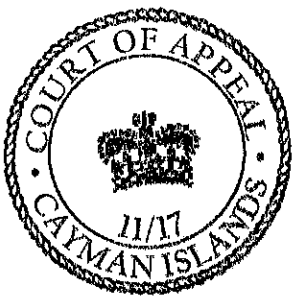
IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 14/2017
IND.0101/2014
SC#06083/2014

BETWEEN:

ROHAN GIDARISINGH

Appellant



- and –

HER MAJESTY THE QUEEN

Respondent

BEFORE: **The Rt. Hon Sir John Goldring, President**
The Rt. Hon. Sir Bernard Rix, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Date of Hearing: Wednesday, 14 November 2018

Appearances: Mr. John Furniss for the Appellant
Ms. Candia James for the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 14 November 2018 Approved
Release 22 January 2019

MOSES, J.A.:

1. This applicant was convicted of rape following a trial by jury and possession of a prohibited weapon. It is of significance to point out that the trial took place between the 19th and the 25th of April 2017 - two and-a-half years after the events of which were the subject matter of the allegations.

2. The applicant had met the complainant for the first time on the night when the rape was alleged to have taken place on 6 November 2014. He had, however, known the complainant's mother in the past. At his suggestion, but with the consent of the complainant's mother, they had been out for a number of drinks and it was plain from eyewitnesses that by the time he took her to what he said was going to be a "*private party*" at the Holiday Inn she was drunk. She was seen by witnesses, including the receptionist, to be drunk. The applicant took a room giving his own name and address and they went up to the room where, at some stage, she, in her intoxication, sent a text to her boyfriend in Jamaica.

3. The complainant said that he first of all told her that he wanted oral sex, then removed her underclothing, tried to insert his penis but when she sought to fight him off, produced a knife, pressed it against her neck and then penetrated her for a second time.

4. At one stage she was sick over him and at another, so she said, urinated. When he had finished, although he said he did not ejaculate, she went downstairs and complained to the receptionist and at one point hid amongst the bushes, sending a message to her mother to seek help. She was seen by the hotel desk manager to be in a distressed state.

5. When the police arrived, it was plain that the applicant sought to throw the knife, which was a flick knife, away but it was found. The applicant said that he had used the knife to cut a small hole in her tights but the clothing was not produced and nobody could judge whether that was correct or not.

6. The first ground of the appeal which he has sought to bring relates to the absence of proper investigation of material that plainly would have been available for the jury had that proper investigation taken place. It was alleged that there could have been produced, as the investigating officer's notebook revealed, further videos, which would have shown her state and movements and of the applicant before and after the rape was alleged to have taken place.

7. There were admissions that the knife that was produced did not contain any fibres from the complainant's underwear but, says the applicant, it was not tested to see whether it

was free or not from the complainant's DNA, having regard to the allegation that the knife was pressed against her neck nor was the bed clothing examined and therefore it was not known whether there were signs of urine or not.

8. The telephones were not interrogated so as to see the content of the messages that it was said that she sent. All of this, in the context of a very delayed trial, where the investigating officer had left the service and was no longer on the island.

9. It is, in our judgment, plain that there was inadequate investigation but it is equally plain that that is of no avail to the applicant unless it can be said that a fair trial of the issues in this case was not possible. (see *R on behalf of Ebrahim v Feltham Magistrates Court* 2001 1 All ER 831) The judge warned the jury not to speculate as to whether what was contained in those items that should have been further investigated would have helped the Crown or would have helped the applicant. In that direction he was correct. We would only comment that his further direction was not, in our view, sufficiently forceful in favour of the defence. He said to the jury:

> *"I direct you that such failures by the police and holes in the evidence that are left behind by those failures must not weigh against the defendant in any way".*

10. In fact, of course the absence of evidence was an argument that it was perfectly proper for the defendant to deploy, underlining the absence of any evidence that might have otherwise been available to support the Crown and thus putting into stark highlight the fact that the Crown's case depended upon the complainant who had gone to that room in a drunken state. However, that direction was not, in our view, anything like a sufficient misdirection as to cast doubt upon the safety of the verdict of the jury. In those circumstances, it does not, in our judgment, afford any distinct ground of appeal.

11. The other ground on which it is sought to rely relates to the fact that during the course of cross-examination of the applicant, it was put to him that he was a man willing to have sex with other women when he was married and what was more, would lie about it when it suited him. That has to be put in the context that the defence sought, and successfully, to have his interview put before the jury to show that he had been in the past to the

Holiday Inn in order to have sex with other women, but always with their consent. The fact that he was, from time to time, willing to go to that particular place where he took the complainant to have sex was relevant to establish that that must have been what he had in mind when he took her to the Holiday Inn. But it is contended, on behalf of the applicant, that it went much further than that and that this was an attempt to paint him as a bad character, willing to lie when he chose to do so, and intended to excite the feelings of the jury against him; many of whom, particularly on this island, would have taken a poor view of such infidelity.

12. In those circumstances, it is said that it fell within the character of inadmissible bad character evidence with no basis for putting it forward. We do not agree and do not think it arguable. It was not put forward as bad character evidence. It was, as we have said, a legitimate line for the Crown to pursue, having regard to the fact that the interview had been admitted and to show the motives of this defendant when he took this young complainant to the Holiday Inn. What is more, the judge properly directed the jury as to this applicant's good character and that was a significant matter to weigh in his favour. In those circumstances, we reject that second ground of appeal.

13. In our judgment, neither ground is properly arguable and in those circumstances we reject this application.

14. There was an application for leave to appeal against the sentence of 13 years. But sensibly this ground has been accepted not to be arguable. There were clear guidelines given in this island. (See *Dilbert v Samuels* 2010, 1 CILR 10 as to the appropriate starting point for a rape of this kind.) It was plainly aggravated by the use of the knife and the degradation of this victim. In those circumstances, we need not deal further with the application for permission to appeal the 13 years which, in any event in our view, was a wholly just sentence. For those reasons, we would dismiss this application.