FOURTH SUPPLEMENT TO THE GIBRALTAR GAZETTE

L.R. 7/78.

No. 1,800 of 15th MARCH, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1978) Gib. L.R.

TOLLAND v. R.

Court of Appeal
Forbes, P., Hogan and Unsworth, J.J.A.
3, 4 October 1978

Evidence — rape — corroboration of complainant's evidence Appeal — appeal against conviction — whether court's power to revise sentence may be invoked by appellant who has not sought leave to appeal against sentence — Gibraltar Court of Appeal Ordinance, s. 17 (4)

The appellant was charged on six counts of rape, two of indecent assault and one of attempted buggery. He was convicted on one count of rape and sentenced to four years imprisonment. He appealed against conviction. There was no appeal against sentence but counsel for the appellant invited the court to consider it of its own motion. The court rejected, without reasons, all but two of the grounds of appeal. After considering and rejecting those two grounds, the court dealt with the sentence, reducing it to one of imprisonment for three years.

HELD: (1) The trial judge, in expressing his opinion that the nature of the defence of itself excluded the possibility of honest belief in consent, was not in effect withdrawing that issue from the jury.

(2) A direction that the jury should first decide whether they believed the complainant and only if they did, should they look for corroboration was unduly favourable to the defence: the jury were entitled to look at all the evidence, including the corroborative evidence, is deciding whether to believe the complainant.

(3) The fact that the jury convicted on one count and acquitted on the others was capable of logical explanation and therefore not inconsistent or unsatisfactory.

Per curiam. Subsection (4) of s. 17 of the Gibraltar Court of Appeal Ordinance should not be used so as to enable an appellant to appeal against sentence, when he has not given notice of application for leave to appeal.

Cases referred to in the judgment

Stoddart (1909) 2 Cr. App. R. 217
Cumbo v. *R.* Cr. App. 1 of 1976

Appeal

This was an appeal against conviction of rape passed in the Supreme Court.

H. K. Budhrani for the appellant
C. Finch for the Crown

9 October 1978: The following judgment was read—

The appellant was charged on six counts of rape, two counts of indecent assault and one count of attempted buggery. He was tried in the Supreme Court before the learned Chief Justice sitting with a jury and, on 23 June 1978, was convicted on the first count of rape. He was sentenced to four years imprisonment. He has appealed to this court against his conviction.

[After setting out the facts in detail and the grounds of appeal, the judgment continues]

As regards grounds 1, 2, 4, 5, 6 and 7 it is sufficient to say that we cannot find any material misdirection or non-direction in the summing up on the issues raised in these grounds of appeal. As was said by the Lord Chief Justice in the case of *Stoddart* (1)—

> "Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more con-

(1) (1909) 2 Cr. App. R. 217, at p. 246.

> venently expressed, or whether other topics which might have been dealt with on other occasions should have been introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice."

We cannot find that there has been any mistake or omission on the part of the learned Chief Justice in relation to these grounds of appeal which might reasonably have led to a miscarriage of justice.

Ground 3 of the Memorandum of Appeal (1) raised, in our opinion, a more substantial issue, namely, whether the learned Chief Justice, in expressing his views as to the effect of the defence put forward in the trial court (namely that the complainant was a willing partner throughout) on the possible defence of an honest belief in the complainant's consent, effectively withdrew that issue from the jury. The passage complained of reads:

> "But what the defendant cannot do, he cannot say: my evidence is that she was a willing partner, her evidence is that she was not, if you disbelieve both of us you can pluck out of the air a third version. He cannot produce a version which is inconsistent both with his own evidence and with that of the complainant."

Looked at in isolation that passage could give rise to some anxiety, but when seen in the context where it appears, and in the light of the summing up as a whole, the court is satisfied that the issue was not withdrawn from the jury. The learned Chief Justice had put the issue carefully to the jury at an earlier stage, indicating factors which might possibly have led the appellant to believe the complainant was a willing partner. The Chief Justice continued:

> "When it comes to the events of the night of the 13th you must consider whether he could have thought that her submission was consent. He may have drawn a conclusion from the fact that the door was not locked.

(1) "That the learned Chief Justice failed to leave to the jury the question whether the appellant honestly believed that the complainant was consenting even though in fact she was not."

