The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 8 of 2007

Between:

TEWOLDE MATHIN SELASSIE

Appellant

-V-

THE QUEEN

Respondent

Before: **Hon. Justice Zacca, President**
Hon. Justice Ward, JA
Hon. Justice Auld, JA

Date of Hearing: **4th June 2008**
Date of Judgment: **18th June 2008**

REASONS FOR JUDGMENT

Hon. Justice Sir Austin Ward:

On the 4th June 2008 we dismissed the appeal against conviction and sentence. We now give our reasons.

The Appellant was convicted on 8th May 2007 of burglary and serious sexual assault committed on 19th January 2005 and was sentenced to terms of imprisonment of 8 years and 25 years respectively to run concurrently. He has appealed against conviction and sentence.

The evidence was that a male burglar removed an air-conditioning unit from the window of a dwelling house in Pembroke Parish, that he entered the bedroom of a 15-year-old girl who was sleeping therein and that he viciously buggered her and threatened to kill her if she screamed before escaping. From remarks made to the girl by the burglar, one may reasonably infer that he had targeted her beforehand. The appellant was linked to the scene of the crime by DNA evidence. At the trial no evidence was adduced by or on behalf of the appellant.

Ground 1 of the Notice of Appeal is that the learned Trial Judge erred in failing to find in favour of the Appellant in his no case application.

At the end of the evidence led on behalf of the Prosecution, Ms. Christopher, Counsel for the Appellant, submitted that there was no case to answer as the evidence linking the Appellant to the scene of the crime was weak and tenuous and should not have been allowed to be placed before the jury. That application was renewed before this Court.

There was DNA evidence linking the Appellant to the scene of the crime. The weight to be given to that evidence was properly a matter for the jury and there was a case for the Appellant to answer. *R v Galbraith* 73 Cr. App. R. 124, as Ms. Christopher acknowledged before us.

The witness, Tricia Lynn Saul was declared an expert for the purposes of interpreting and comparing DNA profiles and assigning a statistical weight to any matches or inclusions, that is to say, a DNA expert.

She examined a vaginal swab taken from the victim on 19th January 2005 which matched her known female profile. A male profile was also

generated from the same vaginal swab which had tested positive for spermatozoa and that profile matched the known blood sample of the Appellant taken by Dr. Heir on 5th May 2005.

From this match the jury concluded, after due warning, that there was a strong statistical probability that the Appellant was the perpetrator, and in the absence of any evidence to the contrary, convicted him.

Ground 2 is that the learned Trial Judge erred in failing to find that there was no continuity established in respect of the blood sample of the victim: that is that there was no or no sufficient evidence from Dr. West and Nurse Brewster-Minors. The learned Trial Judge misdirected the jury in suggesting that the fact that the Appellant's Counsel did not cross-examine the Doctor and the Nurse should be of significance. Further the learned Trial Judge did nothing to identify for the jury the issue of continuity. The learned Trial Judge later stated:

> "Remember CQ2 is (the victim's) blood".

Ground 3 is that the learned Trial Judge erred in permitting the jury to examine the sexual assault kit without same having been properly proved and containing a great deal of hearsay evidence.

It was argued by Defence Counsel that there is no evidence that the samples in the Sexual Assault Response Team Collection Kit were the victim's samples which were handed over to the Government Analyst and later examined by the DNA expert witness, Ms. Saul, because of a lack of positive identification.

On 19th January 2005 within hours of the occurrence of the incident, the victim was seen at King Edward VII Memorial Hospital about 4 a.m. by Dr. West, the Paediatrician in the presence of Nurse Brewster-Minors, the SART Nurse. He examined the victim and took anal and vaginal swabs and blood samples which were placed in a SART Collection Kit, sealed, labelled and handed over at 5 a.m. to WDC Burrows who was positioned outside the examination room. Later that morning WDC Burrows delivered the sealed SART Collection Kit to Ms. Quigley, the Government Analyst at 10:10 a.m. Ms. Quigley opened it and removed an envelope labelled "Known blood sample (the victim)" which contained a blood sample. She prepared a blood stain card for transmission overseas, sealed it and placed it in a Police Evidence Bag and labelled it "CQ2". There was no evidence to suggest that the preparatory work done by Ms. Quigley had not in fact been done, so that the jury could properly find that the blood on the stain card was indeed the blood of the victim. The Trial Judge had repeatedly warned the jury that they were the judges of fact, so that subject to that caveat, there was nothing improper in drawing the conclusion that "CQ2 is (the victim's) blood."

On 4th February 2005 at 11:30 a.m. Inspector Cardwell collected the sealed SART Collection Kit with reference to the victim and a sealed Evidence Bag containing the victim's blood stain card from the laboratory of the Government Analyst. On 14th February the said items were sent to Canada for forensic examination.

There was evidence before the jury from which they could find that the items which were placed in the SART Collection Kit by Dr. West were the

same items which were later examined by Ms. Quigley. There was no time or opportunity for the contents to be altered. As stated in *R (on the application of Byrne) v Director of Public Prosecutions* [2003] EWHC 397 (Admin) at p.401 Para 10.

"In determining whether that evidence was capable of establishing continuity, the trial court is entitled to make sensible inferences from the evidence before it."

