The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 16 of 2015

Between:

KIJON BAKER

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Ms. Elizabeth Christopher and Ms. Susan Mulligan, Christopher's for the Appellant
Mr. Loxly Ricketts and Ms. Jaleesa Simons, Attorney General's Chambers for the Respondent

Date of Hearing: **23 November 2016**

Date of Judgment: **23 February 2017**

JUDGMENT

Baker, P

Introduction

1. This is the judgment of the Court to which each member has contributed. About 11:30 p.m. on 4 November 2014, the Complainant (C) was in bed with her three year old daughter in her one bedroom ground floor apartment. Her

one year old son was in his cot nearby. She was woken by a man crouched at the foot of her bed and told to "shut up before I kill you." She was then brutally raped. The man wore dark clothing and his face was covered. He appeared to have a knife which she felt on her cheek. He lifted C's legs up, took off the tights she was wearing and had sexual intercourse with her. After he had ejaculated inside C, he told her to turn over. At this point, C tried to fight him off and to escape through the window but he pulled her back by the ankles. The little boy began to cry and the man then left. She called first the father of her children and then her parents and after they had arrived, the police. She told the police the name of the person whom she suspected was her assailant i.e. Kijon Baker (the Appellant).

2. On 12 October 2015 the Appellant was convicted of Aggravated Burglary contrary to Section 340 (1) of the Criminal Code and Serious Sexual Assault contrary to Section 325 (1) (a) of the Criminal Code, and sentenced to concurrent sentences of 8 and 25 years. He appeals against conviction and sentence, the latter with the leave of the single judge.

3. The Appellant has advanced nine grounds of appeal against conviction, one of which is no longer pursued.

Appearance of Bias

4. Ms. Mulligan, who argued this ground on behalf of the Appellant, contended that the judge, Greaves J., should have recused himself as there was an appearance of bias on his part against the Appellant's counsel at the trial, Ms. Christopher. The law is stated by Lord Hope in the well-known case of *Porter v Magill* [2002] 1 All ER 465 at 507 c:

> "…The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances

would lead a fair-minded and informed observer to conclude there was a real possibility or a real danger, the two being the same, that the tribunal was biased…"

5. *Porter v Magill* was a civil case and the test above stated was described by Lord Hope as a modest adjustment to the test in *R v Gough* [1993] AC 646. *Gough* was a criminal case and involved the possible bias of a juror. Whether one is considering a judge or a juror the test is the same. There is however, an important difference between a criminal trial by jury and a civil trial. In the former the fact finder is the jury and in the latter the judge.

6. The basis of the case of apparent bias on the part of the judge was an allegation that the judge had personal animosity towards Ms. Christopher. Ms. Mulligan sought to rely on exchanges between the judge and Ms. Christopher in other criminal trials and extracts from the transcript in the present case. We find no assistance whatsoever in examining exchanges between the judge and counsel in other trials. As for the present trial, there are two very important factors. First, the alleged animosity is directed towards Ms. Christopher and not the Appellant. Secondly, all the exchanges of which complaint is made took place in the absence of the jury. In our judgment, looking at the circumstances that might have a bearing on the suggestion of bias, it is critical to look and see whether the judge did or said anything that might have had a bearing on the fairness of the trial.

7. Ms. Christopher's first application for the judge to recuse himself was on 6 October 2015, prior to the jury being sworn. The application was made in the context that Ms. Christopher had previously made an unsuccessful written application to have the start date of the trial put back. The basis for Ms. Christopher's recusal application related to differences with the judge during other cases. At the same time she applied for an adjournment on the basis that she was not ready to proceed. The judge rejected both applications; he was right to do so. Ms. Christopher is a forceful and determined advocate.

Greaves J. is a strong judge who keeps a firm grip on the running of his court. Clashes have on occasion occurred between them, but there is nothing to suggest these were in any way causative of unfairness to the Appellant.

