

GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 4 of 1992

BETWEEN:

1. CASSIUS BATSON
2. PHILLIP GILBERT

Appellant

and

THE QUEEN

Respondent

Before: The Hon. Mr. Justice Dennis Byron - President
The Hon. Dr. Nicholas Liverpool - Justice of Appeal
The Hon. Mr. Justice Satrohan Singh - Justice of Appeal

Appearances: Mr. Anselm Clouden for the Appellant
Mr. Keith Friday for the Respondent

1992: November 10th

JUDGMENT

BYRON J. A.

On the 9th day of April 1992, the appellants were convicted of Rape and sentenced to 3 years imprisonment by St. Paul J.

The grounds of this appeal were: -

- 1 That the learned trial judge failed to give proper directions to the jury as to the failure of the doctor to testify and be cross-examined.
- 2 The statements voluntarily given by the accused were not, adduced in evidence and that this was a material irregularity.
- 3 The judge should have alerted prosecution and defence to this omission so they could have adduced trial on the issue and if necessary apply to call further evidence, and
- 4 That the verdict was contrary to the weight of evidence.

Facts

The appellant Batson, was the virtual complainant's boyfriend at the time of the incident. On the night of 13th April 1991, he invited her out and took her to the bus driven by appellant Gilbert whom she knew casually. The bus was driven to a lonely spot on Fort Jeudy and parked.

It was the complainant's story that while there the appellant Batson took out his knife and told her he would kill her. He told her to take off her clothes so he could find out whether it was true that she was having a relationship with another man. He slapped her mouth, which bled, when she did not obey immediately. On her compliance he made her lie down on the seat of the bus inserted his finger in her vagina and told her she had been lying to him. She said he then had sexual intercourse with her without her consent. She said the appellant Gilbert who was at the front of the bus said he had nature too and when Batson was finished he called Gilbert to the complainant and told her to lie right there before he sticks a knife in her waist. She said that the appellant Gilbert also had sexual intercourse with her without her consent. She said that when Gilbert finished, the appellant Batson came back and had sexual intercourse with her again and when he finished Gilbert came back and he also had sexual intercourse with her a second time. She said that Batson came back a third time and had sexual intercourse with her. She was screaming and he was slapping her on her shoulder and Gilbert who was outside the bus was saying "stop doing the girl that."

She said that when they were leaving Fort Jeudy, Batson told her that was a punishment for her.

When she reached home she called the police. She was taken to the hospital where she was examined by doctor that same evening.

Both appellants made statements from the dock. They both admitted having sexual intercourse with the complainant but said that she consented. In particular Gilbert said that Batson called him to have sexual intercourse with her and when he went he kissed her and she responded and he had sexual intercourse with her, with her consent. During her cross-examination she had admitted that when Batson threatened to kill her, Gilbert had taken the knife away from him.

Ground 1

At the trial the deposition taken from the doctor at the preliminary inquiry was admitted in evidence in accordance with the relevant statutory provisions, on the ground of the doctor's

absence from Grenada.

It was argued by the appellant and conceded by the prosecution that the judge failed to discharge the duty described by Lord Griffiths in **SCOTT & BARNES v THE QUEEN** [1989] 2 All E.R. 305 A.C. p. 313 as follows: -

"It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination; but no rules can usefully be laid down to contest the detail to which a judge should descend in the individual case."

The details of the evidence contained in the deposition were that the examination took place about 11.58 p.m. on the night in question. At that time the complainant was in no acute distress. There was swelling on the back with 4 finger-like impressions. There was no external trauma to the vagina. No blood or secretion was found internally, and digital examination produced a conclusion that the vagina was warm and dry. No treatment was administered.

The doctor's evidence was relevant and admissible as an important link in the chain of events that led to the institution of these proceedings. There was very little in the deposition which was probative of the sexual intercourse which the appellants admitted had taken place. There was nothing in the deposition which could be related to consent which was the crucial issue in the trial.

The information about the physical and emotional condition of the complainant does not refute the appellants contentions on consent. It seems to be neutral on that question. There was no fact to be found from this evidence which had a material or damaging impact on the issue of consent.

