MONTSERRAT

IN THE COURT OF APPEAL

HCRAP 2011/002

BETWEEN:

KEITHROY LLOYD

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Chief Justice [Ag.]
The Hon. Mr. Francis Belle — Justice of Appeal [Ag.]
The Hon. Mr. Mario Michel — Justice of Appeal [Ag.]

Appearances:

Mr. David S. Brandt for the Appellant
Ms. Kathy-Ann Pyke, Director of Public Prosecutions, and Mr. Oris Sullivan, Senior Crown Counsel for the Respondent

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2011: December 5, 6.

Criminal appeal against conviction and sentence – Rape – Unlawful carnal knowledge – Section 40(2) of the Supreme Court Act, Cap. 2.01, Revised Laws of Montserrat 2008 – Substitution of an alternative verdict by the Court of Appeal – Section 39(1) of the Supreme Court Act – Corroboration – Prosecutorial misconduct – Defence put forward in conflict with defence counsel's statement of the defence – Whether the trial judge erred in allowing hearsay evidence to be left to the jury at trial – Whether the trial judge erred in not giving adequate directions to the jury during his summing-up

The appellant, Keithroy Lloyd, was indicted and tried for the offence of rape of a fourteen year old girl contrary to section 117(1) of the Penal Code.[1] At the trial, a direction was given to the jury by the learned judge on the alternative verdict of unlawful carnal knowledge, although it was not a second count on the indictment. Notwithstanding this direction, on 21st July 2011, the appellant was convicted for the offence of rape for which he had been indicted, and sentenced to 10 years imprisonment. He appealed against his conviction on 3rd August 2011, challenging the manner in which the learned judge had conducted the trial, and the trial judge's directions on corroboration

[1] Cap. 4.02, Revised Laws of Montserrat 2008.

and the appellant's defence. The appellant contended that there were material irregularities in the course of the trial which affected its overall fairness.

Held: substituting a verdict of guilty of unlawful carnal knowledge for the verdict of guilty of rape found by the jury, and sentencing the appellant to 2 years imprisonment effective from the date of delivery of the judgment, subtracting the period of 4 months and 5 days which the appellant had spent in custody pending the determination of this appeal from the period of 2 years, that:

1. There were material irregularities and errors which would impact on the appellant's conviction for rape.

2. It would have been open to a jury properly directed to properly find that the appellant did have sexual intercourse with the virtual complainant, but that the virtual complainant may have consented to sexual intercourse. Consequently, there would be no miscarriage of justice if the Court were to substitute a verdict of guilty of unlawful carnal knowledge for the verdict of guilty of rape found by the jury at the trial.

   Section 40(2) of the Supreme Court Act, Cap. 2.01, Revised Laws of Montserrat 2008 applied.

3. A sentence of 2 years is appropriate for the offence of unlawful carnal knowledge, having taken into account the aggravating and mitigating factors in the instant case, including the time that the appellant has spent in custody, pending the hearing of the appeal.

   Desmond Baptiste and Others v The Queen Saint Vincent and The Grenadines High Court Criminal Appeal Nos. 8 and 10 of 2003 and Magisterial Criminal Appeal Nos. 16, 22, 25, 26, 29, 34, 35, 37, 41, 46 and 47 of 2003 (Consolidated) followed.

ORAL JUDGMENT

[1] This is the judgment of the court. The appellant was indicted and tried for the offence of rape of a fourteen year old girl on 15th August 2009, contrary to section 117(1) of the Penal Code.[2] He was convicted by a jury for that offence on 21st July 2011 and sentenced to 10 years imprisonment effective as of that date. On 3rd August, 2011 he appealed against his conviction. At the hearing of the appeal, we granted the appellant's notice of motion to amend his grounds of appeal which was filed on 29th September 2011.

[2] Cap. 4.02, Revised Laws of Montserrat 2008.

The Consent Issues

[2] Ground 1 of the amended grounds of appeal complain that the learned judge improperly interrupted defence counsel during his closing address to the jury on the essential ingredient of consent for proving rape, which effectively stultified defence counsel and prevented him from fully and forcefully addressing the jury on the issue of consent. Ground 5 alleges that the trial judge's direction to the jury on the issue of consent, corroboration and unlawful carnal knowledge confused the issues, thus causing those directions to be internally contradictory.

[3] Defence counsel in his address told the jury:[3]

> "There is a misconception in our laws that because somebody is 14 that for the purposes of rape they cannot give consent."

