a causal connection between the procurement and the offence. In the instant matter the essential ingredient of sexual intercourse with a minor and that of rape is different. Learned Counsel concluded that Williams could not be convicted in the count as framed and proceeded upon in the indictments.

[34] Finally, Mr. Hamilton argued the learned trial Judge should have withdrawn the case against the appellant Williams from the consideration of the jury because either there was no evidence that he had procured the rape of Rochel Harvey by Greg Roberts or that the evidence taken at its highest showed that he by his words and actions disclaimed the acts of the said Greg Roberts which negatived the inference that he procured the complainant to have sexual intercourse.

[35] In Archibald 2000 at paragraph 18 – 2 the learned authors state:

> "Whosoever shall aid, abet, Counsel or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any act passed or to be passed shall be liable to be tried indicted and punished as a principal offender" (Accessories and Abettors Act 1861, S8 England).

[36] Section 3 of the Accessories and Abettors Act Chap 4 of Antigua & Barbuda is in substantially the same as the English provision statute.

[37] It seems to me that if the principal offender is to be indicted for an offence that the secondary party should be indicted for aiding and abetting or procuring the same offence.

[38] To give an obvious example if John Brown is indicted for Burglary with intent to commit a felony namely rape. It would be improper and illogical to indict the secondary party for aiding and abetting or procuring John Brown to receive stolen goods.

[39] The crucial question is, is the offence of rape the same as having unlawful sexual intercourse with a female under sixteen years of age? Both involve the act of sexual intercourse.

[40] However in the instant case the secondary party Ian Williams, was prosecuted for procuring Rochel Harvey, a minor under the age of sixteen years to have sexual intercourse with Greg Roberts. This was contrary to Section 16(a) of the Sexual Offence Act 1995.

[41] The principal Greg Roberts was prosecuted for the offence of rape. Greg Roberts having been prosecuted for the offence of rape the jury could not return the verdict of guilty of having unlawful sexual intercourse with Rochel Harvey notwithstanding that the sexual intercourse was with a person under 16 years at the time of the incident and her date of birth was established at trial [See page 31 of the record].

[42] I am persuaded by the arguments of Learned Counsel for appellant and by the decision in Mochan and others [supra] and propelled to the conclusion that Greg Roberts having been prosecuted for the offence of rape, Williams could not have been convicted on the count as framed in the indictment. I would have also allowed his appeal on this ground.

[43] I have read the draft judgment of Saunders J.A. [Ag.] in relation to the other appellant Greg Roberts. I too would dismiss the appeal and affirm the sentence. I have nothing useful to add in respect of this appeal.

Albert J. Redhead
Justice of Appeal

[1] SAUNDERS, J.A. [AG.]: The appellants were tried together and both convicted on 21st March, 2002 of separate offences. Roberts was convicted of the rape of a schoolgirl ("R") aged 14 years at the time. Williams was tried and convicted of procuring the minor to have sexual intercourse with Roberts. Roberts had originally been charged both with rape and unlawful sexual intercourse with R. However, at the commencement of the trial, the DPP withdrew the latter charge and proceeded only on the count of rape.

[2] The appeals were heard together on 7th February, 2003. After hearing the same, we allowed the appeal of Williams and discharged him. We reserved our decision regarding the appeal of Roberts and promised to give both that decision and our reasons for allowing the appeal of Williams in a written judgment. We now do so.

The Factual Background

[3] The case for the prosecution was that on 24th November, 1999, R and two of her school friends, both young girls themselves, were out of school at about mid-day when Williams approached one of the friends and had a conversation with her. Some time after this conversation, the girls went to Billigin's to await Williams who had apparently promised to take them to lunch at Big Banana. Williams arrived in a yellow jeep with black tinted windows. Instead of taking them to Big Banana he picked up another man and drove them to a very remote location where the appellant, Roberts, was waiting.

[4] At the time R knew neither Roberts nor Williams. Williams and the other man came out of the vehicle and went to meet Roberts. The three men began talking among themselves. R began to feel afraid and upset. She suspected that something bad was going to happen. Roberts then came over to where R was

sitting in the vehicle and spoke with her. In the mean time one of the girls came out of the jeep and exchanged some words with Roberts.

[5] Roberts then entered the vehicle on the driver's side. Those outside also climbed into the jeep. Roberts drove the jeep to another remote location where there were neither people nor houses. He stopped the jeep and everyone alighted. The three men again went into a huddle by themselves. One of the girls began fretting about an examination that she had to write. Roberts whispered something in the ear of that girl. The men again talked among themselves. Roberts then announced that for the girls to get themselves out of the situation, one of them had to "give wife". Williams was present when this was said.

