REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CrA. No. 63 OF 1998

BETWEEN

JACOB RAMJATTAN APPELLANT

AND

THE STATE. RESPONDENT

Coram:

R. Hamel-Smith, J.A.
L. Jones, J.A.
A. Lucky, J.A.

APPEARANCES:

Miss J. Charles for the Appellant.
Miss S. Chote for the State.

DELIVERED: **29th March, 2001.**

JUDGMENT

Delivered by Jones, J.A.

At a trial before a jury at the San Fernando Assizes on the 26th day of May 1998, the appellant was convicted of one count of rape, two counts of indecent assault and one count of serious indecency. He was acquitted on a count of buggery which was alleged to have been committed at the same time as the other offences. He was sentenced to 12 years hard labour for rape, 12 months and 9 months respectively on the counts of indecent assault and 18 months for the offence of serious indecency.

These offences were committed on the 19th of June 1993. His victims were Vashtie Samboocharan and Geeta Samboochan. Evidence was led from these two witnesses that on the night of 19th June, 1993 they were in bed at the home of Vashtie's boyfriend, one Joseph Ramjattan, brother of the appellant. Around 10.00 p.m., they were attracted to a sound at the backdoor; they overheard a voice at the front door calling out, "Roland, Roland, is Jacob, Joseph's brother". Both girls went to the front door, opened it and saw the appellant, whom they had known before. Thereupon he complained to them that Vashtie's mother had made the police beat him up and that he had to take it out on her. He then held on to Geeta and dragged both girls inside the house and locked the front door. Once inside he asked them to strip; they refused. He then took out an ice pick from his pocket and ripped off Geeta's jersey, short pants and panties. Vashtie at this time was sitting on the bed crying.

The appellant began kissing Geeta on her breasts and touching her all over her body; Geeta resisted. He then turned his attention to Vashtie. He told Vashtie he would have to "get some sex" from her. The appellant proceeded to remove Vashtie's short pants and underwear and kissed her all over. She begged him to desist but he continued. We think it necessary to recite her

evidence in some detail because together with the doctor's evidence it formed the basis of counsel's attack on the jury's verdict. Vashtie testified as follows:

> *"he turned me in front and took out his penis and put it in my vagina. It was real hurting, real bad. I was begging him to stop, but he keep wining on top of me. When I fighting he asked me if I want it in my vagina or in my bottom, I told him I did not want it nowhere. He just turn me to the back and he put his penis into my bottom. I was begging him to stop, it was hurting. He then turned me in front again and put his penis in my vagina again. I was fighting a lot when he was wining. I was pushing him away but he was stronger than me. I was crying. He took his hand and hit me a slap on my right cheek. He turn me to the back again and put his penis in my bottom again. Then he turn me in front and start kissing me up all over. Geeta was on the bed sitting. He asked me if I ever had sex before. I told him no, I never had sex before. He asked me if I want it in my mouth. I said I did not want it anywhere. He turn me to the back again and put his penis in my bottom and started to wine on me. Then he took out his penis and turn me in front again. Then he slap me on the left side of my face. I freak out for 15 minutes".*

She said that when she awoke she had on her shorts and the appellant was next to her. She was experiencing considerable pain in her belly, her vagina and her buttocks. Once more the appellant put his penis in her vagina after pulling off her shorts. She was scared and weak and kept fighting but he kept "wining up".

Geeta's account of the events made no mention of the appellant having anal sex with Vashtie nor of the repeated assaults on her notwithstanding the fact that she was seated on the same bed while the appellant assaulted Vashtie; all she could say was that the appellant took out his penis and placed it between Vashtie's legs.

The activities in the house were, however, interrupted by the sound of a vehicle outside and a voice saying, *"good night, good night*". The appellant told the girls to dress themselves and that if the police enquired whether anything was going on, they should say no. On opening the door a police officer was seen. They reported the matter to him and were later taken to the police station

and then to the San Fernando General Hospital where they were examined by a Dr. Sawh.

