REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CvA. No. 43 OF 2001

BETWEEN

STEVE WILLIAMS ***APPELLANT***

AND

THE STATE ***RESPONDENT***

CORAM:

L. Jones, J.A.
M. Warner, J.A.
A. Lucky, J.A.

APPEARANCES:

Mr. K. Scotland for the Appellant
Miss. J. Charles for the Respondent

DATED DELIVERED:

3rd October, 2002

Delivered by Warner J.A.

JUDGMENT

The appellant was on the 25th June 2001 convicted of the following offences for which he was sentenced to serve various terms of imprisonment, that is to say -

1. burglary - 15 years;
2. rape – life imprisonment, not to be released for 20 years.
3. buggery - 10 years.
4. serious indecency - 5 years
5. indecent assault - 5 years
6. robbery with aggravation - 15 years;

these sentences to run concurrently but to begin after the expiration of a sentence for rape imposed on him on the 20th June 2000.

The victim, to whom I shall refer as the virtual complainant, was a young woman, the mother of a 3 year old son who was present at the time these offences were committed.

The prosecution's case was that on the night of 26th July 1997 the virtual complainant secured her apartment at Laventille and went to bed. At about 4:00 a.m. on the morning, of the 27th July

1997 she heard a loud noise, then someone said to her ***'bandit, don't move.'*** She reached for a torchlight and shone it in the direction from which the voice had come. The person pointed a silver gun at her and ordered her to ***'put out'*** the torchlight. She could see his face clearly because she had left a ***'touch lamp'*** at her bedside, on. He was wearing a bandana tied over his head and forehead. The intruder demanded money and jewellery.

She told him where he could find some jewellery. He took a gold chain, valued at $300. After doing so, he raised up her nightdress and put his hands between her legs and felt her private parts. He then ordered her to get out of bed and to proceed to the living room where he again asked her for money. On the way there he took money, ($80.00) from her handbag. They then went to the toilet and after that, back to the living room where she was made to lie on the floor, after which he forced her legs open and had sexual intercourse with her without her consent. He continued to defile the victim when he forced her to lie on her stomach, and forced his penis into her anus. At this point her son awoke.

The appellant ordered her to put him back to bed. After a few minutes, the appellant ordered her back to the living room, and made her lie on the floor. He again had sexual intercourse without her consent. He then put his penis into her anus again. At that point her son awoke. She went into the bedroom. The appellant followed her and passed his hand over her body. He then made her lie on the bed and he put his penis into her anus. He ordered her to open her mouth; he put his penis into her mouth. After two minutes he put his penis into her vagina. On each occasion that he entered her he made ***"in and out"*** movements for about two to three minutes. He finally left.

This shocking ordeal lasted about $1^1/_2$ hours. The virtual complainant later identified the appellant at an identification parade held on the 5th September 1997.

The appellant filed 2 two grounds of appeal. Firstly, that it was an abuse of process for the appellant to be convicted both of burglary and robbery.

Counsel relied on Section 62(1)(a) of the Interpretation Act Chap. 3:01 which provides -

> ***"Where an act constitutes an offence under two or more laws the offender is liable to be prosecuted and punished under either or any of those laws, but a conviction or an acquittal upon a prosecution is a bar to prosecution for the same offence or for an offence which is substantially the same offence under any of those laws."***

He also relied on the case of ***R v Lewis 9 WIR 333*** which, he submitted, received approval of this Court in ***Jokhan v The State Cr.App. 52/99 (unreported)***.

Before we refer to those authorities, it is appropriate to refer to elements of the respective offences. Burglary is committed when any person, in the night, breaks and enters the dwelling house of another with an intent to commit an arrestable offence therein. The maximum sentence is fifteen years. Robbery with aggravation is committed when any person who being armed with an offensive weapon or instrument, or being together with one person or more, robs or assaults with intent to rob any person. The maximum sentence is 15 years. These offences are accordingly two separate and distinct offences, and the elements of the offences are different. It will be demonstrated that the facts on which the prosecution relied to prove the offences were not substantially the same.

In this case the prosecution led evidence that the virtual complainant secured her apartment on the previous night, so that the appellant's presence in the apartment could only have been as a result of breaking and entering. In respect of this offence, the prosecution had to prove that the appellant intended to commit an arrestable offence. The intent was, therefore, clearly proven by the events which unfolded, that is to say, the commission of the robbery.