8. The next event of significance to this ground of appeal occurred the following day during the cross-examination of C when Ms. Christopher sought to cross-examine her about her sexual history with the Appellant. Applications of this kind are governed by section 329 of the Criminal Code. By section 329 (4) applications must be made in writing, giving particulars of the evidence sought to be adduced or the questions asked and their relevance to an issue in the case. They must also be made not less than two clear days before the application is to be heard and they must be served on the prosecutor and the court. Quite apart from these procedural requirements there are strict criteria to be met before the court may allow such an application. Ms. Christopher's overriding difficulty was that she had not complied with any of these requirements and sought abridgement of time.

9. The background facts are these. C's evidence was that she met the Appellant when he introduced himself in about March 2008. Thereafter, she did not see him until, probably, the following year. They then used to pass the time of day whenever they saw each other. He took her out on a date in late 2013 or early 2014 but nothing came of it because C did not wish to embark on a relationship. There was sporadic contact thereafter, but at the Appellant's instigation. She had borrowed some money from him because she was behind on her rent, and had repaid him a few days later. That was in March 2014, and that was the last time C had spoken to the Appellant. Thereafter, he sent her messages on Facebook but she did not respond because she felt he was harassing and bothering her. He had never been to her house before the night of the rape.

10. Ms. Christopher wanted to cross-examine C on the issue of previous sexual history between her and the Appellant. The judge rejected the application

without calling on the prosecution, making some fairly robust observations about the lateness of the application during the course of Ms. Christopher's submissions. In our judgment the judge was fully entitled to refuse the application. Ms. Christopher had been instructed long before the trial and should have been fully aware of her client's case. In was an unimpressive answer that her mind had been engaged on another trial. The immediate response to the judge's refusal was a fresh application that he should recuse himself. This time it was based on comments he had made during the course of argument, in particular the implication that Ms. Christopher was inventing a story for her client. The judge's comments were no doubt on occasion stronger than they should have been, but precipitated by Ms. Christopher's apparent attitude to the court.

11. Ms. Christopher repeated her application for recusal an hour later. Again it was summarily rejected by the judge. However, the judge in doing so did invite Ms. Christopher, despite her failing to comply with the statute, to say what it was she would like to put to C. There was then further discussion which concluded with the judge allowing limited examination of the matters identified by Ms. Christopher. In the event Ms. Christopher chose not to avail herself of the opportunity and, when the time came, the Appellant elected not to give evidence. This indicates to us that if there was any animosity towards counsel, which the judge firmly denied during Ms. Christopher's submissions, it did not reflect adversely on the Appellant's case.

12. Applying the test adumbrated by Lord Hope in *Porter v Magill*, and examining the circumstances of what occurred it is plain that that the test of apparent bias is not made out. Nor did what occurred in any way undermine the fairness of the trial. This case is wholly different from one such as *R v Clewer* (1953) 37 Cr App R 37 where the conduct of the judge of which complaint was made took place in the presence of the jury.

Admission of Reponses from the Appellant over the Telephone

13. When C told the police the name of the man she suspected, the police set about trying to find him. They went to his house. He wasn't there, but his girlfriend Yolanda Bashir was. This was in the early hours of 5 November. Soon after 6:00 a.m., Ms. Bashir telephoned the Appellant, who said he wanted to speak to the police. She handed the phone to the senior officer present, Inspector Geraghty, who introduced himself and said he wished to speak to him in relation to an allegation that had been made. The Appellant asked the nature of the allegation, but Inspector Geraghty said he was not prepared to discuss it in any detail over the phone and needed to speak to him in person. During the conversation he asked the Appellant where he had been last night, to which his reply was that he had been with friends on Riviera. A little later he said he hadn't been with friends last night, he had been with a girl named Shanae Vanderpool.

14. Ms. Christopher sought the exclusion of this evidence on the basis that a caution should have been administered and that Inspector Geraghty should have made a contemporaneous note of the conversation, which the Appellant should have been given an opportunity to confirm. Mr. Ricketts for the Crown responded that the line of inquiry engaged in by the officer was not one that suggested accusing the Appellant of an offence. His response was exculpatory rather than inculpatory and the finger only really pointed at the Appellant once the results of DNA testing were to hand. The officer's notes, he submitted, were made at the first reasonable opportunity when he had returned to Hamilton Police Station. In the event the Appellant's responses were put to him in an interview the following day and he replied "no comment" to all the questions.

