BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 43 of 2001

BETWEEN:

JOHN WESLEY HUNTE
(Appellant)

AND

THE QUEEN
(Respondent)

Before: The Hon. Errol DaC.Chase, CHB, The Hon. Colin A. Williams, Justices of Appeal and The Hon. ElliottF. Belgrave, CHB, Justice of Appeal (Ag.)

2002: October 18

Mr. N. Keith Simmons with Messrs. MichaelLashley, Arthur Holder and Tennyson Vaughn for the Appellant

Miss M. Renee for the Respondent

REASONS FOR DECISION

[1] Belgrave,J.A. (Ag.) At the conclusion of thesubmissions made by counsel for the appellant and the respondent on 18thOctober, 2002 it was ordered that the appeal be allowed and that theconviction and sentence be quashed.

[2] We nowgive our reasons for so doing.

Background

[3] The appellant was convicted on the 23rd July, 2001for the two offences of buggery for which he was indicted.

[4] The particulars of the first offence were,that he, John Wesley Hunte, on the 7th day of January, 1997,in the parish of St. Philip in this island committed buggery with a named 13year old boy.

[5] The particulars of the second offence werethat he John Wesley Hunte, sometime between the 8th day of January,1997 and the 14th day of January, 1997,in the parish of St. Philip in this island committed buggery with the said 13year old boy.

Complainant's Evidence

[6] The evidence of the complainant was thathe was a 13 year old student of the Princess Margaret Secondary School at Farm Road, St. Philip. He lived with his parents at Weston, St.James, and travelled to and from school by bus each day. On the 7th day of January, 1997,he left school about 2.45 p.m.,and was on his way to a bus stop, somewhere near Six Roads, some distance awayfrom the school. He heard someone callhis name twice. He looked around, and hesaw the appellant in the yard of a house. The appellant invited him into the yard. He went to the appellant who then went into the house and he entered thehouse behind him. The complainant saidthat, on entering the house, the appellant grabbed his hand and proceeded tofeel his penis. The appellant "pulleddown his pants and then he took off mine". The appellant applied vaseline to his buttocks and had sexualintercourse with him per anum. Thecomplainant said that, when the act of intercourse was finished, the appellanttold him to put on his clothes and not to tell anyone about what had happenedbecause, if he did so, the appellant would be jailed. He said that during the sex act, theappellant had forced his penis to his anus, but it barely entered him. On leaving the appellant's house thatafternoon, he caught a bus, and went to his home in St. James. On reaching home, he found his father, hismother, his little brother, and little sister there, but he did not tell themwhat the appellant had done to him. Thecomplainant's further evidence is, that on a day in the week prior to ErrolBarrow Day, in 1997, he and his best friend P.H. were going to the same busstop. He saw the appellant, who againinvited him into his house. He did soand the appellant buggered him a second time. When it was finished, he left that house and rejoined his friend and hetook a bus and went home. He did nottell his friend what the appellant had done to him, neither did he tell hisparents. The complainant said that thereason for not telling his parents anything was because " I was shame and I didnot want my parents to know because at the time I know how they would react tosomething like this".

The Range Warden's Report

[7] The complainant stated that he was atschool on the 12th May, 1997 when he was called to the office of the headmaster, whoquestioned him about a report concerning him and the appellant. The complainant said that he told theheadmaster that he was buggered by the appellant on two separate occasions,after school, but he did not give the headmaster the dates on which theoffences were committed. Under cross-examination,the complainant said that the offences took place before Errol Barrow Day inJune 1997. The complainant admittedhowever, that his mother took him to the office of the Child Care Board afterthe headmaster had spoken to her. Shealso took him to the Police Station at Oistins, and to the office of Dr. Murrayat Thorpes Terrace, St. James. Thecomplainant's mother confirmed that she had received a report from theheadmaster on the 12th May, 1997 and the next day she took him to the Child Care Board,the Police Station at Oistins and to the Doctor.

The evidence of Joan Pilgrim, a RangeWarden employed by the N.C.C., is that on the 8th May, 1997 she saw a boywhom she later identified as the complainant, dodging and peeping around ahouse near where the appellant lived. Asa result of what she had seen, she reported the matter to the headmaster of Princess Margaret School. The complainant admitted that the RangeWarden did speak to him, but it was in either June or July 1997. Dr. Murray said that he examined thecomplainant on the 13th May, 1997, in the presence of his mother, and P.C. Catwell. On examining the boy's anus, he found thatthe anal sphincter was intact. He saidhowever that the condition of the anus did not exclude the possibility of theboy having been buggered.

[8] The evidence of P.C. Catwell was that heinterviewed the appellant in connection with the complaint made to the Policethat the complainant was buggered by a man sometime between 7thday of January, 1997 and the 12th day of March, 1997, andthe appellant adamantly denied that he had committed any offence of any kindagainst the complainant.

