

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. A. No. 25 of 2005

BETWEEN

GREGORY DONNOR

Appellant

AND

THE STATE

Respondent

CORAM

S. Sharma CJ
I. Archie JA
P. Weekes JA

APPEARANCES

Mr. K. Ratiram for the appellant
Mr. W. Rajbansee for the respondent.

DATE OF DELIVERY: 11th May 2006

REASONS

Delivered by S. Sharma CJ

1. This appeal was heard on 2nd May 2006. On that date we dismissed the appeal and affirmed the conviction and sentence. We promised to give our reasons at a later date and do so now.

2. Gregory Donnor ("the appellant") was convicted on the 17th October 2005, at the San Fernando Assizes on an indictment charging him with rape. On the 2nd November 2006, he was sentenced to 15 years hard labour.

CASE FOR THE STATE

3. The case for the prosecution depended essentially on the evidence of Yvonne Perry ("the virtual complainant"). She testified that on the 16th February 2002 she was at her home located at 199 Main Road, Cap -de -Ville, Point Fortin, when her friend Natalie, paid her a visit along with one Kelvin and the appellant. The virtual complainant had known the appellant for approximately four months, and would see him at church at least three times a week. She said they had a 'hi, hello' type of relationship.

4. They all left her home to go to church, but the appellant said that he had something to collect at home, in any event he had said that their Pastor would be late and church would not be starting on time. As a result, they proceeded to the appellant's home at Warden Road. They arrived at the appellant's home at around 5:45 p.m., entered and talked for about 10 minutes, then they went outside and spoke for about another 8 minutes. Natalie and Kelvin had something to discuss so they asked the virtual complainant and the appellant to take a walk on the road. The appellant asked the virtual complainant to go across the road with him instead to a place where there was a brick foundation.

There was some bush in front of the foundation. They were about 40 feet from the appellant's house. They spoke initially about church and a camp they had both attended.

5. The appellant began to make advances to the virtual complainant and attempted to kiss her, but she pushed him away. He subsequently held her hands and she told him that she disliked that. The appellant placed her on the ground and moved to on top of her. The virtual complainant began to fight and scream. Some of the buttons on her dress became loose. The appellant tried to take off her underwear, at times pinning her down with his body and holding her hands and wrists. He eventually succeeded. He then took off his pants and underwear and proceeded to have sexual intercourse with her without her consent. He made the comment that he had to get her virginity so that she would keep running back to him. After about three minutes he rose and fixed his clothing.

6. As the virtual complainant stood up, she felt something running down her leg, she recognised that it was blood, and the appellant gave her his rag to clean herself up, which she did. Then she used her rag to form a pad and placed it in her underwear.

7. She told him that she would tell the Pastor and he would get in trouble. In response, he raised his hands and she said, "was coming towards my neck". Fearing he would attack her, she told him he would not get in trouble. The appellant then went to the roadway.

8. The virtual complainant saw the appellant very clearly during the incident, as there was a lamppost located about 100 feet away. Further, while they were on the brick foundation, they were face to face. The duration of the entire

incident from the time they walked from the appellant's house to the brick foundation and back was about 15 minutes. There was nothing blocking her view.

9. Upon returning to the appellant's house, the virtual complainant, appellant, Natalie and Kelvin walked out of the trace and went to a church camp. Natalie spoke to some members of the church for about ten minutes, then they left.

10. On Monday 18th February 2002, the virtual complainant spoke to a friend and a pastor about the incident. On the 20th February 2002, three of her aunts took her to the Port Fortin Police Station where she made a report. Sergeant Cooper left the police station and detained the appellant.

11. Sergeant Cooper and WPC Balbosa took the virtual complainant to a doctor's office where she was examined. On the 21st February 2002 the virtual complainant gave the bandana she had used as a pad to Sergeant Cooper,

CASE FOR THE DEFENCE

12. The appellant testified in his defence that on the material date, he had known the virtual complainant for about 3-4 months, as they attended the same church.

13. He and the virtual complainant had attended a church camp the weekend before the day in question, and he had become better acquainted with her, as they participated in sporting events together and took walks on the beach. The appellant felt that their relationship was more than the 'hi, hello' type claimed by the virtual complainant.