Grounds 2 and 3

Statement not adduced in evidence

It was conceded that the appellants had made statements to the police which were produced at the preliminary inquiry and formed part of the deposition. At the trial the prosecution did not adduce them in evidence. The defendants did not make any

application for their production.

Counsel submitted that the failure of the prosecution to disclose documents (being the statements of the accused) was a material procedural irregularity which should lead to an acquittal. He relied on **R v MAGUIRE** [1992] 2 All E.R. 433. The headnote reads: -

"A failure on the part of the prosecution to disclose to the defence material documents or information which ought to have been disclosed may be a material 'procedural' irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed under section 2(1)(c) of the 1968 Act. Furthermore, the duty of disclosure is not confined to prosecution counsel but includes forensic scientists retained by the prosecution and accordingly failure by a forensic scientist to disclose material which he knew might have some bearing on the offence charged and the surrounding circumstances of the case may be a material irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed under section 2(1)(c) (see p. 446 c d f g and p 447 c to e, post); dicta of Lord Salmon in **R v Shannon** [1974] 2 All E.R. 1009 at 1051, of O'Connor LJ in **R v Paraskeva** (1982) 76 Cr App R 162 at 164, of Ralph Gibson LJ in **R v App** R 115 at 121 and **R v Hassan** (1968) 52 Cr App R 291 considered."

It is clear that the principles on which Maguire was decided are inapplicable here, because the statements about which the appellants complain were in their knowledge having been made by them, and in any event were disclosed on the depositions by the prosecution.

The appellant further submitted that the statements being documents forming part of the record it was wrong not to disclose them to the Court. He cited **R v IGBAL** [1940] 3 All E.R. 787. But Igbal's case deals with the refusal by the Court of an application by the defence to have a statement admitted in evidence. That case is therefore distinguishable because there was no application for admission of the statements.

The appellant also relied on **R v BOLTON JUSTICES ex parte SCALLY** [1991] 2 All E.R. 619 where the Court quashed a conviction where it found that the conduct of the prosecution was analogous to fraud and collusion. But in this case there were no such allegations, nor was there any basis for any such conclusions.

The point, here, was not non-disclosure, because there was disclosure on the depositions. The point was whether there was a duty on the prosecution to adduce the statements in evidence. It is clear that there could be no such duty. An obvious example is that where the voluntary character of an incriminating statement is questionable, it would be improper for the prosecution to adduce the statement in evidence. The prosecution in this case made the statement available. The police officer who took the statement gave evidence on oath and it was open to the defence in cross-examination and to apply to introduce the statement in evidence if they so wished. This ground of appeal therefore fails.

Ground 4

That the verdict was contrary to the weight of the evidence

We hold the view that despite the eloquence of counsel for the appellant this point was unarguable. The evidence of the complainant was consistent with the statements made by the appellants except in so far as to the issue of consent, but the circumstances in which the incident was admitted to have occurred by the accused inferentially supported her contentions as to lack of consent.

The appellant Batson said in Court: -

"We did have sex. I never used any violence or forced her to have sex at all. When we were having sex she said Phillip want sex too. I say if is so I finish, I quit. In all appearances she did not like what I said."

The appellant Gilbert made a lengthy statement which was substantially the same as what the complainant had said, except that he did not make any statements as to the use of violence.

The combined effect of the evidence given by the complainant and the statements of the appellants in Court was of such a nature that, in our view, there could have been no other verdict than guilty on both counts.

The admitted error of the trial judge in failing to give directions on how to deal with the deposition evidence could not have materially affected the verdict. Even if those directions were given any reasonable jury would nonetheless have convicted. As a result, we are of the opinion that no miscarriage of justice has been caused by the conviction of these appellants.

In the circumstances this is a fit case to apply the proviso to section 41(1) of the Eastern Caribbean Supreme Court (Grenada)

Act 1971, and dismiss the appeal.

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DENNIS BYRON
Justice of Appeal

I concur.

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NICHOLAS Liverpool
Justice of Appeal

I concur.

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SATROHAN SINGH
Justice of Appeal