IN THE COURT OF APPEAL
TURKS & CAICOS ISLANDS
CRIMINAL DIVISION

CR-AP 3/21

BETWEEN:

STEEVE SANTANA

Appellant

AND

REX Respondent

****

DATE HEARD: **17th JANUARY 2023**

DATE DELIVERED: **3rd FEBRUARY 2023**

Before:

The Honourable Mr. Justice K. Neville Adderley **- President Ag**

The Honourable Mr. Justice Stanley John **- Justice of Appeal**

The Honourable Mr. Justice Sir Ian Winder **- Justice of Appeal**

Appearances:

Mrs. Lara Maroof **For the Appellant**

Mr. Eugene Otuonye KC **For the Respondent**

Ms. Tamika Grant

JUDGMENT

JOHN JA:

1. The appellant on the 23rd July 2021, was found guilty of rape after a trial by jury before Her Ladyship Justice Lobban-Jackson. On the 18th day of October 2021, he was sentenced to a term of imprisonment for eight (8) years. On the 2nd day of November 2021, he filed a Notice of Appeal against conviction to the Court of Appeal.

2. On the 17th day of January 2023, we heard submissions from attorneys for the appellant and the respondent. At the conclusion of the hearing, we reserved judgment, on the 3rd day of February 2023 we dismissed the appeal and indicated that written reasons would be given at a later date. This we now do.

Factual Background

3. The appellant and the complainant Claudia Farina knew each other, as Farina's brother was married to his cousin, Maxine. Ms. Farina lived in the home with her brother and Maxine. The appellant was a regular visitor to the home and had meals there on occasions.

4. On Monday 4th March 2021, the appellant came to the house in the morning between 9am and 10am when Farina was alone, looking after her brother's baby. At the time the baby was on the floor. He sat down in the kitchen for a while and she gave him something to eat. The appellant went to lie down in a bedroom in the house. After a period of time, Ms. Farina went into the bedroom and told him that it was 12 o' clock and it was time for him to leave, as he had earlier said that he had a 12 noon appointment. She alleged that at this point he replied *"Well you ain't send me yet"* and proceeded to attack her. He then held her by her hand and started to shake her. They began to fight and he held her around her neck. He then pushed her towards the closet and started knocking her. She continued fighting with him until he put her on

the bed. He then pulled her panties off, pulled up her skirt, pulled out his penis and pushed it inside her. He kissed her and took her breast and put it in his mouth.

5. After the intercourse, she pushed him off and went to the kitchen. He came after her into the kitchen and she told him, *"Steeve, you stole from me."* He replied *"what do you mean I stole from you? Explain that."* The appellant went on to say *"You are not a bitch. If you were a bitch I would have pay you but since you are not I just put my hand and take."* Ms. Farina told the appellant that she would tell her brother or sister in law what had happened. The appellant left the house shortly afterwards around 1 or 2pm. Later that evening when her sister in law Maxine returned home, Ms. Farina told her that she had been raped by the appellant. Ms. Farina's brother later heard of the incident and called the police. Ms. Farina was then taken to the hospital for a medical examination.

Grounds of Appeal

6. Ms Lara Maroof, counsel for the appellant filed three (3) grounds of appeal in support of his case that the verdict be quashed and the appeal allowed.

The First Ground of Appeal

7. Firstly, she contended that in the closing speech for the Crown, prosecuting counsel made comments in relation to the medical evidence which were factually misleading and overly emotive thus undermining the fairness of the trial. This is what prosecuting counsel said and which is the subject of the complaint;

> *" Claudia Farina, in examination-in-chief said she didn't have sex before. And yes, the doctor gave injury of a 1 centimetre tear in Claudia Farina's vagina opening, and the scratches and abrasions there. She said that yes, it could be from the friction of being rubbed up against. But Steeve would like you to believe that after the first round he said they went back for a second round.*
>
> *Now, the doctor has indicated that this young lady has a cut to the opening of her vagina. Now, I accept that we have men in the jury, so you may not fully appreciate if there is pain or not to Claudia Farina during the sex act,*

but the women there may be able to help you. But I am going to suggest to you, men, to put yourself in the position of having a cut on the head of your penis and having sex. I will suggest to you, I will submit to you, that that is not comfortable. That is not something that you would be eager to go try again until you are healed. But Steeve Santana would like you to believe that after the sex she wanted to go again; and that they went again the second time."