14. On the day in question, he was at the home of an elder, Kelvin, who asked him to accompany him to the homes of the virtual complainant and Natalie. After arriving at Natalie's home they proceeded to the virtual complainant's which was about a minute or two away. Then they all, with the exception of Kelvin, went to the appellant's home. Kelvin had gone to his home a few minutes away, to get something for the ladies to eat as they had indicated that they were hungry. The ladies sat on the door-step outside, while the appellant went inside to change. The virtual complainant entered the house and asked for a tour. The appellant obliged. They ended up sitting on his bed and started kissing and speaking about the camp they had attended. During that time, Kelvin returned with popcorn and they ate, the appellant and virtual complainant sharing a bowl.

15. Kelvin winked at the appellant and Natalie said that she and Kelvin wanted to speak. The appellant interpreted the wink as meaning that they wanted to be alone. He went to his bedroom and got a blanket and invited the virtual complainant to take a walk. They went across the street to a building foundation where they spread the blanket. They kissed and he fondled her breast and her vagina. She did not resist. He told her to take off her panties, she began and he helped her. He performed oral sex on her. The virtual complainant asked him to take it easy, as she was a virgin.

16. They had sexual intercourse for about three minutes. When he withdrew the virtual complainant said "*Look what you did*", but she had not protested nor resisted him penetrating her.

17. It was too dark for him to see but the virtual complainant told him that she was bleeding. He gave her a rag; it was red, white and blue with a Canadian flag on it, which the virtual complainant had used as a pad. He identified the rag produced in Court as the one he had given to her.

18. They went back to his house and the virtual complainant went inside to speak to Natalie, while the appellant remained outside. They left in pairs to get a car, Natalie and Kelvin, followed by the appellant and the virtual complainant. Whilst walking the virtual complainant asked if she could get pregnant and he replied no. Natalie and the virtual complainant left together in a car.

19. On the 20th February 2002, he was at a house in Warden Road, Point Fortin when Sergeant Cooper came, identified himself and told him of a report he was investigating, to which the appellant replied "*I know Yvonne but it's not really so.*"

20. He was arrested and taken to the Point Fortin Police Station. He was taken to a room in which the virtual complainant was present and an officer asked her if he was the said Gregory Donnor. She responded in the positive.

21. Sergeant Cooper later cautioned him and the appellant replied, "*We had sex but I didn't rape she.*" Consequently, he was charged with the offence of rape.

22. Dr. Nicholas Benny Tia Okwee was the District Medical Officer for the County of St. Patrick. He performed a general examination of the virtual complainant on the 20th February 2002, four days after the alleged rape. His findings were confined to her vaginal area; he noticed two small lacerations, each with a depth of about 0.5 centimetres. The hymen was not intact. There were no abrasions in the surrounding area and no vaginal bleeding was observed. He stated that any blunt or sharp object could have caused the laceration.

23. He said that the extent of the injuries to a female, who was not aroused, and who had thus produced no vaginal secretions to reduce the possibility of injury to the vaginal wall, would depend on the size of the penis, whether the female is sexually active, the size of the vaginal canal, and the degree of force used. Bruises, abrasions, lacerations, contusions and haematoma may occur. He testified that on a female who had sexual intercourse for the first time, which was non-consensual and lasting about three minutes, with the assailant's penis being 6" in length, one would expect to find more "mess" in other words more injuries than the two lacerations found in the virtual complainant. He said that the injuries sustained by the virtual complainant were consistent with rough sex and in the scenario suggested by defence counsel.

24. In answer to the Court, the doctor noted that it was impossible to give any kind of statistical data to support his opinion that in the alleged scenario one would expect to find more injuries. He then added that he could not say one way or the other whether there would normally be more injuries in the scenario described. He said that it was possible that initial minor bruises would not be visible 4 days later.

25. There were seven grounds of appeal filed.

GROUND 1

The trial judge erred in refusing an application by the Defence to re-open its case to call an additional witness. Mr. Ratiram cited the cases of **Sanderson** (1953) 1 WLR 392 and **Morrison** (1911) 5 Cr. App. R 159 in support of his submission. Firstly, it must be reiterated that the Court of Appeal is very slow to disturb a judge's exercise of his discretion. Notwithstanding, where it is clear that the trial judge has made such a fundamental error either in taking into consideration matters he ought not or not taking into account the relevant factors, the Court of Appeal will step in to correct the error.