[9] The evidence of Sgt. Darrell Jordanwas that he saw the appellant at the Oistins Police Station on the 16th of March, 1997,and told him that he was accused of buggering the complainant onthree occasions sometime between the 7th day of January, 1997 andthe 12th day of March, 1997. Sgt. Jordansaid he held an informal exercise and that the complainant pointed out theappellant as the man who had buggered him. When asked what he had to say after being cautioned, the appellantsaid: "He telling lies on me, so I havenothing to say". At the close of thecase for the prosecution, the appellant gave sworn testimony in which he saidthat he did not bugger the complainant and that the boy was never at hishome. He knew the boy by seeing him inthe public library near the Princess Margaret School.

[10] The case for the crown rested on theuncorroborated evidence of the complainant who was 17 years old at the time ofthe trial. The case for defence restedon the sworn testimony of the appellant. It was the word of one against the word of the other.

The Appeal

[11] Three grounds of appeal were filed on behalfof the appellant, and these will be dealt with now.

Ground 1

[12] It was submitted that the learned trialJudge erred in Law in that he did not define the ingredients of the offence ofbuggery to the jury.

[13] The record shows at page 52 lines 5-8 that thedirection of the Judge was in these terms:-

"Now buggery is defined inArchbold as consisting among other things, of sexual intercourse, committedagainst the order of nature by man with man per anum, or in other words throughthe anus."

[14] It was submitted that this direction bythe Judge was inadequate in that it made no reference to the degree ofpenetration which must be proved by the prosecution in order to succeed. The record however shows at page61 line 32 that the Judge referred to the necessity of penetrationbeing an element in this way: "The prosecutorreminds you that only the slightest degree of penetration is necessary".

[15] The Judge also reminded them of theevidence of Dr. Murray that the absence of damage to the anal sphincter did notexclude the possibility of penetration having taken place.

[16] A reference to the 38th Edition ofArchbold paragraph 2968, would show that the Judge gave the jury adefinition of buggery which in our view was adequate for the purposes of thiscase. He did not give them the fulldefinition which is as follows:-

"The offence of buggery consists of sexual intercourse(a) committed against the order of nature (i.e. per anum) by man with man or inthe same unnatural manner by man with woman or (b) by man or woman in anymanner with beast."

[17] Having carefully considered this ground andthe direction of the Judge we were satisfied that the directions given wereadequate. This ground of appealaccordingly failed.

Grounds 2 and 3

[18] It was submitted that the learned trialJudge failed to put the defence adequately to the jury (ground 2) and that theverdict of the jury was unsafe and unsatisfactory (ground 3). We were of the opinion that there wasmerit in each of these two grounds and when the submissions under these headswere taken together they created a lurking doubt in our minds as to whether theconviction was safe and satisfactory.

[19] The appellant gave evidence on oath at histrial in which he denied committing the offences with which he wascharged. In his testimony he said heknew the complainant by seeing him and that he only knew his name when he wastaken to court.

[20] In his summation to the jury the learnedtrial Judge recited to the jury the main points made by the appellant in hisdefence and said:-

“So that is the case for the defence. He knows nothing about the buggery. He said if there was a buggery it did nothappen at his house. It would have to besome other house and some other person but not his house and certainly not himand I told you, he does not have to prove anything. The prosecution must prove the case againsthim beyond reasonable doubt.”

The crown’s case is that having seen and heard thecomplainant, you can be left with no reasonable doubt. “The accused said he only knew the boy’s nameafter going to the court and to the Police Station, but the prosecution remindsyou of the evidence of officer Catwell who told you that the accused said tohim I know R. by seeing him at the library. So the prosecution ask, how would the accused know at that time who Rwas?”

[21] A reference to the record would show thatofficer Catwell gave this evidence to the court in the presence of thejury: “When I told the accused of hisright to consult with an Attorney-at-Law he said: ‘start the interview I will speak to mylawyer if I get charge’. I then told theaccused that I was investigating a report made by a lady who reported that sometimebetween the 7th of January, 1997 and the 12th March, 1997, a John Hunte had buggered herson R. 13 years old, and who was a student at Princess Margaret Secondary School at Farm Road, St.Philip. I told the accused that I hadreason to believe that he was the said John Hunte mentioned in the matter andcautioned him”. He replied, ‘that is nottrue officer, I know R. from seeing him at the library in Six Roads but I neverinterfered with him’.

[22] This evidence clearly shows that theaccused was given the name and a full description of the complainant by officerCatwell and yet the Judge was asking the jury how could the appellant haveknown the boy’s name was R. when he told the officer he had known thecomplainant from seeing him at the library in Six Roads.

