

GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.16 OF 2003

BETWEEN:

TROY SIMON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Hugh A. Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Derick Sylvester for the Appellant
Mr. Christopher Nelson, Director of Public Prosecution, with him Mr. Darshan Ramdhanny, Senior Crown Counsel for the Respondent

2005: December 5;
2006: May 22.

JUDGMENT

- [1] RAWLINS, J.A.: In November 2003, the appellant, Mr. Simon, was convicted by a majority verdict by a jury on a charge of rape, which was allegedly committed in March 2001. He was sentenced to serve a term of seven years in prison. He appealed against the conviction and sentence. On 5th December 2005 this Court heard the appeal and, on the single ground that the failure to raise the issue of the good character of Mr. Simon, and, consequently, the omission by the trial judge to give a good character direction, we allowed the appeal, quashed the conviction and ordered a retrial. Taking into account Mr. Simon's frail physical condition, we

admitted him to bail in his own recognizance and with one surety. This judgment is for the purpose of stating the reasons for that decision.

Character

- [2] First, I shall set out the applicable principles. I shall then apply those principles to the present case.

The principles

- [3] The basic principle on which a court may determine whether an appellant was entitled to a good character direction was recently summarized by the Judicial Committee of the Privy Council in *Mantoor Ramdhanie and others v The State*.¹ Lord Mance, who delivered the judgment stated at paragraph 14:

"Where a defendant's good character is established by evidence (including an admission by the prosecution) or cross-examination, it is incumbent on a trial judge to direct the jury as to its significance in relation to both credibility and the (un)likelihood of the defendant having committed the offence charged: *R v. Vye* [1993] 1 WLR 471 and *R v. Aziz*, cited above. But before a judge is so obliged, the defence must have raised the point "distinctly", establishing the absence of any prior record by evidence or cross-examination: *Barrow v. The State* [1998] AC 846, 852d; *Teeluck and John v. The State* [2005] UKPC 14, para. 33(v). There are however "some circumstances in which the failure of defence counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel can lead to the conclusion that the conviction is unsafe and that there has been a miscarriage of justice": *Sealey and Headley v. The State* [2002] UKPC 52, para. 30; *Teeluck and John*, paras. 38-40. In the last case, the Board issued a reminder that it would not ordinarily entertain a ground of appeal based upon allegations of incompetence by counsel when raised for the first time before the Board", but it entertained such a ground in the case before it "because of the importance of the issue to the appellant John and because, on account of the frankness of his former counsel in furnishing information, [the Board was] in a good position to determine the issue without having to deal with any conflicts of fact" (para.38). The Board went on in para. 39 to say:

¹ [2005] UKPC 47, delivered the 15th day of December 2005, on appeal from the Court of Appeal of Trinidad and Tobago

‘There may possibly be cases in which counsel’s misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel’s conduct of the case according to some scale of ineptitude: see *Boodram v The State* [2002] 1 Cr App R 103 at para 39; *Balson v The State* [2005] UKPC 2; and cf *Anderson v HM Advocate* 1996 JC 29’.”

[4] The obligation of a trial judge to give a good character direction, will therefore ordinarily be triggered after the defence raises the point “distinctly”, establishing the absence of any prior criminal record by evidence or cross-examination. However, the exception to this general rule is that the accused will still be entitled to a good character direction in the rare cases in which the misbehaviour or ineptitude of defence counsel is so extreme that it constitutes a denial of due process to the accused. In *Rupert Yearwood v The Queen*,² Saunders JA, as he then was, stated that the authorities underline the principle that the good character of an accused is relevant to his credibility and to the likelihood that he would commit the offence in question. He said that, *prima facie*, where an accused has a good character, appropriate directions should be given by the judge as to the relevance of that good character.³

[5] In *Harry Wilson v The Queen*,⁴ after assessing the applicable statements that relate to the operation of this exception, and the judgment of the Judicial Committee in *Sealey and Headley v The State*,⁵ in particular, Saunders, JA, stated⁶ that the critical question was whether it could be said that the jury would necessarily have reached the same verdict if they had had the good character direction. This, in my view, is also the critical question in the present case.

² St. Vincent and the Grenadines Criminal Appeal No. 13 of 2002 (29th September 2003).

³ See paragraph 8 of the judgment. His reference was to *R. v Aziz* and to *Sealey*, referred to in paragraph 3.

⁴ St. Vincent and the Grenadines Criminal Appeal No. 15 of 2002 (22nd September 2003).

