SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.1 OF 2002

BETWEEN:

GREGORY BURTON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. Marcus Peter Foster and Mr. Andie George for the Appellant
Ms. Victoria Charles, Director of Public Prosecutions [Ag.] with Mr. Leslie Mondesir for the Respondent

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2002: October 29;
2004: January 12.

JUDGMENT

[1] GEORGES, J.A. [AG.]: On the 11th March 2002 the Appellant, Gregory Burton was convicted by a majority verdict of rape of a 16-year-old female at Morne Fortune Castries on Friday 16th June 2000 and sentenced to fifteen years imprisonment with hard labour. He now appeals both conviction and sentence.

[2] Initially three grounds of appeal were lodged on 13th March 2002, namely:

[i] That the Learned Trial Judge erred in failing to adequately (sic) or at all refer the law to the facts.

[ii] That the decision is against the weight of the evidence.

[iii] That the Accused is not guilty of the offence.

On the morning of the hearing of the appeal [i.e. 24th October 2002], notice of ten additional grounds were filed and the hearing of the appeal was, at the request of Appellant counsel adjourned to 29th October 2002.

The Background Facts

[3] In a nutshell, the facts of the case as outlined by six prosecution witnesses are that at about 3 o'clock on the afternoon in question, the Appellant, who at the time was a Mathematics and Sports teacher at the Rockhall Senior Primary School, offered the complainant Crystal Felix who was then a 16 year old student at the school a ride in his car.

[4] Instead of stopping where she had requested, the Appellant accelerated and locked all the doors of the car by means of a central locking device and drove to a remote area on the Morne where he stopped and fixed a sunscreen on the front windscreen of the car and proceeded to rape her at gunpoint and threatened to blow her head off if she told anybody.

[5] The complainant testified that she had entered the left side of the back seat of the car and the Appellant spoke to her while he drove up Rock Hall. Then the car glass, which was tinted, went up and the doors were locked. The Appellant [Mr. Burton] then said to her that she had too much style in school and did not talk to fellas [sic] and that he was taking her maid [hymen] and nobody could stop him. He then began driving fast and she asked to be put down past the school but he continued driving faster. She started to punch the door of the car, she said, and was screaming.

[6] The Appellant drove straight up Rock Hall hill and eventually parked the car and tacked on the sunscreen to the front windshield of the car. There was loud music

in the car throughout she added. The Appellant then removed something from one of the pockets of the car and placed it on the car seat next to him and came out of the car, opened the right rear door and entered the car where he grabbed her shirt. She pulled herself away from him, she said, whereupon he grabbed her by her jeans and a button flew off and her trousers unzipped.

[7] A struggle ensued during which she related how she was slapped in her face and punched on her feet and legs about six times. The Appellant finally pulled off her trousers, she declared, tore her black lace panty, placed a gun to her head, threatened her and raped her. He then kicked her out of the car, threw her clothes at her and drove off.

[8] She afterwards walked to the home of her friend Brendaly Nicholas and told her that the Appellant had raped her. Nicholas gave evidence of the recent complaint, which was consistent with the complainant's testimony. The complainant's mother, Luciana St. Ange, testified that the following day 17th June 2000, she had noticed the complainant looking pale and walking with a limp and that her cheeks were swollen. On Tuesday 20th June 2000, after being summoned to her daughter's school, she accompanied the complainant to the Criminal Investigation Department following which she (the complainant) was examined by Dr Herbert Marius who discovered that the complainant was no longer a virgin. Her hymen had been recently ruptured, he said, by sexual intercourse with penetration by an erect penis. He further disclosed in re-examination that his findings were consistent with both consensual and non-consensual intercourse.

[9] Sgt. Sebastiana Charles who investigated the case formally arrested and charged the Appellant for the offence of rape. A silver and green sunscreen was recovered and a pair of jean pants with a missing button and a torn panty were put in evidence.