The trial judge interrupted and the following exchange took place before the jury:[4]

> "COURT: Is that so?
> MR. D. BRANDT: Yes My Lord?
> What I want to say is that somebody 14 can give consent for the purpose of rape.
> THE COURT: I do not agree with that. The law is a person under age of 16 in Montserrat cannot give consent to sexual intercourse.
> MR. D. BRANDT: Is it permissible for me to show you something.
> THE COURT: Yes. A person under the age of 16 years cannot give consent to sexual intercourse and rape embodies sexual intercourse. You may try to convince me when you are finished.
> MR. D. BRANDT: May it please you Ladies and Gentlemen of the Jury if the charge was unlawful sexual intercourse with a girl under 16 then there could be no consent but the charge is rape and if you find that the virtual complainant consented then there is no rape in mind.
> THE COURT: Unless there is statute that says otherwise then there will be a flaw with that argument but as I said when you are finish."

[4] The trial judge,[5] in the absence of the jury, was not convinced by Mr. Brandt and learned Crown Counsel that a fourteen year old girl could consent to sexual intercourse where the charge was rape. The learned trial judge ruled that he would not direct the jury on this

[3] See p. 137 of the Appeal Record.
[4] See pp. 137-138 of the Appeal Record.
[5] At pp. 153-156 and 162 of the Appeal Record.

aspect. However, in his summation to the jury,[6] the learned judge did give directions on the essential ingredients for rape, and made it quite clear to the jury that if they had doubts as to whether or not the virtual complainant consented to sexual intercourse with the appellant they should find him not guilty of rape. The learned Director of Public Prosecutions, Ms. Pyke, submitted that these directions were adequate and they cured the material irregularity and errors on the law previously made by the learned trial judge.

[5] Learned counsel Mr. Brandt submitted that this was not enough to cure the prejudice to the appellant, caused by the trial judge's interruptions during defence counsel's address to the jury. He submitted that the judge should have gone further by referring to his interruptions and directing the jury to disregard what he had previously said on the question of the law governing consent by a 14 year old to sexual intercourse on a charge of rape. Having not given such directions to the jury, that interruption was indelibly etched in the minds of the jury and the subsequent directions served to confuse the jury. Despite the submissions of the learned Director of Public Prosecutions ("DPP"), Ms. Pyke, we agree with Mr. Brandt's submissions that the judge should have gone further in his attempt to cure the material irregularity caused by the judge's interruptions of defence counsel's address and the learned judge's misapprehension as to the law.

The Hearsay Evidence

[6] There was evidence from the virtual complainant and her mother that the appellant, who was a family friend living with his wife at Look Out, had previously told the virtual complainant that he was in love with her, and inadmissible evidence that her mother had warned her to keep away from the appellant and not to go to his home. On the date of the offence, the appellant had telephoned the virtual complainant, told her that his wife who was away had left instructions for her to do household chores, and requested that she come to the appellant's home to fold clothes. The virtual complainant's mother gave her a phone before she left for the appellant's home. Inadmissible hearsay evidence was

[6] At pp. 132-133; p. 155, lines 22-25; p. 156, lines 19-23; p. 157 of the Appeal Record.

adduced at the trial without objection that the virtual complainant's mother had told her that if the appellant molests her she should telephone her, and that the virtual complainant's mother had telephoned her at the appellant's home to find out if she was alright and the virtual complainant told her mother that she was okay. The appellant took the virtual complainant home in his car after committing the offence. Her mother had then asked her if the appellant had interfered with her and she said no. It was only after the virtual complainant subsequently became ill and a doctor determined that she was pregnant that the virtual complainant reported that the appellant had raped her. Ground 6 complains about the trial judge's failure to give fair and adequate directions on this hearsay evidence. This hearsay evidence was not recent complaint and ought not to have been allowed by the learned trial judge. According to the submissions of learned counsel Mr. Brandt, the judge's omission to give directions on it which favoured the appellant, deprived the appellant of the jury's adequate consideration of the evidence as to whether or not the virtual complainant consented to sexual intercourse with the appellant.

[7] While the subsequent conduct of the virtual complainant on the prosecution's case was a factor to be taken into account in considering her credibility, we do not agree with learned counsel Mr. Brandt that the appellant was entitled to directions in his favour concerning the hearsay inadmissible evidence, some of which was adduced through cross-examination of the prosecution witnesses.

The Defence Raised

[8] Although the appellant had, through cross-examination of the witnesses by his counsel Mr. Brandt, and by his unsworn statement from the dock, denied that he ever had sexual intercourse with the virtual complainant, Mr. Brandt addressed the jury in the following manner:[7]

> "Look at what [the virtual complainant] said. That he held her both hands over her head and you saw how it happened. After folding the clothes she went into the bedroom where the defendant was sitting watching TV and the TV was close to

[7] At pp. 138-139 of the Appeal Record.

