

IN THE COURT OF APPEAL

BETWEEN:

FITZROY PHILLIP

- Appellant

and

THE QUEEN

- Respondent

Appearances: Mr. Anselm Clouden for the Appellant
Miss Velma Hylton for the Respondent

1992 July 8

JUDGMENT

The appellant was indicted on two counts with regard to his alleged interference with the virtual complainant (a female aged 11 years) on an isolated occasion between the 14th August and the 8th October, 1989 at Belmont in the parish of Saint George, Grenada. The first count was unlawful and indecent assault contrary to Section 180(f) of the Criminal Code of Grenada. The second count was unlawful carnal knowledge contrary to Section 182 of the said Criminal Code.

At the appellant's trial by a jury presided over by St. Paul J., the virtual complainant testified that the appellant committed certain indecent assaults culminating in the appellant's sexual intercourse with the virtual complainant. At the conclusion of the trial, the appellant was acquitted of the offence of unlawful and indecent assault but was convicted of the offence of unlawful and

carnal knowledge and was sentenced to imprisonment for a term of 7 years "plus seven strokes with the cane, subject to medical fitness". The appellant appeals against his conviction and sentence.

The sole ground of appeal argued is that the verdict is unsafe and unsatisfactory. To sustain that ground, counsel for the appellant sought to establish that having regard to misdirections by the learned judge on the question of corroboration and having regard to the evidence and other circumstances of the case, this Court should have a lurking doubt that justice may not have been done by the verdict.

The perplexity of the verdict is how the jury could justify convicting the appellant of unlawful and carnal knowledge after they had acquitted him of unlawful and indecent assault (which is one of the essential ingredients of unlawful and carnal knowledge).

In *R v Court* (1988) 2 AER 221 at 232, Lord Ackner said:-

"On a charge of indecent assault the prosecution must prove (1) that the accused intentionally assaulted the victim, (2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent, (3) that the accused intended to commit such an assault as if referred to in (2) above."

The jury's acquittal of the appellant of the offence of indecent assault should therefore be the result of the prosecution's failure to prove either the appellant's assault or the virtual complainant or the indecency of the assault or the intent to commit the assault. Whatever was fatal to conviction of the lesser offence of indecent assault should have been fatal to conviction of the greater offence of unlawful carnal knowledge. The jury nevertheless found the appellant not guilty of the lesser offence but guilty of the greater offence. It is therefore necessary to ascertain the apparent causes of these paradoxical or inconsistent verdicts.

The first apparent cause was the undesirable charging of the appellant with two offences which in fact constituted one compound offence arising out of a single incident. In *R v Harris* (1969) 1WIR 745 at 746, Edmund Davies L. J. Said:

"There is no suggestion of any indecent assault upon this same boy except that which formed the preliminary to and was followed very shortly thereafter by the commission of the full act of buggery. It does not seem to this court right or desirable that one and the same incident should be made the subject-matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue. We accordingly allow the application for leave to appeal against the conviction of indecent assault, which really merges into the conviction for the graver charge."

The second apparent cause was the learned judge's misdirection of the jury on the question of corroboration. After warning the jury of the danger of convicting the appellant on the uncorroborated evidence of the virtual complainant and after explaining to the jury the reason for the danger, the learned judge said: "The question is - is there any evidence of corroboration in the case? And I will give you a few instances I deem to be corroboration". Whereupon the learned judge proceeded to enumerate instances of evidence which were not capable of amounting to corroboration. He was careful to tell the jury that the evidence enumerated was not corroborative of the alleged intercourse between the appellant and the virtual complainant. But he had previously told them "Then you may ask, what is corroboration? And I tell you corroboration is no more than evidence which confirms or affirms or strengthens other evidence. That is evidence which makes other evidence more probable". This inaccurate definition of corroboration and the learned judge's enumeration of instances which were not but which he deemed to be corroboration must have misled the jury to conclude that legal corroboration is not confined to supportive evidence of incriminating evidence.

The third apparent cause was the learned judge's direction to the jury in regard to alternative verdicts. The direction to the jury was as follows:-

"The counts are in the alternative.
by that I mean, if you find him guilty
of one you cannot find him guilty of
the other."