[10] The Appellant denied the charge and raised an alibi by way of defence at the trial. He testified that on the alleged date and at the time of commission of the alleged offence, he was in Castries at the Key Shop on High Street whence he went to the Bank of Nova Scotia and returned to the Key Shop. He called two witnesses in support of his alibi

[11] Notably when first told of the complainant's allegations by Sgt. Charles, the Appellant said that he could not understand what she was talking about and he knew nothing about that. He also testified that he said nothing during a confrontation in which the complainant had gone through all the details of the sexual encounter. The issue of an alibi was never disclosed until the trial a year and a half later and the two witnesses admitted that they had been contacted by the Appellant at most three weeks prior to the trial. That therefore is the crux of the case. It is essentially the complainant's word against that of the Appellant.

[12] For convenience, I shall first deal with the three original grounds of appeal, which are set out at paragraph 2. Perusal of the Judge's summation shows that at the outset, he gave general directions to the jury on the respective functions of the Judge and the jury in a criminal trial, the burden and standard of proof and the need for fairness and impartiality. He then went on to give specific directions [at pages 70 to 72] by defining the offences with which the Appellant was charged, the ingredients of each offence and explained special features such as the law relating to consent, recent complaints and corroboration which had to be taken into account in sexual cases. Throughout all of this, the learned trial Judge illustrated his directions to the jury by reference to the facts of the case as borne out by the evidence given by the witnesses. This is amply borne out throughout the detailed summation and, in particular, at pages 70 to 75 of the record. There is therefore, in my view, no merit in ground 1 of the appeal.

[13] As regards ground 2, which alleges that the decision is against the weight of the evidence, perusal of the record is replete with evidence on which a jury, properly directed, could safely convict. It was a thoroughly bad case. As stated earlier, this was a case that was ideally fit for a jury, and largely hinged on the evidence of the complainant and that of the Appellant.

[14] At page 86 of his summation, the learned trial Judge told the jury that:

> "Basically the prosecution's case is that you should believe Crystal's account, a very graphic account, a very detailed account of what took place between her and her teacher. This is a person whom she knows very well, a person who teaches her, whom the Accused himself said that she could'nt mistake for somebody else at 3 o'clock in the afternoon. That account is consistent with the evidence of Brendaly Nicholas who saw Crystal in a very distressed condition the Friday afternoon. The evidence of Dr Marius also confirms that Crystal had sexual intercourse at a time which included the time when Crystal said this incident occurred. The evidence of Sgt Charles as to what the Accused said at the confrontation. The evidence as to Sgt. Charles again who gave the evidence as to what his reaction was when he was accused of committing this crime".

[15] The defence of the Appellant was a complete denial and an alibi which he gave in evidence on oath and which the Judge put to the jury who would have been in a good position to assess its credibility. They evidently rejected it and accepted the complainant's testimony, which was cogent and consistent with the rest of the evidence. Ground 2 of the appeal is accordingly dismissed. Ground 3 in my view does not constitute a ground of appeal and is disregarded.

[16] I now turn to Ground 4 of the appeal namely:

"That the learned Judge erred in that the evidence of Dr Marius with regard to refreshing his memory of notes he made should not have been allowed:-

[a] as it was not established that he had made these notes contemporaneously with his examination; and

[b] he had declared or expressed no defect of memory to warrant him reading these notes in Court at trial."

[17] Mr. Marcus Foster, learned counsel for the Appellant referred to paragraph 74 page 1040 of the 1997 Edition of Archbold. He urged that there was no evidence that the doctor's notes had been made contemporaneously with his examination or that he suffered any imperfection of memory to warrant reading from his notes at the trial. The learned DPP on the other hand submitted that the trial Judge had properly admitted Dr Marius' evidence. No objection had been taken at trial to the doctor refreshing his memory from his notes nor was the issue of contemporaniety raised in cross-examination. From page 14 of the record of appeal, the obvious inference from the doctor's evidence is that the notes of his findings on examination of the complainant were made contemporaneously with the examination and permission was sought and granted to refresh his memory therefrom without objection. That ground of appeal therefore fails.