> the bed. She came into the room and stood by the TV and stood by the bed and said that she was ready. Then he asked her twice if he could make love to her. Then he pushed her down on the bed and she fell backward on the bed, her back was on the bed. He came over me. He held me. He held my knees together and held my hands over my head with his left hand. She demonstrated how he held her hand. Then he proceeded to pull down one side of my pants along with my panty. I ask you if it is possible as men and women of the world for somebody to pull down one side a jeans pants and panty. Look at the height of [the virtual complainant] she may have been a little shorter as men and women of the world although it was not given in evidence … you know what a jeans pants is. Is it physically possible for someone to hold your hand above your head in that manner and pull down one side of my pants along with my panty. I say to you that that is impossible. I want to say to you as well that our case is that [the virtual complainant] consented to the ses [sic]. That is our case, if the sex occurred. You will recall that [the virtual complainant] told you that the defendant told her before the 15th that I am in love [with] you."

[9] The learned trial judge, in dealing with the defence, told the jury that:[8]

> "It is difficult perhaps for you to determine what really is his defence because he told you that he never had sexual intercourse with her. He never raped her but in addressing you Mr. Brandt said that sexual intercourse was with consent."

We are of the view that the directions given to the jury as to what the defence was may have confused the jury and led them to believe that the comments of Mr. Brandt were to be considered as evidence or as a part of the appellant's defence when in fact the only defence was clearly that the appellant did not have sexual intercourse with the virtual complainant.

The Corroboration Issue

[10] Ground 4 alleges that the learned trial judge erred in law in highlighting certain aspects of the evidence which he characterised as being capable of consideration as corroboration. These highlights constituted material irregularities Mr. Brandt submitted.

[11] The trial judge elected to give a corroboration warning to the jury though the law does not mandate this. The learned DPP has conceded Mr. Brandt's submissions that the terms of

[8] Appeal Record, p. 158, lines 9-13.

those directions did not comport with the law governing corroboration. The learned judge identified the evidence of Dr. Kassim as evidence which corroborated the virtual complainant's testimony that she was raped by the appellant. Dr. Kassim saw and spoke to the appellant on two occasions following the report that the virtual complainant was raped by the appellant. His evidence was that the appellant and the virtual complainant's mother were in a car together when the appellant and the virtual complainant's mother asked him to help terminate the virtual complainant's pregnancy. On another occasion, Dr. Kassim said that he saw the appellant and the appellant told him he was responsible for the virtual complainant's pregnancy as he had sexual intercourse once with her and he had no reason to lie. Dr. Kassim's evidence supported the prosecution's case in two material particulars, namely: that the virtual complainant had sexual intercourse; and that it was the appellant who had sexual intercourse with her. Dr. Kassim's evidence offered no support for the material particular of consent or the absence of consent regarding the offence of rape. In that regard, the trial judge erred therefore when he told the jury that if they accepted Dr. Kassim's evidence then that was corroboration. Although the trial judge told the jury that if they found that there was no corroboration they may convict the accused for the offence of rape if they are satisfied to the extent that they feel sure that the virtual complainant was speaking the truth, the learned judge's misdirection on corroboration was a material misdirection which would have deprived the appellant of an acquittal on the count for rape on the indictment where the jury concluded that the virtual complainant's evidence that she did not consent to sex with the appellant was corroborated by Dr. Kassim's evidence. Had the jury been properly directed, it would have been open to them to find that the prosecution had proven beyond a reasonable doubt that the appellant did have sexual intercourse with the virtual complainant, but that they were not satisfied beyond a reasonable doubt that the virtual complainant did not consent to that sexual intercourse.

Prosecutorial Misconduct Issues

[12] Grounds 2 and 3 address the alleged improper comments of learned Crown Counsel at the trial in his address to the jury. Ground 3 points to other comments of Crown Counsel which allegedly show that Crown Counsel pressed for a conviction and failed to demonstrate that he is a Minister of Justice. Mr. Brandt pointed to passages in the address[9] including those where prosecuting counsel rhetorically asks:[10]

> "Are we willing to accept people who abuse our children. Are we willing to accept conduct which most law-abiding citizens believe or consider to be deplorable and by your verdict, your verdict as law-abiding citizens, your verdict as the 9 persons selected to represent the entire community you will send us a message as to what you are willing to accept. So consider it carefully and determine which direction you are willing to take…"

Other passages were identified at pages 128 to 132 where Crown Counsel comments on the failure of the defence counsel to put certain questions to witnesses although suggesting that the appellant did not commit the offence; and failure of the appellant to deny the detailed version of events as told by the virtual complainant and her mother, in his unsworn statement from the dock. Mr. Brandt submitted that the trial judge had a duty to inform the jury in his summation that neither the defendant nor his counsel had any duty to contradict the testimony of prosecution witnesses and if they did not do that, it does not mean that what the prosecution witnesses say is true. Mr. Brandt submitted further that the general warning which the judge gave[11] as to how to deal with comments of counsel in their closing addresses was not sufficient to correct the lengthy address of counsel for the prosecution.