> He may have drawn a conclusion from the fact that she did not scream and of course you may well think that he is a man with a certain vanity who might think himself very attractive to young women. But it seems to me, now I am giving you my own opinion which does not bind you at all because you must make up your minds on this, but it seems to me that the defendant by his own evidence has deprived himself of this, you might call it a defence, saying that he thought she consented. If he had supported her evidence or gone along with it to a considerable degree, if he had merely spoken of passive acceptance of his advances, then you might have considered that he had mistaken submission for consent. But the defendant went much further. In relation to the first visit to the bedroom he said it was the girl who started, who made the first sexual advance. He said that she was even more friendly on the second occasion. He said that she was just as eager as he was. Well, you can believe his evidence in which case you have her as a fully co-operating partner. Or you can believe her evidence that she was an unwilling and resisting partner. But what the defendant cannot do, he cannot say: my evidence is that she was a willing partner, her evidence is that she was not, if you disbelieve both of us you can pluck out of the air a third version. He cannot produce a version which is inconsistent both with his own evidence and with that of the complainant."

Whilst the implications, for this particular issue, of the appellant's alleged answers to the police, and his written statement might have been more fully explained, a majority of the court is satisfied that the jury could have been in no doubt as to how they should approach this issue when considering the evidence as a whole. Consequently, this ground of appeal must fail.

There remains ground 8, and we consider that the only point of substance arises under paragraph (c). (1) The remaining (1) "8. That the conviction is unsafe and unsatisfactory having regard to all the circumstances of the case and especially to the following facts: —

> (c) the absence of evidence or sufficient evidence of lack of consent on the part of the complainant having regard to the jury's acquittal of the appellant on seven other counts in which consent was in issue;".

paragraphs raise questions of fact which were fairly before the jury, and there was ample evidence on which they could reach their conclusion.

Paragraph (c) of ground 8, however, raises the question of the consistency of the jury's verdict in convicting the appellant on a single count of rape only. We cannot know the jury's reasons for their verdict, but there are two possible and logical routes by which they could have reached their conclusion. In the first place the learned Chief Justice had directed the jury that they must decide first whether they believed the complainant, and that unless they believed the complainant that was an end of the matter. That they should not look for corroborative evidence to decide whether they believed the complainant or not, and that, only if they did believe the complainant, should they then look for corroborative evidence to make doubly sure. We think, with respect, that this is unduly favourable to the defence. We consider that a jury is entitled to look at all the evidence before them in considering whether to believe the complainant, including any corroborative evidence. The learned Chief Justice's directions on the need to look for corroboration before convicting, however, was correct and stringent. The jury could well, we consider, have taken the view that the appellant's answers and statement to the police provided corroboration in respect of the first act of rape, but in respect of that act of rape only, and that therefore they should convict on that count only. Alternatively, the jury could have concluded, that since the complainant at some stage submitted to the appellant, he might genuinely have believed her to be consenting except in respect of the first act of rape. In either case the jury's verdict is logical on the evidence in the case. There was, of course, ample evidence of lack of consent in the complainant's evidence which, on the learned Chief Justice's direction, the jury must have believed if they were to convict at all. This ground also must fail.

Accordingly, the appeal against conviction is dismissed.

As regards sentence, although there was no appeal against sentence, we were invited to consider it under the provisions of s. 17(4) of the Gibraltar Court of Appeal Ordinance (Cap. 170).

The court is of the opinion that this subsection should not be used so as to enable an appellant to appeal against sentence, when he has not given notice of application for leave to appeal against sentence.

In the present case, however, a majority of the court feels that the court should, of its own motion, exercise its powers under s. 17(4) of Cap. 170. The majority consider, that the circumstances of the offence in the present case, were very different and substantially less vicious than those in *Cumbo* v. *The Queen* (1), and although there may have been particular reasons which led to the sentences in that case being somewhat lighter than might have been expected, the majority consider that the appellant in this case could well feel that he had a justifiable sense of grievance, if he found himself serving a sentence of similar length for an offence which must be regarded as less heinous than the majority of those in the *Cumbo* case.

Consequently, the sentence of four years is set aside and replaced by a sentence of three years.

(1) Cr. App. 1 of 1976.

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