[18] Ground 5 of the appeal states:

"That the learned Judge erroneously admitted the evidence of the confrontation between the accused and the virtual complainant despite:

[i] the fact that Sgt. Charles was not of the rank of Inspector and was directly involved in the case contrary to Code D Paragraph 2.2 of the Codes of Practice of the Police and Criminal Evidence Act 1984 (U.K.).

[ii] breach of Code D paragraph 2.14 where there was complete non-compliance and Annex C paragraph 3 where no solicitor or friend was present and (Investigating Officer admitted that she did not inform the accused of his rights to have a Solicitor present).

[iii] no contemporaneous note was taken of this confrontation which was a major part of the prosecution's case."

[19] Mr. Foster went on to submit that the cumulative effect of breach of Code D paragraph 2.2 and paragraph 2.14 of the Code of Practice of the Police and Criminal Evidence Act 1984 (U.K.) and of the Appellant not being told that he was entitled to a solicitor and the officer [Sgt. Charles] conducting the investigation and

also being the one who conducted the confrontation resulted in the entire confrontation evidence being seriously contaminated. This was further compounded by the fact that no contemporaneous note was made of the confrontation itself, which constituted a major part of the prosecution's case.

[20] The learned DPP countered by pointing out that not every breach of the Codes of Practice of PACE would necessarily result in exclusion of evidence. She further pointed out that the fact that the confrontation was conducted by the investigating officer and not an officer of at least the rank of an inspector did not result in any oppression to the Appellant which rendered the evidence unreliable and the proceedings unfair. Further, the fact that the Appellant was not informed of his right to a lawyer, friend or relative at the confrontation did not render the evidence of the confrontation inadmissible. The evidence of Sgt. Charles at page 39 of the record is that she informed the accused of his right to a lawyer when she went to his home and took him into custody. Further, the fact that no notes were taken at the confrontation does not render the evidence inadmissible. I fully agree with those submissions which are amply supported by Eversley Thompson v R Crim Appeal No. 9 of 1995 and Llewlyn Jemmott, Magisterial Crim App No. 4 of 1994. That ground of appeal accordingly fails.

[21] Ground 6 which complains that the learned Judge's directions as to the burden and standard of proof were inadequate and amounted to a non-direction in that the Learned Judge never instructed the jury that even if they completely rejected the defence of alibi that they were to fall back on the prosecution's case to ascertain beyond reasonable doubt that the Appellant had raped the complainant. That ground is in actual fact subsumed by ground 1 where the learned Judge at pages 3 and 4 of the record properly and adequately directed the jury on both the burden and standard of proof required to be reached before they could safely convict. On the issue of consent the learned trial Judge at page 70 paragraph 2 of the record directed the jury that they had to be satisfied so as to feel sure that the complainant did not consent to penetration of her vagina and at page 73

paragraph 1, he further instructed them on the burden of proof required of the prosecution when considering the Appellant's defence of alibi. The directions in my view were adequate and sufficient and that ground of appeal therefore fails.

[22] Ground 7 states that despite the Appellant's presentation of his good character and the Judge's own comment in the third paragraph of page 86 of the record to the effect that he is a person who had held several positions of responsibility at a school and in the community generally, the learned trial Judge never directed the jury on evidence of good character which remained unchallenged by the prosecution. This, it was submitted, was a substantial non-direction.

[23] The DPP on the other hand contended that the defence did not specifically raise the issue of good character and had called no witnesses to give evidence of the Appellant's good character nor were prosecution witnesses questioned on his character. Moreover, at the end of his summing up, the learned trial Judge asked both prosecution and defence counsel if there was anything they wanted him to add and no issue was raised by defence counsel regarding the Judge's omission to give a good character direction.