[13] The Learned DPP described the comments complained of as "youthful exuberance" in Jamaican parlance, and overzealousness on the part of Crown counsel in pressing his case which fell short of the conduct frowned on by the Court in the case Huggins and

[9] At p. 128 of the Appeal Record.
[10] See p. 126, line 12 of the Appeal Record.
[11] At p. 150, lines 1-10 of the Appeal Record.

Others v The State[12] Learned counsel Mr. Brandt relied on several cases including the Huggins case where the Privy Council endorsed the decision of the trial judge to correct misstatements of prosecuting counsel prior to delivering her summation after the address of counsel for the prosecution and defence. The Board pointed out[13] that "this was done in a separate segment of the trial, so that it had maximum impact and it could not become submerged in the content of a long and detailed summing-up."

[14] The comments of learned Crown Counsel may have been emotive and bordering on the standard of propriety recommended by the plethora of decided cases; there was definitely a lapse on the part of the trial judge in holding the reins of propriety and decorum where he ignored the emotive comments of Crown Counsel. In such circumstances, the judge is required to admonish prosecuting counsel on his intemperate language and give a direction to the jury as to how to treat it. However, we do not think that it can be said that those comments and the failure of the trial judge to intervene, compromised the fairness of the appellant's trial to any major extent.

The Alternative Verdict

[15] The learned trial judge directed the jury on the alternative verdict of Unlawful Carnal Knowledge which was open to them, although it was not a second count on the indictment upon which the appellant was tried. Section 117(4)(b) of the Penal Code states that:

> "(4) On a trial for rape, the jury may find the accused guilty of –
> *(a)* …
> *(b)* sexual intercourse with a girl under the age of sixteen, under section 121;"

Section 121(2) of the Penal Code states that:

> "(2) It is immaterial in the case of a charge for an offence under this section that the intercourse was had with the consent of the girl concerned."

[12] (2008) 73 WIR 420.
[13] At para. 33.

[16] Section 40(2) of the Supreme Court Act[14] states:

> "(2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[17] The jury did not consider the offence of unlawful carnal knowledge as the learned judge instructed them that they should go on to consider it only where they found the appellant not guilty of rape.

Should the Proviso be Applied?

[18] Section 39(1) of the Supreme Court Act states that:

> "39. (1) The Court of Appeal on any such appeal against conviction shall subject as hereinafter provided allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal:
>
> 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 miscarriage of justice has actually occurred."

[19] We have considered the submissions of Mr. Brandt, the case law he relied on, and the submissions for the learned Director of Public Prosecutions concerning the effect of the material irregularities and errors on the overall fairness of the trial. Having weighed up the seriousness of those existing irregularities and errors, we are of the view that the impact of those irregularities and errors resonates on the appellant's conviction for rape. It appears to us on the strength of the prosecution's case that it would have been open to a jury properly directed to properly find that the appellant did have sexual intercourse with the

[14] Cap. 2.01, Revised Laws of Montserrat 2008.

virtual complainant as alleged by the prosecution but that the virtual complainant may have consented to sexual intercourse. Consequently, no miscarriage of justice would occur were we to substitute a verdict of guilty of unlawful carnal knowledge in the circumstances of this case pursuant to section 40(2) of the Supreme Court Act.

[20] We have had the benefit of submissions from counsel and an oral application of Mr. Brandt for the Notice of Appeal to be amended to reflect that there is also an appeal against sentence. This amendment is granted. The maximum sentence for the offence of unlawful carnal knowledge is 2 years.

[21] We consider a sentence of 2 years appropriate for the offence of unlawful carnal knowledge having applied our sentencing guidelines in Desmond Baptiste and Others v The Queen,[15] and taken into account the aggravating and mitigating factors, including the time of 4 months and 5 days that the appellant has spent in custody pending the hearing of the appeal.

[22] We note further that section 46(1) of the Supreme Court Act states that:

> "46. (1) The time during which an appellant is in custody pending the determination of his appeal shall … be reckoned as part of the term of any sentence to which he is for the time being subject."

[23] The result of the appeal therefore is that instead of allowing or dismissing the appeal, pursuant to section 40(2) of the Supreme Court Act a verdict of guilty of unlawful carnal knowledge is substituted for the verdict guilty of rape found by the jury; and the appellant is sentenced to 2 years imprisonment effective from this date and the period of 4 months and 5 days which the appellant has spent in custody pending the determination of this appeal is to be subtracted from the period of 2 years.

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[15] Saint Vincent and The Grenadines High Court Criminal Appeal Nos. 8 and 10 of 2003 and Magisterial Criminal Appeal Nos. 16, 22, 25, 26, 29, 34, 35, 37, 41, 46 and 47 of 2003 (Consolidated).

[24] Finally, we would recommend that the Legislature consider increasing the maximum penalty for the offence of unlawful carnal knowledge as has been done in other member states of the OECS, to reflect the seriousness of the offence and emphasize deterrence for this very prevalent offence.