8. Counsel for the appellant submitted that those comments were misleading and had no factual basis in the evidence. Counsel sought to make heavy weight of the expression *"cut"* in relation to the evidence of the doctor who used the term *"a tear to the vaginal opening".* In her summation to the jury, the trial judge in referring to the evidence of the doctor said *"On examination of Claudia there was a tear…there was a tear to her vaginal opening measuring 1 centimetre."*

9. In response Mr. Eugene Otuonye, DPP relied on his written submissions where he said that the comments of prosecuting counsel were far from emotive and that prosecuting counsel was simply making an analogy when referencing a cut on the penis as there were men on the jury.

The Second Ground of Appeal

10. The second ground of appeal overlapped to a large extent with the first. Counsel submitted that, *"The Learned Judge failed to assist the jury with the relevance of the medical evidence in the case, in particular the vaginal injuries during her summing up. Further, she failed to address the misleading statement made by the Prosecution Counsel in her closing speech."*

11. The D.P.P. by way of response submitted that there was no need for a special direction from the judge as the tear/cut was not determinative either way of the fact in issue, namely whether the complainant had consented, and the medical evidence was not challenged.

12. The medical evidence relative to the injury to the vagina was proffered by Dr. Bridget Asieu who was deemed an expert by the court. Dr Asieu explained to the jury the

nature of the injury. She referred to the injury as a *'tear'* whereas prosecuting counsel used the term *'cut'*. It must be borne in mind that jurors are persons with a certain level of intelligence and would have appreciated that prosecuting counsel was clearly making reference to the tear. Having heard from an expert, I am unable to see what further assistance the trial judge could have provided to assist the jury.

The Third Ground of Appeal

13. The third ground of appeal was that prosecuting counsel made inappropriate, overly emotive and misleading comments in relation to the appellant's case in her closing speech which undermined the fairness of the trial. Those comments were;

i. *"How, the police asked did you or did you think she was consenting. Oh she gave me food. Oh she put food out for me. Now I know that they say the way to a man's heart is through his tummy but that wasn't the case here…*

ii. *And she wants to make this jury feel that because she didn't say stop at the very beginning with her voice because she didn't say- he said she didn't say no…You are telling me that struggling with you till the point where I am bruised because I am struggling to free myself that is not reasonable to say I am not consenting? You struggling to get Claudia Farina to the bed but you want us to believe that it was reasonable?*

iii. *He said in the interview, I didn't ask her, if that's what you mean...He said he got her consent because she was flirting with him, because she gave him food, because she would keep food for him.*

iv. *Now Mr. Steeve Santana is suggesting that, oh, the struggling only came, he said because she said it hurt, and so she was you know, struggling, and trying to push him off. Because the police asked him "so she tried to push you off?" Yeah. And he squirmed up his legs you know she was trying to close her legs. If you are making love to a man and you tell him it hurt, you got to squeeze up your legs? Or that reasonable man would have just come off to allow you to adjust yourself?*

v. *But what did Steeve do? Steeve said when she told me stop, I stop. But look at 7(a) he goes back over that and he says when she told me to stop, I stop, but he said he pull out and ejaculated. So no, he didn't stop when she told him to stop either. He got his pleasure. Don't send me home yet. Yes.*

vi. *And you know through his counsel questioning Claudia Farina she said Steeve asked you to kiss him. Claudia Farina said yes he asked. So Steeve had the common sense to ask her to kiss him, how is that Steeve didn't ask her to have sex?*

vii. *And not because someone feed you means they like you enough to have sex with you…"*

14. Counsel further submitted that these comments and the tone of the comments were wholly inappropriate. They were designed, she added, to suggest to the jury that the defence were seeking to prevent the jury from hearing some important piece of evidence by repeatedly objecting and/or trying to mislead them.