[24] Reliance was placed on Thompson v R [1988] A.C. 811 P.C. and Barrow v The State [1988] A.C. 846 P.C. where it was declared that:

> "if the issue of good character is not raised by the defence whether by calling evidence or by putting questions to witnesses for the prosecution, it is no part of the judge's duty to raise it."

[25] Respondent counsel went on to submit that notwithstanding the decisions in R v Vye, R v Wise and R v Stephenson that a direction on good character should be given where there is evidence of the defendant's good character, failure to do so is not fatal in every case and these cases should be distinguished from the instant case.

[26] In R v Vye [1993] 3 All ER 241 it was pointed out that the issue there was consent, which turned essentially on the credibility of the Appellant on the one hand and the complainant on the other. It was therefore of first importance that a character direction should have been given and related to credibility.

[27] In R v Wise, reference of previous good character referred to evidence that the accused had no previous convictions and made him someone of good character which was relevant to his believability. A Judge is entitled to take this issue into account when assessing him as a witness. At the end of the summing up, Counsel for the prosecution raised with the Judge the question of giving a second limb direction as to character. But the Judge did not agree.

[28] In allowing the appeal, the Court not only considered the failure of the Judge to give a direction on propensity but also the fact that it was raised by counsel for the defence and took into consideration the nature of the prosecution evidence and the defence and was unable to say that the jury would necessarily have reached that verdict had they been given a full direction.

[29] In the case of Dominic Joseph Fulcher [1995] 2 Cr App R 251, the prosecution relied on circumstantial evidence to prove its case. There was no direct evidence as to who had inflicted the fatal injury. It was submitted that the instant case should be distinguished from those cases as the defence never specifically raised the issue of good character. Moreover, given the strength of the prosecution's case, it was urged that failure to give such a direction did not render the verdict unsafe and that ground of appeal should therefore fail. I entirely agree.

[30] I now move on to ground 8 which alleges that the learned Judge's failure to inform the jury that any silence by the accused during the confrontation could not be held against him amounted to a miscarriage of justice. That ground of appeal is partly

subsumed by ground 5. On the issue of silence, the learned trial Judge in directing the jury at page 75 of the record reminded them that

> "I said earlier that the burden of proof remains throughout on the Prosecution and you will not forget that. You are entitled to draw whatever inferences you consider to be appropriate in all the circumstances. When you do so, you will bear in mind that the accused has a right to stay silent when accused of a crime. That is his constitutional right. You will also consider that he was never specifically told of his right to a lawyer. At the end of the day, it is for you to resolve these matters."

In all the circumstances, in my judgment, there could have been no miscarriage of justice on that account. Ground 8 of the appeal accordingly fails.

[31] Ground 9 of the appeal is subsumed by ground 2 and calls for no further elaboration. The complaint here is that the Judge did not put the defence case fully or at all to the jury by:

[i] emphasizing the credibility of the complainant where the Judge on a number of occasions made reference to the details of the complainant's evidence lending itself towards being truthful;

[ii] attacking the defence for not cross-examining the Investigation Officer or the complainant's mother re the confrontation when the accused gave his version of the confrontation; and

[iii] that his explanation of the Doctor's findings at the time of his examination that the complainant had vaginismus suggested that she had this condition as a result of the rape.

Suffice it to say that in a careful and thoroughly detailed summation, the learned trial Judge in my view, gave a balanced and even handed account of the case for and against the prosecution as well as the defence and in so doing, related the law to the facts to assist the jury in arriving at a true verdict.

[32] A useful exposition of the Judge's duty in this regard is contained in the judgment of Simon Brown LJ in R v Nelson [1997] Crim. L.R. 234 C.A. where the learned jurist stresses that:

> "Every defendant we repeat has a right to have his defence whatever it may be faithfully and accurately placed before the jury…The Judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the Judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reached a logical and reasoned conclusion on the evidence."

And this is precisely what the trial Judge did in my view and I am satisfied that there is no merit whatsoever in that ground of appeal.