This was a clear misdirection which must have confused the jury. Unfortunately, it is impossible to determine how the jury interpreted the learned judge's direction on misdirection so as to return the two inconsistent verdicts.

The fourth apparent cause was the failure of the learned judge to advise the jury to consider the greater offence of unlawful carnal knowledge before considering the lesser offence of indecent assault.

According to Blackstone's Criminal Practice (1991) at page 1248

"A rather different problem arises where counts are not strict alternatives, in the sense that a conviction for both would be unlawful, but they arise out of the same facts and are of differing degrees of gravity (e.g., counts for wounding with intent to cause grievous bodily harm and malicious wounding contrary to ss 18 and 20 respectively of the offence against the Person Act 1861). It is usual in such cases for the judge summing-up to tell the jury to consider first the more serious count and only to go on to consider the lesser one if they are not satisfied as to the former. Similarly, when verdicts are taken, the foreman will be asked first for the verdict on the graver count. If it is guilty, the jury will be discharged from giving a verdict on the other; if it is not guilty, a verdict is also taken on the lesser count. It would not be proper in such cases to allow the jury to convict on both counts because the lesser count really merged in the greater."

In *R v Andrews - Weatherfoil Ltd* (1972) 56 Cr. App R 31 at 40, *Evaleigh J* said:

"As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another. Such a result may be due to differences in the evidence presented at the two trials or simply to the different views which the juries separately take of the witnesses. That the result produced by such inconsistency is "unsatisfactory" cannot be disputed, but it is the unsatisfactory character of the guilty verdict to which section 13 of the Criminal Justice Act 1968 is directed, rather than an unsatisfactory result of the two trials as a whole. When inconsistent verdicts are returned by the same jury, the position is usually more simple. If the inconsistency shows that that single jury was confused, or self-contradictory, its conclusions are unsatisfactory or unsafe and neither verdict is reliable."

Having regard the conduct of the trial and the learned judge's misdirections, I consider the verdict to be unsafe and unsatisfactory for the reason that I have a reasonable or lurking doubt that justice may not have been done by the verdict. I would accordingly allow the appeal, quash the conviction and set aside the sentence.

BYRON, J.A

On the 28th November, 1991, after a trial on a two count indictment, the appellant was acquitted of indecent assault but convicted of unlawful carnal knowledge of a female below the age of 13 years and sentenced to 7 years imprisonment and 7 strokes.

Counsel for the appellant argued that the conviction was unsafe and unsatisfactory because the judge made errors in his directions to the jury on the subject of corroboration, and also that the verdicts were inconsistent. He also complained that the sentence was excessive.

The prosecution's case was that the virtual complainant was about 11 years old one night in October 1990 when the appellant who is a friend of the family came to the home about 10.00 p.m when only her 6 year brother was there . He tied the hands of the complainant behind her back put a panty in her mouth, pulled off her clothes, pulled her into her father's room, pushed his finger in her vagina which was scraped by his nail, he pushed his penis in her vagina for about 15 minutes. Then he took it out and blood came from her vagina, and then he ran when she heard somebody passing.

The next day the complainant was examined by Dr. Theresa Simon who found bruising to the vulva but an intact hymen. The doctor expressed the opinions that the bruising was caused by a penis or finger, but "The presence of the hymen means there was no actual introduction of the penis into the vagina".

The appellant's case was that he was looking at a movie with the complainant before going to work at the Ramada Inn. He denied the allegations of assault and carnal knowledge.

The doctor's evidence did not support the conclusion that the

appellant's penis had penetrated the vagina of the complainant, an essential ingredient in the offence of unlawful carnal knowledge. The Judge had directed the jury that indecent assault was an unlawful touching of the private parts, so that the complainant's evidence that the appellant put his finger in her vagina supported as it was by the doctor's finding of bruising to the vulva, if believed, would support the conclusion that an indecent assault had been committed.

The jury's verdict of acquittal for indecent assault and conviction for carnal knowledge seems to be illogical, not only on the basis of the evidence in this case but also as a general principle that carnal knowledge cannot be committed without an unlawful touching of the private parts. It is difficult to see how a jury could be sure that unlawful carnal knowledge was committed, but not an indecent assault.