26. Mr. Ratiram for the defence had premised his request to re-open on information that he received only after closing addresses had been completed. The information emanated from a client of his in unrelated proceedings who had inquired as to the matter with which he was dealing, and subsequently told him that about two years ago he met the virtual complainant in a taxi and she told him that she had consented to sex with "a man from the church" and only reported the offence because of family pressure. Counsel also indicated that he had taken a statement from the potential witness.

Rampersad J's Ruling

27. The trial judge in ruling against the request by defence Counsel found the case of **Sanderson** unhelpful as the judgment was brief with little reference to facts. Nevertheless, Rampersad J. felt that the principle was quite clear- it is permissible if the circumstances warrant it, for a witness for the defence to be called even after a judge's summing up. The case of **Morrison**, which preceded **Sanderson** also illustrated this, as the Court of Appeal had held that defence

evidence may be allowed to be given after counsel's closing speeches, the evidence just then having coming to light.

28. The trial judge examined the case of **Morrison**, which Counsel said was on a similar footing to the instant case. In **Morrison**, at p. 168, the Lord Chief Justice held that counsel for the appellant submitted that the evidence of Becky Snelwar would prove that the prosecution witness had committed perjury because her evidence contradicted his. The Court, in the final analysis was unable to attach any importance to Ms. Snelwar's evidence. Rampersad J. noted that in the instant case the purpose for the defence request to re-open the case was to adduce evidence of a previous inconsistent statement made by the virtual complainant to a third party. The Court refused to exercise its discretion to allow the defence request, as previous to this, there had been an application to recall two prosecution witnesses, namely the virtual complainant and the complainant so that Counsel could put certain instructions that he had only recently received from the defence witness, Wilma Kelly. That application was granted. Thereafter, the defence recalled Ms. Kelly who gave evidence of a previous inconsistent statement made by the virtual complainant to her on the 18th February 2002. That is, the virtual complainant said she had allowed the appellant to have sex with her, in other words she consented to sexual intercourse with the appellant. In the circumstances, the defence had been given every opportunity to put its defence fully and squarely before the jury, and indeed had done so. Rampersad J. felt that in the circumstances there was no injustice in not granting the application to re-open the defence case. The trial judge also remarked that he did not think the interests of justice required the granting of the application or that it was proper to do so.

29. The reasoning of the trial judge on the defence application was in our view quite justified. Mr. Ratiram has failed to establish the detriment caused by

the refusal of his request, as there was other evidence of previous inconsistent statements made by the virtual complainant, which evidently had not affected the jury's finding of guilty. The jury disbelieved the evidence of the parties' Pastor, who held a position, which carries in our society a great deal of clout or respect. It is also noted that this potential witness did not purport to know the identity of the man in question. Therefore, it is unlikely that the jury would have been influenced by the evidence of this prospective witness (a client of Counsel, in an unrelated matter, who just happened to have spoken to the virtual complainant in a taxi). This evidence was suspect in nature. In the circumstances we find no merit in this ground of appeal.

30. **GROUND 2**

Counsel complained of an inaccuracy in the trial judge's summing up when the Judge stated that the Defence did not dispute that the virtual complainant told the appellant that she would tell the Pastor with the result that the appellant would get into trouble. The cases of **Walter Barkley Hart** (1932) 23 Cr. App. R 202, **Browne vs Dunn** (1893) 5 R 67 and **Lovelock** (1997) Crim LR were cited in support of this submission. It is clear from notes of evidence that Mr. Ratiram never directly put it to the virtual complainant that she never said the above to the appellant. Defence Counsel accepts this but claims that an implied challenge was established by way of his having put a different version of events to the virtual complainant, that she told the Pastor that she had caused him to fall by allowing him to have sex with her. This version, the virtual complainant denied. Additionally, Counsel noted that the appellant had not testified to being told this by the virtual complainant. Mr. Ratiram stressed that it was never part of the defence case, which the virtual complainant told the appellant she would go to the Pastor after they had sex.