[6] Roberts then looked at R and said to her, "I think you will have to give wife because you have the body for it". Roberts then pulled R and the two of them got into the jeep. The evidence is that Roberts threatened to hurt her if she did not get into the jeep. He drove with her, away from the main group, to a deserted area where he stopped and asked if she was "ready". R said she could not do what he wanted because she was a virgin. He replied, "So"? R then tried to get away from him by running off and screaming. Roberts held and choked her, slapped her down on the seat of the vehicle and slipped off his pants. He removed a condom from his pocket and put it on, took off her underwear, forced himself on top of her and proceeded to rape her while she cried.

[7] Williams came upon them as he was finished and said to Roberts, "Boss now is not time for that. The two girls gone away and they said they were going to the station". Roberts then warned R to keep secret what had occurred and he offered her some money which she refused to take. They then drove towards the other girls who were walking away. The girls found R looking stressed and tired and asked her what had happened. One of them said that her reply was that nothing had happened. The other girl said her reply was that Roberts had tried to rape her.

[8] For a very long time R told no one about the rape. She felt ashamed and uncomfortable. About four months later, in March 2000, Roberts saw R and one of the girls in the porch of someone's house. Roberts called R but she refused to go. They had an exchange of words.

[9] In May, 2000, R was with an older friend of hers when she saw the yellow jeep being driven by Roberts. He invited them to go for a ride. When they refused, Roberts began following them. They ran off in an effort to evade him. R fell down while running and they decided to call the police. They went to a telephone booth but while R was speaking she had to drop the phone as she saw Roberts approaching in the jeep. She again ran and, later that day, she made a report at the St. John's Police Station. When she made that report she neglected to mention anything about the rape that had occurred some months before in November.

[10] The following day, R and her friend told a teacher in school about the incident that had taken place the previous day. R also, either on that same day or a day or two later, for the first time, reported the rape. This report was made to her teacher. The police then became involved and an investigation was launched that resulted in the arrest of both Williams and Roberts.

[11] While in custody Williams gave a police interview. In that interview he denied that he had driven the yellow jeep in November, 1999. He said that he could recall the 24th November, 1999 and that he was at home all that day except for going by his neighbour, Sam. He said he did not know R. When he was asked "Can you recall at any time you spoke to three girls from Mary E. Pigott School in the vicinity of Billigin's restaurant", his response was "No. Officer me na answer anymore question".

[12] The trial of the accused began on a Thursday and was concluded in the evening of the following Thursday. The learned trial judge commenced his summation to

the jury at 4.41PM and concluded the same at 6.10PM. The jury returned with the guilty verdicts at 6.45PM.

The Appeal of the Appellant Roberts

[13] Counsel for Roberts filed five grounds of appeal. I think they can be approached under three heads. The first was that commencing the summing-up and having the jury retire at so late an hour amounted to a material irregularity.

[14] No special reason was advanced as to why the learned judge opted to begin his summation at 4.41PM. However, on that Thursday, the jury had several breaks. For example, the jury were out of court between 10.20 and 11.30 while a No Case submission was made. The lunch break was taken between 1.04 and 2.30 and another break was taken between 4.25 and 4.41.

[15] It is true that this was a case that lasted 6 days and on hindsight, it may well have been a more prudent course to embark upon the summing-up on the following morning. Given the week-end break however and the several breaks taken on Thursday, I do not agree that, without more, this amounted to a material irregularity. The learned judge may well have taken his cue from the jury who may have been ready and willing to go on. In my judgment this ground of appeal fails.

[16] Counsel also complained about the fact that on several occasions during the testimony of one of the young girls, the witness was permitted, while on the witness stand, to refresh her memory by looking at her previous statement. In Da Silva vs. R (1990) 90 Cr. App. R. 233 it was held that it was open to a judge, in the interests of justice, to exercise his discretion to permit a witness to refresh his memory from a statement made near to the time of the events in question, even though the statement could not be considered to be a contemporaneous one. In such a case however, the statement should be removed from the witness when he comes to give his evidence and he should not be permitted to refer to it again.

[17] The learned trial judge did not follow this course of action. But here again, I do not regard this as a material irregularity. It could not in my view have resulted in a miscarriage of justice. See: Mansfield vs. R. (1977) 65 CAR 276 at 282. The appellant Roberts was convicted by the jury because they believed R's account of what took place when she was alone with him. The evidence of this witness would have been of marginal significance to the jury's decision to believe R's account of what transpired.

[18] Counsel also argued that the case for Roberts was not fairly put to the jury and that the verdict was unsafe and unreasonable. Both accused had elected to make unsworn statements. In his statement Roberts admitted that he had seen the girls that day, that he and R were together in the jeep at one point and that with her in it he had reversed the jeep about 20 feet. He said they chatted amicably and he loaned her $100.00. His defence was that he had never had sexual intercourse with R or with any of the girls.