To refer to an older edition of Archbold, the 35th Edition, at paragraph 18:20, the learning is –

> ***"The best evidence of the intent is that the prisoner actually committed the act."***

With respect to the offence of robbery with aggravation, the appellant used force to relieve the complainant of her property. He was armed with a gun. There is no question but that the facts relied on to prove the commission of the offences were not all the same.

Counsel submitted that the conduct to establish the burglary was the same as the conduct to establish the robbery. He, continued his submission in this way "***the robbery was***

subsumed by the burglary," but he conceded that "***the burglary was not subsumed by the robbery."***

In the case of Lewis, the court observed that the offences of rape and carnal abuse for which the appellant was convicted and sentenced were substantially one offence. The essential characteristic was the unlawful sexual intercourse. Therefore, it was held that the trial judge was wrong to have treated the counts as two substantive counts. This case can clearly be distinguished from the facts of the present case, where the essential characteristic of the offences were different.

In the case of Jokhan the appellant was charged with burglary and misbehaviour in public office. At page 10 de la Bastide, C.J., as he then was, had this to say –

> ***"The misbehaviour alleged in the fourth count was procuring Marlon Nunes to commit the offence of breaking and entering the house of Chin Maharaj and stealing in it the US currency and jewellery belonging to her. But it was precisely because the jury found that Jokhan had procured Nunes to perform these acts and for no other reason that the jury convicted Jokhan of the substantive offence of housebreaking and larceny alleged in count 1.***

Clearly, in both instances Jokhan was convicted twice for 'what was substantially one offence arising out of one incident.' We are satisfied, therefore, that it was wrong for the trial judge to have allowed guilty verdicts to be taken on both, 1 and 4, and on both counts 2 and 3. Counsel for the State suggested that the common law principle and the Interpretation Act forbid the imposition of double punishment and that, therefore, the convictions ought to be allowed to stand provided they did not result in any increase in the punishment imposed. That we note was not the approach adopted in Lewis by the Jamaican Court of Appeal. Moreover, it seems to us contrary to principle that a man should be liable to conviction but not to punishment. We do not accept that allowing the convictions to stand is an option……..

We do not think that Jokhan is entitled to benefit from the order in which the offences happened to be charged in the indictment and in which the verdicts were taken. Notwithstanding the order in which the counts appeared and were numbered in the indictment, the judge ought to have first taken the verdict of the jury on the more serious charges of misbehaviour in public office (i.e. counts 2 and 3) and the jury having returned guilty verdicts on those charges, they should have been discharged from giving a verdict against Jokhan on the other charges, (i.e. counts 1 and 2)."

The distinguishing feature in Jokhan is that the Court held that there was substantially one offence arising out of one incident. In the instant case there was the commission of two separate

offences. On those grounds, we would reject that ground of appeal.

Counsel obtained leave to amend his second ground of appeal to read that ***"it was an abuse of process for the appellant to be convicted for the offences of buggery and indecent assault.***" Counsel for the State, Miss Charles has quite properly directed the Court's attention to the case of ***R v Harris [1969] 2 All E.R 599***.

The gist of this case is that the appellant had been charged for buggery on a boy and of indecent assault of the same boy. He was sentenced to 7 years imprisonment for the buggery and to five years imprisonment concurrent for the indecent assault. Lord Justice Edmund Davies said -

> ***"It was perfectly clear on reading the transcript that the two charges related to one and the same incident. There is no suggestion of any indecent assault on this same boy except that which formed the preliminary to and was followed very shortly thereafter by the commission of the full act of buggery.***
>
> ***It does not seem to this court right or desirable that one and the same incident should be made the subject matter of distinct charges, so that hereafter it may appear to***

> ***those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue."***

The evidence relied on in the instant case in respect of the indecent assault was that while the appellant and the virtual complainant were sitting on the bed, before he committed the act of buggery, he felt her breast and then proceeded to commit the offence.

We are of the view that those acts or the act of feeling of her breast were preparatory to, or can be said to have merged with the act of buggery committed upon the virtual complainant so as to amount to one and the same incident.

While, therefore, the conviction for the greater or the more serious offence of buggery will stand, we quash the conviction for indecent assault. Apart from that, we would wish to say that the summing up, in our view, was flawless and the verdict and sentences befit these most heinous crimes. We therefore affirm the conviction and sentences with respect to rape, buggery, serious indecency and robbery with aggravation; we

quash the sentence for indecent assault, and to that extent only the appeal is allowed.

L. Jones,
Justice of Appeal

M. Warner,
Justice of Appeal

A. Lucky,
Justice of Appeal