The learned D.P.P pointed out that the jury's verdict was not necessarily inconsistent because the trial judge had directed them that the counts of indecent assault and unlawful carnal knowledge were alternative and that in pursuance of those directions the jury could have opted to convict on the more serious offence of carnal knowledge having believed the testimony of the complainant in full. She conceded that the judge erred in this direction because the counts were not alternative, as the indecent assault related to the insertion of the finger, and the carnal knowledge to the penetration of the penis.

Even if the counts were alternative the position is clearly set out in *Blackstone's Criminal Practice 1991* at D-15-8 as follows:-

"The general rule that there should be verdicts on each count is subject to the qualification that, where a jury wishes to convict on one of two counts which are in the alternative, it is preferable to take a verdict only on that count and discharge them from giving a verdict on the other. This is because the Court of Appeal will then, in appropriate circumstances, be able on appeal to substitute for the jury's verdict, a verdict of guilty of the alternative count, whereas if the jury are allowed formally to acquit the accused of the alternative, their verdict on that must stand, even though the conviction on the other has to

be quashed (See [1954] 1WLR 678, *Melvin* [1953] 1 QB 481, and *Rome* [1956 Crim. L.R 46]).

On Corroboration

The well established rule is that it is the duty of the trial judge to warn the jury that although it is lawful to do so, it is dangerous to convict on the uncorroborated evidence of this complainant for two reasons. In the first place, she was the female complainant of a sexual offence and experience has shown that in such cases testimony can be fabricated for a variety of reasons and sometimes for no reason at all and that an accusation of a sexual offence once made is difficult to refute. In the second place, children of tender years are known to be fanciful and easily influenced and to make up stories or exaggerate whether from lack of understanding or over active imaginations. (See *Nelson Abraham and the Queen, St. Lucia, Crim. App 40/91* where *Kellman v State* [1975] 26 WIR 438, and *R V Spencer* 1987 1AC 128 were followed).

The judge did tell the jury that it was dangerous to convict on the uncorroborated evidence of the complainant, but in explaining what corroboration was and whether this was a case where there was corroboration, he made fundamental errors.

He told the jury:

"I tell you corroboration is no more than evidence which confirms or affirms or strengthens other evidence. That is evidence which makes other evidence more probable".

Apart from using the word "probable" which could have misled the jury to believe that the standard of proof was on a balance of probabilities, the judge failed to explain that in criminal cases corroboration means evidence which confirms in some material particular that the accused committed the crime. Corroboration is not just any evidence which supports some aspect of the prosecution's case or the evidence of the complainant. Evidence is only capable of amounting to corroboration if points to the accused having committed the crime.

The judge compounded the defect in his definition by purporting to give a few instances he deemed to be corroboration.

The instances given by the judge related to the statement of the accused that he was in the complainant's home looking at a movie.

He summed up the effect of the examples he gave as follows:

"So these are some instances of corroboration. But though they corroborate her evidence in some material particular, they do not corroborate her evidence that he was in truth and in fact the man who had sex with her in her home".

Evidence which did not point to the fact that the accused had sex with the complainant is not capable of amounting to corroboration in law.

The effect of these directions was that the judge pointed out to the jury evidence as being corroborative which was incapable in law of having that effect. It is inevitable that the jury would therefore have approached this case on the false basis that it was not dangerous to act on the evidence of the complainant because it was corroborated.

On the basis of a long line of authorities this would be a serious misdirection of the jury, which could result in an unsafe and unsatisfactory verdict.

In ~~my~~ ^{of combination} view the ~~corroborative~~ of this error and the apparent inconsistency of the verdicts we should not allow the conviction for unlawful carnal knowledge to stand. It is clear that in this case, a retrial would be inappropriate as the jury have already returned a verdict of not guilty for the indecent assault. I would allow the appeal and set aside the conviction and sentence.

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VINCENT F. FLOISSAC
Chief Justice

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C. M. D. BYRON
Justice of Appeal

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SATROHAN SINGH
Justice of Appeal (Ag.)