31. In response, Counsel for the respondent propounded that in cross-examination there must be an express challenge to the witness's evidence, however this had not occurred in relation to the piece of evidence Counsel for the defence now seeks to impugn, and therefore the defence must be taken to have accepted that evidence. Counsel relied on the same cases as the defence in addition to the cases of **Wood Green Crown Court, ex parte Taylor** [1995] Crim. LR 879 which approved a passage in Blackstone's Criminal Practice (1995), para. F7.4, **Lovelock** (1997) Crim. LR 821 and **Bircham** [1972] Crim. LR 430.

32. In Blackstone's Criminal Practice (1995), para. F7.4 the learned author stated that "a party who fails to cross-examine a witness upon a particular matter in respect of which it is intended to contradict him or impeach his credit by calling other witnesses tacitly accepts the truth of the witness's evidence in chief on that matter". Additionally, in the other cases referred to by both Counsel, the main principle gleaned is that the proper course is to challenge the witness while he is in the witness box or at any rate, to make it plain to him at that stage that his evidence is not accepted, so that the witness may have an opportunity to make any explanation that is open to him.

33. Whether the virtual complainant told the appellant that she would complain to their Pastor, impacts the issue of consent. One might consider that, if she had consented it is unlikely that she would tell the accused immediately after, that she would get him in trouble with the Pastor. The trial judge invited the jury to consider this, in the light of the undisputed evidence that she in fact spoke to the Pastor. There is a distinction between the alleged statement of the virtual complainant to the appellant that she would go to their Pastor and get him in trouble and the version put by the Defence that she told the Pastor she had caused the appellant to fall. The impact of the judge saying that the defence had not disputed her alleged statement must be analysed in light of

the judge's other directions, he reminded the jury that they were to decide whether this alleged statement assisted them on the issue of consent. Further, he reminded them that they had heard all the evidence, so that he would not be repeating everything, as such they were to bring into remembrance all they had heard prior, which included the cross-examination of the virtual complainant by Mr. Ratiram, at which time, he put the different version of events to her. Further, the jury would be free to consider what meaning to attach to her words if they found that she did make that statement. In all, the judge's error here does not seem fatal to the determination of the issue of consent by the jury.

34. **GROUNDS 3 AND 4**

These grounds are intertwined and together allege that the trial judge erred in law by directing the jury that the Doctor stated that the lacerations themselves would be consistent also with the factual matrix as was presented by the Defence Counsel, and that the trial judge erred when he commented in summing up that "it would seem that you cannot rely on his [the doctor's] evidence one way or the other as to whether the issue of consent is satisfied...".

35. It appears from the Judge's notes of evidence that the doctor did indeed say that the injuries were consistent with the scenario set out by the defence; in any case, the trial judge's handling of the doctor's evidence was quite balanced and accurately reflected the doctor's evidence. He told the jury that the doctor could provide no statistical data that in the scenario one would expect more injuries, as he had opined. The judge remarked that the doctor's evidence was inconclusive in determining the issue of consent, as the injuries that could be caused in such a scenario depended on several variables and so did not assist the case for either side. We observe that this is more often than not the position in trials of this nature.

36. **GROUND 5**

The trial judge erred in law when he directed the jury that the Pastor's evidence was inconsistent with that of the appellant. Counsel submitted that the Pastor was merely giving her interpretation of what the virtual complainant had said to her. The evidence in issue was that of the Pastor who said that the virtual complainant visited her and told her that she had caused the appellant to fall, which the Pastor took to mean that she had caused him to have sex with her. The Pastor then went on to say that that would be inconsistent with the appellant's admission of wanting to have sex with the virtual complainant. The Trial Judge commented that this would be inconsistent with the appellant's proclaimed lust towards the virtual complainant. The judge then reiterated that it was a matter for the jury, but reminded it that the Pastor's evidence was inconsistent with the appellants. We agree with Counsel that the matters are not inconsistent, as the virtual complainant may have caused him by consenting to sex, to succumb to his great lust. There is always a need for judicial caution and restraint in making comments. In this case, however, the judge's comment was not of such a robust or persuasive nature, to take the matter out of the jury's hands, he reiterated that the matter was one for the jury to consider. Further, the issue of the evidence of the Pastor contradicting the appellant's evidence was highlighted initially by the Pastor, and therefore, in summarising the judge was permitted to quote what she said and expand on it if he deemed necessary. The Judge simply put his interpretation on the evidence of the Pastor. The jurors as men and women of the world were free to accept or reject the Judge's view and form their own views on that evidence.