[23] That comment by the Judge was clearlycapable of impugning the credibility of the appellant in a case where thecentral issue which fell to be determined was whether the jury should believethe complainant or the appellant. It wasthe word of one against the word of the other.

[24] In our view the appellant’s case wasthereby prejudiced by that comment. Theevidence of the complainant, and that of the police officers was replete withinconsistencies. The complainant saidthat he was buggered by the appellant on two occasions after school beforeErrol Barrow Day in June 1997. He wasafforded several opportunities to correct himself but instead of doing so, hesuggested that the offences could have been committed in either Juneor July 1997. It should also benoted that when he commenced his evidence in chief he was led by the prosecutorwho asked him whether he recalled the 7th January, 1997 and he said: “yes”.

[25] He then proceeded to say that the firstoffence had taken place on that date. Itshould again be borne in mind that at the time of the alleged offences, thecomplainant was 13 years old, but when he gave evidence before the jury in July2001 he was then 17 years of age. Yet his testimony was so loose and untidy as to suggest that he mighthave been an hostile witness.

[26] In his evidence, officer Catwell said thathe told the appellant about offences which were alleged to have been committedbetween 7th January, 1997 and 12th March, 1997. From whom did officer Catwell get thosedates? The indictment made no referenceto March1997.

[27] Sgt. Jordan, who held an informal exerciseat the Oistins Police Station on the 16th May, 1997, told the appellant thathe was suspected of having buggered the complainant on 3 occasions, between 7th January, 1997and 12th March, 1997. From whom didSgt. Jordanget his information?

[28] Was it once? Was it twice? Was it three times? Did it reallyhappen? If so, on what date or dates?

[29] These were some of the severaldiscrepancies and inconsistencies in the evidence presented by the Crown. These were some of the several matters reliedupon by the defence as constituting the case for the defence and which thedefence said were not properly or adequately put to the jury.

[30] These serious matters were dealt with bythe learned trial Judge in this way:

“When R. was asked if he knew when Errol Barrow Day ishe replied the 21st day of June. I think you all know that Errol Barrow Day is in January so R. showedsome inconsistencies here not only about dates, but about months but you haveto consider all of the evidence of R. and you have to determine whether R. wasmistaken or confused or whether he was lying. If you think he was lying well then it would be open to you to disregardhis evidence entirely but if you feel that he was confused or mistakenespecially about dates and months, then you will have to consider all of theevidence along with the rest of the evidence in the case and determine wherethe truth lies.”

[31] There was no other evidence in the casecapable of supporting the evidence of the complainant. The other evidence in the case was theevidence of the appellant and that evidence was a complete denial ofguilt. So when it was considered thatthere was no evidence in the case capable of amounting to corroboration of thecomplainant’s story, and that the evidence of the complainant and that of thepolice officers was replete with contradictions and inconsistencies, in thosecircumstances we concluded that the evidence was such that it could notproperly form the basis on which a safe and satisfactory conviction could befounded.

Conclusion

[32] At para.8-055 in TAYLOR ON APPEALS, SWEET & MAXWELL,London, 2000, theLearned Author writes: Puttingthe defence case before the jury:

“It is the trial Judge’s duty to identify andadequately remind the jury of the defence case. A failure to refer in the summing up to a central line of defence thathas been placed before the jury will generally result in the conviction beingdeclared unsafe. In Badjan (1966) 50 Cr. App. R. 141,CCA, for example failure to refer to self defence was fatal to theconviction. In Jones (Peter) [1987] Crim. L.R.701 CA., it was held that in a complicated and lengthy case, the Judgewas under a duty to deal with salient points arising in the evidence, and toput the essential thrust of the defence.

In Bentley, (1999) Crim. L.R. 330, thetrial Judge, Lord Goddard C.J., set out the prosecution case in detail and thenstated that was “the whole case”. Hethen proceeded to summarise the co-defendant’s defence in four sentences andthe appellant’s in two:

“Whether the jury would have been impressed by thesepoints if they had been dispassionately identified and laid before them we cannever know. As it was, the jury werenever fairly invited by the trial Judge to consider the points which had beenmade on the appellant’s behalf. Theeffect was to deprive him of the protection which jury trial should haveafforded.”

[33] We adopted the above opinion of the Courtof Appeal in Englandas our own, as it applies with equal force to the situation before us.

[34] We were of the opinion that there wassubstantial merit in the ground that the defence was not adequately put to thejury and that the appellant was thereby deprived of the protection which a jurytrial should have afforded. Weconsidered that in the circumstances the verdict was unsafe and unsatisfactory,and it was ordered that the appeal be allowed and that the conviction andsentence be quashed.

Justice of Appeal

Justice of Appeal Justiceof Appeal (ag.)