15. Counsel identified two further comments that she said were inappropriate. Firstly, when prosecuting counsel was dealing with the time the appellant had to leave Claudia's home for an appointment at 12 noon;

"And my learned friend would like you to believe that, oh no, there is no paper that they signed an agreement to have sex. You don't have to agree in writing to have sex. You can, if you are working in a brothel."

And Secondly;

"Hello. If you want to do a contract; I am a sex worker blah, blah, blah, you may be signing a contract to that. So yes, we can consent to sex in many different ways. And yes, even by action, encouragement; you know, he embrace me. I embrace him. Like how Steeve would like you to believe that, I tell her come lie down and she lay; Calgon take me away."

16. In addition, Counsel further submitted that prosecuting counsel made numerous comments relative to the account the appellant gave in his interview under caution.

17. The DPP by way of response submitted, the comments by prosecuting counsel did not serve to distract the attention of the jury from the crucial issue it had to decide namely whether or not there was consent. The issue of the comments of prosecuting counsel was central to the appeal and accordingly it is necessary to examine the legal position.

18. As early as 1955 in the Canadian case of **Boucher v Regina (1955) SCC 16** Rand J had this to say:

> *"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly."*

19. The proper approach to be adopted by prosecuting counsel when making comments and delivering final speeches is set out by Rose LJ VP in **R v Gonez [1999] 1 All ER (D) 674;** where he stated**:**

> *"…[Counsel's] submission, which we accept, is that it is the role of prosecuting counsel throughout a trial as indeed before it, to act as a minister of justice. It is incumbent upon him, or her, not to be betrayed by personal feelings in relation to the prosecution. It is incumbent on counsel prosecuting not to seek to excite the emotions of a jury. It is for prosecuting counsel not to inflame the minds of a jury, and prosecution counsel should not make comments which are reasonably capable of being construed as being racist or otherwise bigoted.*
>
> *…*

Rose LJ VP went on to say:

> *…[A] final speech should, as a matter of form, as it seems to us, be a calm exposition of the relevant evidence, so far as it is relevant to give such an*

exposition and an equally calm invitation to draw appropriate inferences from that evidence."

20. In **Gonez (supra),** the appellant was convicted on four counts of rape. He was sentenced to a term of fourteen (14) years imprisonment running concurrently on each count. He appealed against conviction and sentence. One of the grounds of appeal arose from the terms of the closing speech of prosecuting counsel. Lord Thomas Q.C. for the appellant submitted that it was a highly emotional speech, inappropriate for prosecuting counsel, and contained language which it should not have contained. Counsel was critical of a number of passages in prosecuting counsel's final speech.

21. Notwithstanding the fact that prosecuting counsel was very emotive and gave the assurance that it was not his intention emotionally to excite the jury, the court went on to say;

"…[W]e have no doubt that the language which he used in the passages which we have described might very well have had that effect. The language to which we have referred was, as it seems to us, not the sort of language which should appear in the final speech of prosecution Counsel."

22. The question which arose for their Lordships' determination was whether in light of the language used by prosecuting counsel in his final speech, the verdicts of the jury were to be regarded as unsafe. Notwithstanding the court's deprecation of the language used by prosecuting counsel, their Lordships said that on the evidence there was a very powerful case against the appellant and dismissed the appeal.