15. The judge ruled that there was no need to caution the Appellant but that if he was wrong on that, the evidence should not be excluded. Inspector Geraghty's

note was made at the first reasonable opportunity and the spirit of the Code was complied with by putting the answer to him in a subsequent interview.

16. In our judgment Inspector Geraghty did have reasonable grounds for suspecting that the Appellant was the assailant and he should have been cautioned. On the other hand, it is difficult to believe that his answer would have been any different if he had been cautioned and this was hardly the most heinous breach. Failure to administer a caution is not necessarily fatal to the admissibility of answers subsequently given. See *R v Gill* [2004] 1 Cr App R 20. Ms. Christopher sought to rely on Section 93 (1) of the Police and Criminal Evidence Act 2006 which provides:

> "…In any proceedings the Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard of all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit…"

17. That section gives the judge discretion and in our judgment the admission of the evidence did not undermine the fairness of the proceedings and the learned judge was entitled to admit it. A related complaint about the Appellant's answers to Inspector Geraghty is as to the judge's summing up to the jury. The Appellant's defence at the trial as put in cross-examination of C was that he did go to C's apartment and that sexual intercourse was consensual. This was strongly denied by C and the Appellant did not himself give evidence to that effect. He was not of course obliged to do so and he was fully entitled to put the prosecution to proof of its case. The net result however was that there was no evidence to contradict that of C that she was raped.

18. The judge firmly made the point to the jury that the prosecution was entitled to rely on the difference between what the Appellant had said to Inspector Geraghty and his defence at trial, and that once confronted with the DNA evidence that tied him to having had sex with C he was forced to change his story. The particular passage relied upon by the Appellant is at pages 617 / 618 where the judge said:

> "…The prosecution relies upon this evidence in support of their case against the Defendant.
> In particular that oral which you may think the prosecution is entitled to say was another lie designed by the Defendant to create an alibi to extricate him from the defence, but he was forced to change it once confronted with the DNA that tied him to sex with C."

19. The complaint is that no evidence of alibi was ever put before the jury and that what the Appellant was alleged to have said to the officer could not properly be described as creating a false alibi. The Appellant was not given any detail of the allegation, Ms. Vanderpool was never interviewed and matters of timing were never explored. In our judgment the judge was using the word alibi in a loose sense, and the real question was whether the Appellant had told an untruth to Inspector Geraghty on the telephone and was forced by the DNA result to run a different defence at trial. Whilst the judge and the prosecution would have been better advised not to refer to an alibi, we do not think that there is anything in this ground of appeal.

The "No Comment" Interview

20. At the conclusion of Inspector Geraghty's evidence the prosecution sought to adduce in evidence that during the videotaped interview at the Police Station another officer had put to the Appellant the gist of what Inspector Geraghty had recorded in relation to the telephone conversation. Despite objection from

the defence the judge allowed the application, ruling that that part of the video interview could be shown to the jury. In summing up the judge explained to the jury that the general rule is that no adverse inference can be drawn against a defendant for exercising his right to silence and the only reason why they were hearing part of his "no comment" interview of 6 November was because counsel in cross-examining Inspector Geraghty had questioned the accuracy and reliability of his record of the telephone conversation, and the Appellant had not been shown the record. That evidence he said in interview was …

> "…to rebut the inference or innuendo that you may think, or the prosecution may suggest might have been fairly or unfairly or accurately or inaccurately created by the line of cross-examination put by the defence counsel…"

21. In our judgment the judge was in error in allowing this aspect of the "no comment" interview to be put in evidence before the jury. The purpose of showing a suspect the record of an oral conversation is so that he can confirm or deny or correct its accuracy. Although the officer conducting the interview had Inspector Geraghty's statement he did not show it to the Appellant but instead asked him questions that did not precisely correspond with what was in the statement. He did not put Inspector Geraghty's part of the conversation to him. Secondly, expecting the Appellant to confirm or deny what he had said to the Inspector seems to us inconsistent with the right to silence and the caution administered to the Appellant at the start of the interview.

22. There is another aspect of the "no comment" interview of which complaint is made. In summing up the judge said:

> "…In the course of your deliberations you will have to consider the evidence of each of the witnesses and their demeanour on the witness stand so as to determine the quantity of and the weight to attach to the evidence.