37. **GROUND 6**

The trial judge, it is claimed erred in law when he directed the jury that the appellant "said that they were never kissing in the track". We recognise that there is no evidence that the appellant said so nor did the virtual complainant.

The effect of this error on the part of the trial judge was to challenge the credibility of the evidence of one of the defence's own witnesses but only in so far as she purported to repeat a conversation between the virtual complainant and herself. The jury well understood that this witness had no personal knowledge of the events in this case. The jury having been told that they ought to assess all the evidence, would have likely recalled that there was no evidence on 'kissing in the track' by the appellant, which they most likely would hold in effect as a denial of same, so that the effect on the evidence of the Pastor would be the same. The jury in any event would weigh this in determining the weight to give to the Pastor's evidence.

38. **GROUND 7**

The trial judge erred in law when he directed the jury that "there was no sheet there was only a blanket". While the virtual complainant and appellant referred to a blanket, the Pastor in recounting her conversation with the virtual complainant said she had been told of a sheet. The jurors would have understood the context. It was perhaps unfair for the Judge to suggest an inconsistency between the Pastor and the appellant but this was a "throw away" comment, nothing much was made of it and the jury must be trusted to have the sense to put it in its proper perspective. There was no real issue about the sheet or blanket. This was an unfortunate error on the part of the trial judge, but any reasonable jury would have thought at the time of this direction, that these words are used interchangeably in our society, so that the jury most likely would have not heeded this perceived inconsistency in the evidence of the Pastor as put forward by the trial judge. In any event, they knew that the evidence was really to be assessed by them and that they determined the disputed facts in the case.

39. The approach of judges to summing up varies; one approach is to read an abbreviated version of the note of evidence, which the judge has kept. This is satisfactory (though arguably of little value) in straightforward cases. If the trial has been more complex, judges are exhorted to assist the jury by analysing the evidence and relating it to the various issues raised (see **Gregory** [1993] Crim. LR 623). Merely reading a note of evidence in such cases has been criticised, not least because it “must bore the jury to sleep’ (see pp. 339-41 of Lawton LJ’s judgment in **Charles** (1976) 68 Cr. App. R 334). Similarly, in the passage from Lord Hailsham’s speech in **Lawrence** [1982] AC 510, reference is made to the desirability of the summing-up including a ‘succinct but accurate summary of the issues of fact as to which a decision is required, a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts’. In other words, marshalling and arrangement of the evidence and arguments is preferable to recapitulation with running comments. However, the approach the judge adopts must ultimately be a matter for him having regard to the nature of the particular case.

40. It is clear that the trial judge must adequately put the defence before the jury. In **Curtin** [1996] Crim LR 831, the Court of Appeal stated that as part of his duty the judge must identify the defence. The way in which he does so will depend on the circumstances of the case. Where the defendant has given evidence, it will be desirable to summarise that evidence. Provided he emphasises that the jury are entitled to ignore his opinions, the judge may comment on the evidence in a way, which indicates his own views. Convictions have been upheld notwithstanding robust comments to the detriment of the defence case (e.g, **O’ Donnell** (1917) 12 Cr App R 219, in which it was held that the judge was within his rights to tell the jury that the accused story was a ‘remarkable one’ and contrary to previous statements. It is the judge’s duty to state matters ‘clearly, impartially and logically’, and not to indulge

inappropriate sarcasm or extravagant comment, see **Berrada** (1989) 91 Cr. App. R. 131.

41. In the instant case though there have been some unfortunate errors by the trial judge, we do not feel that the effect of these individually or cumulatively would have been to confuse the jury or jeopardise the case for the defence. In our opinion the appellant was afforded a fair trial. In the circumstances, the appeal is dismissed and the conviction and sentence affirmed.

S. Sharma
Chief Justice

I. Archie
Justice of Appeal

P. Weekes
Justice of Appeal