23. The case of **Randall v R [2002] UKPC 19**, was a decision of the Privy Council from the Court of Appeal of the Cayman Islands. The primary ground of appeal against conviction was that the trial was conducted in a manner which was grossly and fundamentally unfair. The source of that unfairness, it was said, was the conduct of prosecuting counsel which was said to have undermined the integrity of the trial process. Complaint was also made that the trial judge wrongly failed to restrain the conduct of prosecuting counsel and on occasions endorsed it.

24. The principal compliant was that prosecuting counsel "repeatedly interpolated prejudicial comments while examining prosecution witnesses, repeatedly interrupted the cross-examination of prosecution witnesses, often with prejudicial comment, repeatedly interrupted the examination in chief and re-examination of the appellant, interpolated prejudicial comments in the course of his cross-examination of the defendant and interrupted the judge in the course of his summing up".

25. The critical issue in that appeal was whether there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial. The Board reluctantly concluded that there were. At paragraph [29] Lord Bingham of Cornhill said:

> *"... Prosecuting Counsel conducted himself as no minister of justice should conduct himself. The trial judge failed to exert the authority vested in him to control the proceedings and enforce proper standards of behaviour. Regrettably, he allowed himself to be overborne and allowed his antipathy to both the appellant and his counsel to be only too manifest. While none of the appellant's complaints taken on its own would support a successful appeal, taken together they leave the Board with no choice but to quash the appellant's convictions. It cannot be sure that the matters of which complaint is made, taken together, did not inhibit the presentation of the defence case and distract the attention of the jury from the critical issues they had to decide."*

26. In **Benedetto v R; Labrador v R [2003] UKPC 27**, the appellants were convicted of murder. One of the several grounds of appeal referred to the manner in which the court dealt with the evidence of one Plante, who gave evidence that he was in prison and while in his cell he overheard an argument between the two appellants, during which the appellant Benedetto admitted to the murder.

27. Counsel for the appellant Mr. Fitzgerald also drew the court's attention to various aspects of the way in which the case for the prosecution was conducted by Mr. Theodore Guerra SC. In support of his argument that Labrador did not have a fair trial, Mr. Fitzgerald said that prosecuting counsel cross examined Labrador in an oppressive manner and that made an unjustified attack on Ms. Tisha Neville, a parole officer from

Texas who had been called to give evidence as to Mr. Plante's credibility. He also submitted that in his address to the jury, prosecuting counsel used terms which were xenophobic and inflammatory, referred to inadmissible evidence and made improper attacks on the credibility of Labrador.

28. The Board in allowing the appeals felt it was necessary to address various aspects of the manner prosecuting counsel conducted himself. In their Lordships' opinion, they called for comment as they were wholly at variance with the way in which prosecuting counsel, as a minister of justice should behave.

29. Their Lordships in a judgment delivered by Lord Hope of Craighead, were mindful to the comments of Singh J.A. in the Court of Appeal where he said that "the principles which determine the proper role of the prosecutor have to be applied in the context of his own environment… juries have to be spoken to in a language and style that they will understand, and there was nothing wrong with a prosecutor delivering a robust but respectful speech".

30. While accepting Singh J.A.'s comments as correct, their Lordships stated that there was "an obvious difference between a robust speech and one which was xenophobic, inflammatory and sought to make use of inadmissible and irrelevant material". Their Lordships concluded that some parts of the prosecuting counsel's speech fell plainly into the latter category.

31. In **Ramdhanie & Ors v State [2005] UKPC 47**, the four defendants were convicted of drug trafficking and sentenced by the trial judge to life imprisonment. One of the three grounds of appeal raised by counsel for the appellants was the prosecutor's closing speech was improper and engendered prejudice.

32. The Court of Appeal of Trinidad and Tobago had found that certain comments made by prosecuting counsel in his closing speech were not prejudicial to the appellants and as such that ground of appeal failed. Whilst agreeing with that decision, their Lordships went a step further and examined other comments and statements made by prosecuting counsel. Their Lordships stated that, "[*a*]*llowance must be made for*

context and environment, when considering the language used, its style and robustness. But there are fundamental limits which prosecutors should observe whatever the context and environment…" .