[33] Ground 10 states:

That the learned Judge's direction on corroboration was inadequate and confusing in that:

[i] he never made a clear distinction to them of evidence going to consistency as opposed to evidence going to corroboration re Brendaly Nicholas' evidence [see page 72 lines 17 and 18].

[ii] he never explained fully to the jury why caution should be exercised before convicting on the uncorroborated evidence of a sexual offence victim [i.e., should the jury find no corroboration] [See pages 71 and 72]. More specifically, the Judge never pointed out what evidence could not be corroborated [for instance, the complainant's mother talking about how the complainant appeared to be limping and in some distress the following day or Brendaly Nicholas' evidence of her apparent distress upon first seeing the complainant.

[34] Mr. Foster pointed out that there was no evidence which amounted to corroboration and so the learned trial Judge was duty bound to say so and to explain the danger of convicting without it and why. Recent complaint, he further pointed out, could not amount to corroboration. I fully agree with both submissions.

[35] The learned DPP for her part relied on the law relating to corroboration as stated in 4 Halsbury's Laws of England Volume IV paragraph 1145 which states that:

> In other cases where corroboration is required as a matter of practice, the language used should convey unequivocally the danger of convicting upon the evidence of the witness alone. But the jury should also be directed if having given full weight to the warning, it comes to the conclusion that the witness has told the truth, it is entitled to convict notwithstanding there is no corroboration. No particular form of words need be used in warning the jury so long as the warning is explicit and intelligible and the meaning of corroboration is explained.

[36] At page 72 of the record the learned trial Judge dealt with the issue of corroboration. After defining the term or expression, he added at lines 4 to 6:

> "When I go through the evidence I shall point out to you matters that are capable of corroborating the evidence given by Crystal Felix but there are in fact very few such matters in this case."

In actual fact, there was no evidence capable of amounting to corroboration.

[37] The trial Judge however, went on to say to the jury at line 8 of the record [et seq] that:

> "I must tell you this however. Even though the supporting evidence may be weak, if after listening to Crystal give her testimony, if after looking at her recount of her story on the witness stand and after hearing her responses when she was cross-examined by Defence Counsel; if you are sure she was telling the truth, then you would be entitled to convict the accused if you are satisfied beyond reasonable doubt that he was the one who committed those offences with which he is charged."

He was careful to point out that the recent complaint by Crystal to Brendaly Nicholas after the occurrence of the incident was not to be regarded as supporting evidence because it was not independent evidence but provided consistency of her conduct with her testimony about what had happened to her.

[38] After referring to Archbold 1998 paragraph 16-20 on the law relating to corroboration and the recent cases of St. Clair Simon v R Crim App No. 5 of 1991 (Antigua Barbuda); Joseph Shane Merchant v R Crim App No. 2 of 1995 and Pivotte v R Crim App No. 11 of 1995 which lay down certain requirements or

directions which should guide Judges in giving such a warning and the reasons why they should give such warning, the learned DDP drew the attention of the Court to R v Makanjoula [1995] 1 WLR 1348 which sets out the modern view on the law regarding corroboration and which indicates that the question whether a corroboration warning should be given is a matter for the trial Judge. That view has since been followed in the Privy Counsel case R v Rennie Gilbert Privy Council Appeal No 10 of 2001 from the Eastern Caribbean Court of Appeal (Grenada).

[39] In Makanjoula, it was held *inter alia*, that it is a matter for the Judge's discretion, what if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness' evidence. It was further held that where some warning is required, it will be for the Judge to decide the strength and the terms of the warning. It does not have to be vested with the whole florid regime of the old corroboration rules.

[40] In Rennie Gilbert, the Court considered that the principle of law from the judgment of Lord Taylor CJ in Makanjoula appropriately gives effect to the purpose for which the rule regarding the corroboration warning in sexual cases existed. The purpose was and still is to give juries the appropriate directions to assist them to arrive at a safe verdict as part of a fair trial. The former rule of practice had not been conducive to achieving that result. It had led to inappropriate and indiscriminate directions being given which confused juries and created unfairness as between the prosecution and the defence and undermined rather than supported the safety of the jury's verdict.