> So that includes all the witnesses for the Crown, and in the case. Since you saw and heard an interview with the Defendant you will also consider his demeanour in that interview, in the context in which he was responding..."

23. No complaint can be made about the first paragraph, which is a standard direction. We have not seen the audio visual evidence of the Appellant's interview but it is difficult to follow how this could assist the jury in the present case. It would have been better left unsaid.

Misdirection on the Burden of Proof

24. It is contended that the judge reversed the burden of proof during his summing up when he invited the jury to consider that the Appellant could have provided evidence to substantiate his defence. The judge in the course of summing up reminded the jury on numerous occasions that the burden of proof was on the prosecution and that the Appellant did not have to prove anything see e.g pp 524, 568, 592, 630. The defence were contending that the Appellant's visit had been pre-arranged and that that was why the door was left unlocked for him. The passage of which complaint was made is at pages 636 - 638 where the judge was dealing with the lack of evidence of any contact between the Appellant and C for many months before 4 November 2014. The judge said at 637 that the Appellant did not have a duty to prove or disprove anything, but went on to say that the absence of any messages on his phone that one would reasonably expect to be there was a matter from which the jury would be entitled to draw an inference. In our judgment there is no substance in this ground. The jury was trying a case without any evidence from the Appellant. It was made abundantly clear that the burden of proof was throughout on the prosecution but the jury was perfectly entitled to draw inferences from the evidence they had or in this instance lack of it.

The Aggravated Burglary Direction

25. Section 340 of the Criminal Code provides that a person commits aggravated burglary if he has with him at the time of the burglary various items including an offensive weapon or an article with a blade or point. The particulars of the offence alleged that the Appellant entered the dwelling as a trespasser and inflicted bodily harm and at the time of the burglary had with him an article with a blade, namely a knife.

26. There was evidence that injury was inflicted upon the claimant during the attack. The judge erroneously directed the jury that infliction of an internal injury is what aggravates burglary. He said at page 549:

> …The infliction of the bodily harm is what makes a burglary aggravated. Okay? So if you take out that, if you are satisfied that that's not proved then it would be just simple burglary. Right? That's the only difference…"

27. This was a misdirection. However, the judge very quickly corrected his misdirection, saying at page 550:

> …"Actually it is the article with a blade, namely a knife that makes it aggravated. That was it, nor the injury. Alright?"

28. The judge returned to the subject at p. 554 pointing out that entering the house as a trespasser and inflicting bodily harm was what makes it burglary. What makes it aggravated burglary is possession of the bladed instrument. The judge made it perfectly clear to the jury that the element of aggravation was satisfied if the Appellant has a bladed instrument with him when he commits the burglary. C's evidence was that she felt something shiny and cool against

her cheek. It felt hard. She did not actually see it but it felt like a knife (pp. 71 – 73).

29. There is a further complaint about a passage in the judge's summing up at page 552 which reads as follows:

> …She didn't actually see the knife, but she felt, like a knife, like it was a knife. All right?
> If you accept her version, that it felt like a knife, I think that is sufficient proof in relation to whether it was a knife or not. Right? Or something with a blade. Right? I do not think that that would be so crucial, so long as you are satisfied that he had some instrument, that she felt he had an instrument which he placed against her neck, felt like a knife, that would, in my view, be enough…"

30. Ms. Christopher makes the point with which we agree that in order to convict of aggravated burglary the jury had to be satisfied that the Appellant had a knife in his possession at the time of the offence. We do not, however, read this passage as a direction to the jury that it was enough that C thought it was a knife when in fact it was not. It is to be noted that the section refers to any offensive weapon or article with a blade or point. In the context that shortly before she felt the object on her cheek the Appellant had told C to shut up or he would kill her, it is difficult to draw any inference other than that the object was a knife. Taking the summing up as a whole we are satisfied that the judge made it clear to the jury that they could only convict of aggravated burglary if they were sure the Appellant had a knife. There was no evidence from him to contradict C's evidence and we reject these grounds of appeal.