[19] Essentially therefore, as stated before, the jury had to decide whether they were sure that R was telling the truth. The learned judge did express the view that one of the three girls had impressed favourably with her testimony but there is nothing wrong with him so saying. The judge also reminded the jury that matters of fact were solely within their province. The ingredients of the offence of rape were properly explained to the jury, as were the burden and standard of proof. The jury were told in no uncertain terms that there was no corroboration in this case and that it was therefore dangerous to convict on the evidence of R alone. The jury were also reminded of the contents of the unsworn statement made by Roberts. I can find no merit in the submission that the verdict was unsafe or that the defence was inadequately placed before the jury. For these reasons I will dismiss the appeal of Roberts and affirm the conviction.

[20] Counsel also appealed against the severity of the 18 years sentence imposed on the appellant. Roberts had a previous conviction for indecent assault on a 14 year old girl. He had appealed this conviction and the Appeal Court had ordered a re-trial but this never occurred as by then he had already served his sentence. It must therefore count as a conviction.

[21] The learned Chief Justice, Sir Dennis Byron, recently had occasion in the consolidated cases of Winston Joseph, Benedict Charles and Glenroy Victor vs. The Queen, St. Lucia Criminal Appeals Nos. 4, 7 and 8 of 2000 to offer some guidance as to sentencing is sexual offence cases. Even allowing for the aggravating factors of a previous conviction for indecent assault and the age of the victim, I find that the sentence imposed is excessive and I would therefore reduce the same. In my view a sentence of 13 years is reasonable.

The Appeal of the Appellant Williams

[22] The appeal of the appellant Williams concentrated on three main areas. Firstly it was said that, as a matter of law, he could not have been properly convicted of the offence of procuring the minor to have sexual intercourse with Roberts because in point of fact, Roberts was convicted of rape and not of having sexual intercourse with a minor.

[23] I have doubts about the correctness of this submission. I think that the focus of the procuring should be on the actions of the procurer and not those of the principal offender. Take the facts of this case. If indeed there were any procuring, looked at from the standpoint of the procurer, both the mental and the physical elements that constituted the procuring would have been complete by the time that Roberts took R with him in the jeep. By then the minor had already been placed at risk. So far as the procurer was concerned, it was immaterial whether intercourse took place consensually or not. The intendment of the section is that a person should not intentionally “bring about a course of conduct which the woman in question would

not have embarked upon spontaneously of her own volition". See: Broadfoot vs. R. (1977) 64 Cr. App. R. 71. If counsel is correct then I can see all kinds of knotty problems arising in the laying and prosecution of a charge of procuring where, as appears to have been the case here, the principal offender hoped and intended to engage in consensual intercourse but was prepared to rape if such consent did not materialise. I suppose at the very least, Williams could have been properly convicted of an attempt. I would not have allowed his appeal on this ground.

[24] The second ground of appeal was that the judge had failed to give a direction to the jury on how they should treat the lies told by the accused to the police or what is now commonly referred to as a *Lucas* direction. Williams, in his unsworn statement from the dock, admitted carrying the girls for a drive. He said that he and one of them went under a tree and Roberts and R went off in the jeep. After some time he and the other two girls were ready to leave and he was asked to go and call Roberts and R. He did so and found them laughing together. He denied seeing them having intercourse.

[25] Williams' intention or purpose in carrying R and the girls to the spot where they met Roberts was an essential aspect of the case against Williams. There was evidence given by R, and at least one of the girls, that after Roberts had gone off with R, Williams had been heard making statements disclaiming the acts and intentions of Roberts and expressing a desire to get back to work.

[26] The lies told by Williams to the police therefore constituted an important plank of the case against him. The learned trial judge highlighted these lies to the jury and also expressly invited the jury to consider the variances between Williams' account, in his unsworn statement at the trial, as to what had transpired and the account given by the girls who testified. The judge however did nor warn the jury to consider whether there was any explanation for those lies other than Williams' guilt of the offence. This was a case which in my view required such a warning

especially as the dock statement of the accused differed so radically from what was contained in his police interview.

[27] Finally, counsel submitted that the learned trial judge neglected to explain to the jury the essential elements of the offence of procuring and that he failed to give them any or sufficient assistance on how they should treat the case for and against Williams.

[28] In the summing-up the learned judge refers to the offence of procuring twice. At the commencement he read the particulars of the offence, namely, "Ian Williams, on the 24th day of November, 1999, procured R, a minor under the age of sixteen years to have sexual intercourse with Greg Roberts". Then later on he stated, "….the Prosecution case is saying he [Williams] was privy to what was going on. He procured the girls, he brought them there. He facilitated the move…" Outside of these references however, throughout the summing-up the emphasis was almost entirely on Roberts and no attempt was made to treat separately the case for and against Williams. Although towards the very end of the summing-up the judge did remind the jury to "consider each count as it relates to each of the accused," when the summing-up is looked at as a whole, the jury could well have formed the impression that if Roberts were found guilty, then Williams must also be found guilty.

[29] For these reasons and given the absence of a direction on Lies, I agree that the appeal by Williams should be allowed and that he should be discharged.

Adrian Saunders
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal [Ag.]