⁵ [2002] UKPC 52.

⁶ At paragraph 19 of the judgment.

This case

- [6] Mr. Sylvester, learned Counsel for Mr. Simon, submitted that although defence counsel did not raise good character during a trial, there is a critical issue of credibility in the case. He insisted that in such a case, it was important and mandatory for the court to give a good character direction, and failure to do so may have resulted in a miscarriage of justice and the conviction and sentence should accordingly be quashed. He pointed out that at the sentencing hearing, Mr. Lennox Purcell, a well known St. Georges business proprietor, who said that he knew Mr. Simon for about 30 years described Simon as 'an honourable guy in the community' whom he could not recall ever had any problems with the law.
- [7] The record of the proceedings of the trial does not indicate, definitively, that the character of Mr. Simon was raised in any meaningful manner by the defence during the trial. There is nothing that shows that the defence raised it in the cross examination of the virtual complainant or any of the witnesses for the prosecution. The accused, Simon, made an unsworn dock statement, but did not raise his own good character in that statement. The record contains a statement by Counsel for the accused, Simon, in his address to the jury after the prosecution and the defence had closed their cases. He stated "Character or credibility. Lifestyle."⁷ There is nothing to indicate that these words referred to the accused, the virtual complainant or another witness. The Record also reveals⁸ the following passing statements by Mr. Ramdhanny, learned Counsel for the Prosecution, in his address to the jury: "Character of complainant. Character of accused. Not really in issue is matter of speculation."
- [8] The fact is, however, that the prosecution had antecedents for a Troy Simon, which recorded a previous criminal conviction. The Record reveals⁹ that after Mr. Simon was convicted on 12th November 2003, he was remanded until 13th

⁷ See page 54 of the Record, line 7.

⁸ At page 54, lines 18-20.

⁹ At page 55, from line 10-13.

November for sentencing. When the sentencing session commenced on that day, the parties realized that those antecedents were not for the accused, Simon. The Police therefore undertook to conduct a proper antecedent check, which later revealed that the accused had no previous convictions.

[9] It is not possible to know whether the incorrect antecedents, which recorded a previous criminal conviction for the accused, Simon, had any influence on the omission by the defence to properly raise the issue of his good character. I think, however, that in light of the undoubted importance which character directions now assume in the criminal trial process, the interest of justice, and, in particular, in the interest of ensuring expedition and the optimum use of resources, the prosecution should always seek to obtain the antecedents of an accused person and to disclose them to the defence prior to arraignment. This would permit the parties to verify the antecedents in good time, and thus assist the defence to make an assessment of the character status of the accused, and whether, all other factors considered, the defence should so conduct its case to permit the accused to have the benefit of a good character direction.

[10] It is clear that this was a proper case for a character direction, notwithstanding that it is apparent that the good character of the accused was not raised by the defence. In *Harry Wilson*, Saunders JA considered the circumstances that made a good character direction particularly valuable in that case. He noted that the accused in that case had maintained his innocence all along, and it was a case of the word of the accused against the word of the main witness for the prosecution.¹⁰ These same circumstances also arise in the present case. Mr. Simon insists that he had consensual sexual intercourse with the virtual complainant, while the virtual complainant equally insists that he raped her. The issue of credibility was, therefore, squarely before the jury in the present case. Certain discrepancies arose in the evidence of the virtual complainant, and, in at least one instance, between her evidence and the evidence of her boyfriend,

¹⁰ See paragraph 20 of the judgment.

whom it is established that she called by telephone from the home of the accused, Simon, during or shortly after the incident, which is the subject of the rape charge.

[11] The learned trial judge referred to these discrepancies in the summation. He stated:¹¹

"There is no doubt that in the evidence as it unfolded there are a number of discrepancies, clear discrepancies. There are discrepancies with regard to things that are said in the High Court, which under cross-examination it was revealed were not said, at least not in the same way, in the Magistrate's Court. There are discrepancies with regard to the consistency of what [the virtual complainant] said she said to her boyfriend. The question is [that you still have to] look at these discrepancies from the point of view of discerning adults, and ask .. whether or not they can be explained by the very facts as they have been given on the witness stand. In other words, she may not have said the same thing on these two different occasions but is there an explanation;"

[12] In the circumstances, it is not possible to tell how a character direction would have influenced the verdict of the jury. It was in these premises that we allowed the appeal, set aside the sentence and ordered a retrial.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

¹¹ See page 7 line 22 – page 8 line 12 of the Record.