The Condom

31. There was no evidence one way or the other whether the Appellant wore a condom. In her closing speech to the jury Ms. Christopher invited the jury to reject C's account of what had occurred. She invited the jury to reject her evidence that the Appellant had disguised himself and yet not worn a condom, thus leaving evidence from which he could be identified. As the prosecution had had no opportunity to deal with a point which was based on no evidence, unsurprisingly the judge dealt with it in his summing up and concluded by pointing out that it was speculation. The judge had previously advised the jury on the distinction between relying on circumstantial evidence and speculation. There is nothing in this ground.

Conclusion on Conviction

32. Although leave to appeal against conviction was refused on all grounds by the single judge and renewed before us as an application for leave to appeal, we considered all the grounds as if we had granted leave. The only two errors we have found are the failure of Inspector Geraghty to caution the Appellant prior to his telephone conversation with him and the admission of the "no comment" interview, when the gist of his answers in the conversation were put to him. The former leads nowhere as the judge was entitled in his discretion nevertheless to allow the admission of the Appellant's responses. As to the latter it did not lead to any substantial miscarriage of justice and accordingly the determination of the appeal falls within the proviso in Section 21 (1) (a) of the Court of Appeal Act 1964. Put in other perhaps more modern terms, we have no doubt about the safety of the conviction. Accordingly, we dismiss the appeal against conviction.

Sentence

33. Greaves J. imposed a sentence of 25 years for the serious sexual assault with eight years concurrent for the aggravated burglary. He directed time in custody to be taken into account but declined to make an order under Section 70 P of the Code because such an order would be ineffective with a 25 year sentence. He found the authority of *Selassie v The Queen* [2008] Bda L.R. 56 a helpful yardstick and could find no reason why the sentence should be any different. In that case the defendant removed an air conditioning unit from the window of a house, entered the bedroom of a 15 year old girl who was sleeping therein, viciously buggered her and threatened to kill her if she screamed, before escaping. He was linked to the scene by DNA evidence and called no evidence at his trial. The trial judge described the sexual assault as a vicious heinous crime of the worst kind. Ward J.A. giving the judgment of this Court said that the maximum for serious sexual assault was 30 years and the Court could see nothing wrong with a sentence of 25 years.

34. In the present case we have read a moving victim impact statement from C. The offence has had a very serious and ongoing effect on her life. The Appellant has seven previous convictions for burglary and other convictions. The conjunction of a very serious sexual assault with an aggravated burglary inevitably requires a long sentence of imprisonment. There were aggravating features. The sexual assault was committed at night in the victim's own home when she was asleep in bed and, even worse, her two small children were present. The Appellant had armed himself with a knife and wore a mask and gloves to try and conceal his identity. Further, the Appellant ejaculated. There was no mitigation.

35. Ms. Christopher referred us to a number of cases. The Court obtains little assistance from reports that do not include the judgment of the court passing the sentence or hearing the appeal because the sentence is necessarily fact specific. Cases in other jurisdictions provide some, but limited, guidance on

the appropriate level of sentence. Our attention was drawn to the England and Wales Sentencing Council's Definitive Guidelines for Sexual Offences, effective from 1 April 2014. These are applicable only in that jurisdiction but their guidance as to the Court's approach to determining the appropriate sentence is particularly helpful. Three categories of rape case are described and the present case plainly falls into the most serious category for which the upper end of the sentencing range is 19 years' imprisonment. However, the opening words of the Guidelines point out that offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years or above may be appropriate.

36. In our judgment, taking account of the assistance in these Guidelines and the authority of this Court in *Selassie*, a case bearing a number of similarities, we think the appropriate sentence is 20 years' imprisonment for the serious sexual assault with 8 years concurrent for the aggravated burglary and accordingly the appeal against sentence will be allowed to that extent. Had Greaves J. imposed that sentence instead of 25 years' imprisonment, we think he would have imposed an order under Section 70 P of the Code, saying that the Appellant would not be eligible for consideration for parole until he has served at least half his sentence, and we make such an order. The judge's direction that time spent in custody is to be taken into account remains undisturbed.

Signed

Baker, P

Signed

I agree Bell, JA

Signed

I agree Bernard, JA