33. Having studied the whole of prosecuting counsel's speech, Lord Mance opined "*it not only included (a) passages in which counsel in effect told the jury or strongly implied that there was incriminating material which had not been put before them, but that it also contained (b) emotive and unjustified comments on the defence case and evidence or on defence counsel and (c) a number of passages where Prosecution Counsel improperly vouched for the soundness of the prosecution's case*".

34. Their Lordships found that while the trial judge's summing up was accurate and comprehensive, no special caveat was introduced regarding any aspect of prosecuting counsel's speech. In those circumstances, it was found that there was a material irregularity and unfairness in the trial process and that the jury's verdicts in respect of all four defendants could not be regarded as safe. The appeal was therefore allowed and the convictions were quashed.

35. In **R v Johal (Gavneet) [2018] EWCA Crim 1256**, the defendants were convicted of conspiracy to rob and were sentenced to detention in a young offender institution for 3-6 years. The modus operandi of the conspiracy was to call taxicab drivers claiming to request their services only to lure them into a trap where they would be robbed and sometimes beaten. The appellant Johal was specifically involved in making the calls to lure the drivers to the destinations. The single judge granted leave to appeal on one ground which related to the comments made by prosecuting counsel in his closing speech, in relation to the defendant's failure to give evidence. Counsel submitted that such comments were improper, emotive, and inflammatory and offensive as a result of which the verdict was unsafe.

36. Counsel for the appellant asserted that in making certain comments to the jury, prosecuting counsel overstepped the line of propriety and, the impact of these words was that the jury were given the impression that had the appellant testified, she would have faced damning evidence that she would have been unable to answer. Following the conclusion of the closing speech by prosecuting counsel, in the absence of the jury,

counsel for the appellant made an application to the judge to do one of the following (1) retract the emotive and totally unjustified comments from the jury, (2) for the judge to give a direction to the jury along these lines or (3) for the jury to be discharged.

37. In her response to the application, the learned judge indicated that she was not minded to discharge the jury but she was concerned about the way in which prosecuting counsel had expressed himself in his closing speech. She said,

> *"…The comments made by Mr. Shaw (Prosecution Counsel) were strong, they were robust, there were overly and unnecessarily emotive in my judgement, but in terms of this application, I have to consider the case as a whole in determining whether defence counsel are correct in their submissions that a fair trial is no longer possible for their clients……We must trust the good sense of the jury, and their innate fairness to honour the oaths and affirmations that they took, to try this case on the evidence, and to assess and bring in true verdicts according to that evidence, rather than simply following the rhetoric of prosecuting counsel's closing speech."*

38. Their Lordships subsequently agreed with the position taken by the learned trial judge as well as her directions given to the jury and as a consequence the appeal against conviction was dismissed.

Analysis

39. The crucial issue is whether the remarks of prosecuting counsel were so emotive and exciting to result in the appellant not having a fair trial. I pause here to quote from **Boucher v Regina** (supra):

> *"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly."*

40. In examining comments made by prosecuting counsel, what the cases of **Benedetto and Labrador** and **Ramdanhie** (supra) established is that the comments must be of such a nature that they overstepped the permissible bounds, causing unfairness in the trial process. On the other hand, **Gonez** (supra) establishes that even where comments are overly emotive where the evidence against an appellant is very strong, the court may nevertheless dismiss an appeal. In the instant case and upon examination of the comments complained of, I am of the view that prosecuting counsel's closing speech did not undermine the fairness of the trial nor were the comments emotive or exciting.

Conclusion

41. I am satisfied that the comments were not of the kind for this court to interfere with the decision of the trial judge. In all the circumstances the appeal is dismissed and the conviction and sentence is affirmed.

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John, JA

I agree

_____

Adderley JA, President (Ag)

I also agree

_____

Sir Ian Winder, JA