The evidence in this case relates to one SART Collection Kit and to one Kit only. There is no evidence to suggest that the contents of different kits could have been mixed in some way or that there was tampering with the kits or that there was contamination of different samples because of contact between them.

This case differs from *Patel v Comptroller of Customs* [1996] AC 356 in which because of the conflicting evidence as to the origin of a box, whether as shown on the label, Morocco, or as shown on the declaration, India, the falsity of the declaration could not be reasonably inferred. There is no conflicting evidence as to the continuity of the items relating to the victim. The evidence pointed in one direction only. The source of the samples, and subsequent handling have all been properly documented.

Ms. Christopher also argued that there is an issue with what purports to be the Appellant's sample of blood.

On 5th May 2005 at 11:51 a.m. blood was taken from the Appellant by Dr. Heir in the presence of Sgt. Taylor. The sample was conveyed by Inspector Cardwell to the Government Laboratory and handed to the Analyst, Ms. Quigley, at 12:35 p.m. It was in a Police Evidence Bag with a

label with the name of the Appellant written thereon. Ms. Quigley prepared a stain card from the blood and after it was dry she sealed it into a Police Evidence Bag and labelled it "CQ6".

There is a discrepancy over the numbering on the label of the Appellant's blood sample—whether it was A375418 or A375118.

An explanation for the discrepancy was given by Inspector Cardwell to the effect that in copying a number from his notebook to the Form he copied a "1" instead of a "4". Ms. Quigley said that the only bag she received with the blood sample, said to be that of the Appellant, bore the number A375418.

The resolution of the discrepancy was clearly a matter for the jury who had received an adequate direction on the treatment of discrepancies.

Exhibit 'CQ6' was sent to Canada for forensic examination on 6th May 2005.

Counsel for the Appellant kept repeating the phrase "strict proof" like some magical incantation which seemed to suggest a higher standard of proof than that required under the criminal law of proof beyond reasonable doubt.

We are satisfied that there was cogent evidence from which the jury could conclude that the samples taken by Dr. West were the same samples examined by Ms. Quigley and labelled Exhibit 'CQ2'. We are likewise satisfied that there was evidence to support the jury's conclusion that Exhibit 'CQ6' was the blood sample of the Appellant extracted by Dr. Heir and later linked by Ms. Saul, by means of DNA profiling, to Exhibit 'CQ2' taken from the victim.

As to the complaint that the learned Trial Judge commented to the jury that Exhibit 'CQ2' is (the victim's) blood, one must consider the context in which the statement was made and assess it against the warning frequently given by the Trial Judge in his Summation that questions of fact were for the jury and comments on factual matters could be rejected by the jury, if they so chose. We are not persuaded that the Trial Judge used his position to persuade the jury what facts to find.

Ground 5 of the Notice of Appeal is that the learned Trial Judge erred, having ruled correctly that it was inadmissible for the Crown to lead in evidence that the Complainant has never had sex before, to then repeat that prejudicial statement on two occasions in his instructions to the jury.

The possible prejudice in the statement is what is complained of. There could have been no prejudice vis-à-vis the Appellant for his defence was not consent nor fabrication, but that he was not the person who committed the crime.

But one should go further and consider the mischief at which the legislation was directed. It was designed to protect victims from specious questioning by defendants or their counsel, to save them from assaults on their personal dignity.

We cannot accept that evidence of previous sexual activity is inadmissible no matter by whom asked. Section 329 of the Criminal Code clearly contemplates that there are circumstances in which questions of that nature may be asked, provided that prior leave is obtained. That is not a question for determination in this appeal.

Ground 6 reads:

"The learned Trial Judge erred in instructing the jury that evidence of the Appellant was found (which was a fact for the jury to consider), then shortly thereafter stating that the Appellant threatened the Complainant with a knife. In "correcting" this misdirection the learned Trial Judge intemperately stated: "The Prosecution says that the person who did that is the Defendant" while pointing at the Appellant with his finger. The Appellant will rely on the tone and gesture of the learned Trial Judge as having prejudiced the Defendant."

We found no merit in this Ground of Appeal. Whenever the evidence was mischaracterized, it was corrected immediately. Whenever a comment was made, or an inference drawn, the Trial Judge was at pains to instruct the jury that matters of fact were entirely within their province and that they should not adopt any of his comments unless they agreed with them. He had not exceeded the proper bounds of judicial comment as in *Mears v R* 97 Cr. App. R. 239 in which the judge stated the defendant's case was not believable because he, the judge, did not think any human being could be so degenerate to make up such a story.

We were invited to listen to a tape recording of a part of the proceedings to hear for ourselves the tone of the Trial Judge. We heard nothing which supported the complaint.

As to Sentence, the Trial Judge aptly described the offence of serious sexual assault "a vicious heinous crime of the worst kind." The circumstances were indeed horrific. The enormity of the crime is such that we can see nothing wrong with the sentence of imprisonment for 25 years

for the serious sexual assault. The Courts must be seen to protect law-abiding citizens from such calculatedly vile attacks in their own homes.

The maximum sentence allowed by law is imprisonment for a term of thirty years. In the circumstances of this case we do not regard a sentence of imprisonment for 25 years as manifestly excessive.

For the above reasons, we dismissed the appeals against conviction and sentence.

Signed

Zacca, President

I agree

Signed

Ward, JA

Signed

Auld, JA

I agree