[41] The prevailing view on corroboration as stated in Rennie Gilbert is that it is no longer necessary to warn the jury that it is dangerous to convict when no question has been raised as to the honesty of the complainant as opposed to the reliability

of the complainant's evidence. The Court rejected the decision in Pivotte on the ground that it was based:

> "on the discredited belief that regardless of the circumstances, the evidence of female complainants must be regarded as particularly suspect and particularly likely to be fabricated."

and held that the question whether or not to give a corroboration warning is a matter for the discretion of the trial Judge.

[42] At page 71, the learned trial Judge directed the jury of the need for caution when assessing evidence of the complainant and why it was necessary to be cautious. At page 72, he defined corroboration and informed the jury that they could convict on the evidence of the complainant alone if they believed that she was speaking the truth, even if her evidence was uncorroborated. Having regard to all the circumstances, that ground of appeal therefore fails.

[43] Ground 11 was abandoned and as regards ground 12, which states that, the Learned Judge unlawfully admitted the exhibits in evidence despite no proper foundation being laid, for instance:

[i] The exhibits had not been identified at the trial by the exhibit keeper, Inspector Agdoma.

[ii] There was no chain of custody established with the clothing the complainant said she wore when she was allegedly raped.

[iii] The sunscreen was not the colour originally stated by the complainant.

In my view it is clear from pages 42-43 of the record that the trial Judge lawfully and properly admitted the exhibits in question in evidence after having satisfied himself that the chain of custody was established in each case. He further went on to point out to the jury the discrepancies in colour of the sunscreen as described by the complainant and how discrepancies and inconsistencies in the evidence should be treated in his directions at page 82 of the record. That ground of appeal accordingly also fails.

[44] In sum, it is my considered opinion that, having regard to all the circumstances, whatever omissions or errors may have occurred in the course of the trial or in the summation those are venial in nature and resulted in no miscarriage of justice and that the conviction of the Appellant should be affirmed. The appeal against conviction is accordingly dismissed.

[45] On the question of sentence, Mr. Foster argued that 15 years imprisonment was in all the circumstances of the case excessive. The learned DPP however contended that in order to show that the sentence is manifestly excessive, the Appellant must demonstrate that the way he was dealt with was outside the broad range of penalties or other dispositions appropriate to the case.

[46] The Court is mindful of the fact that at the date of commission of the offence, the Appellant was 30 years of age and of unblemished character. The maximum sentence for the offence of rape in St Lucia is life imprisonment.

[47] The guidelines for sentencing in sexual offences cases were laid down by Sir Dennis Byron C.J. in the consolidated appeals of Winston Joseph No. 4 of 2000; Benadict Charles No. 8 of 2000 and Glenroy Sean Victor No. 7 of 2000. At page 8 of the judgment, Sir Dennis laid down the benchmark for sentencing in different cases of rape and went on to list the various aggravating and mitigating factors which the Court should consider in imposing sentence at page 9 of the judgment as follows:

[i] Violence was used over and above the force necessary to commit the offence.

In the present case, the Appellant slapped the complainant, punched her several times, placed a gun to her head and threatened to blow it off and after he had raped her, he kicked her out of the car, threw her clothing at her and drove off. On

any view, this was cruel, callous and contemptuous behaviour and treatment of a young girl.

[ii] The victim is very young or very old.

In this case the victim was 16 years of age and was from all accounts a virgin. In addition, the Appellant was in a position of trust as school teacher which he breached and betrayed in a most appalling manner.

Having regard to all the circumstances, the sentence of 15 years imprisonment is not in my view by any means excessive.

[48] The appeal is accordingly dismissed and the conviction and sentence are affirmed.

Sgd.
Ephraim Georges
Justice of Appeal [Ag.]

I Concur

Sir Dennis Byron
Chief Justice

I Concur

Albert Redhead
Justice of Appeal