Dr. Sawh's evidence is of some significance and we recite some of it as set out by the trial judge in his summation. The doctor said that the focus of his examination was influenced by the nature of the complaint, which we understand was the history given to him of the attack on the girls. The doctor said that he examined the genital area and the area around the anus of Vashtie in particular. He said the vulva and vagina were normal, there was no injury on them; the hymen was intact. He opined that it is possible for a penis to penetrate a vagina and leave the hymen intact, but added that that will depend on the size of the penis, the rigidity and the aggression. In response to a question by defence counsel about what he would expect in a case where aggression was present, his response was that he would expect to see bleeding or laceration, some kind of evidence of trauma, and he found nothing of that nature.

One Roland Persad also gave evidence for the prosecution. It appears that he was responsible for the police being on the scene, but we do not think it necessary to highlight his evidence, as it has no bearing on the issues to be determined.

The appellant testified on his own behalf. His evidence was that he owned and lived at the address where the girls were and on that night he had returned from a visit to his aunt in Rio Claro when he saw lights in the house. Upon entering he saw the two girls naked on the bed with the prosecution witness Roland Persad. They were smoking marijuana and there was a plate with cocaine nearby. They refused to leave the house when he asked them to do so. He searched around to see if anything was missing and while doing so the police arrived and arrested him. His defence was that the prosecution's story was a complete fabrication.

We have set out the evidence in some detail as it impacts on the two grounds of appeal filed by the appellant. The first ground challenges the verdict of the jury on the count of rape as being unreasonable having regard to the evidence and therefore was unsafe and unsatisfactory. We do not propose to deal with this ground separately since we feel it is subsumed in the second ground.

Ground 2

> "The jury's verdict of guilty against the appellant in respect of the count of rape was wholly inconsistent with their verdict of not guilty in respect of the other count of buggery".

The evidence led on behalf of the prosecution to establish the offences was challenged to the extent that the appellant denied the allegations made by Vashtie and Geeta. The appellant admitted that he was in the house, but stated that the allegations against him were a total fabrication. In fact, he stated that the truth of the matter was, that he had discovered the prosecution's witness, Roland Persad, in bed with the two girls. They were smoking marijuana and had a quantity of cocaine close at hand. This was the state of the evidence and we agree with both attorneys that no criticisms could be levelled at the summing-up. The learned trial judge had dealt adequately with the issues which arose for the jury's consideration.

Attorney for the appellant submitted that the jury's verdict on the count of rape was inconsistent with its acquittal on the count of buggery. The issue to be resolved is whether there was a sensible, plausible and reasonable explanation for the different verdicts of the jury.

The principle is clear that an appellant who seeks to obtain the quashing of a conviction on the ground that the verdict against him was inconsistent with

his acquittal on another count has a burden cast upon him to show not merely that the verdicts on the two counts were inconsistent, but that they were so inconsistent as to call for interference by an appellate court. The Court will interfere if it is satisfied that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion which was reached. – See *Durante* 56 Cr. App. R 708.

The authorities on inconsistent verdicts show that each case depends on its particular facts (see *R v Cilgram* (1994) Cr. L R. 861 and *R v Van del Molen* (1977) Cr.L.R. 604).

In *Geronimo Charles v The State Crim. Appeal No. 41 of 1997* unreported, the Chief Justice reviewed a number of English authorities when considering a case where the jury returned a not guilty verdict on a count charging rape but a guilty verdict on a count of serious indecency where the evidence on proper consideration revealed a series of acts by the appellant beginning with the act of serious indecency which immediately preceded the act of rape and was preliminary thereto. The act of indecency consisted of the insertion of his finger by the appellant into the victim's vagina. This was closely followed by the act of intercourse against the victim's consent. Both the acts were part of a series of acts that culminated in the rape of the victim. The defence denied that any such acts took place. The jury returned a verdict of not guilty of rape but guilty of indecent assault.

The Court of Appeal allowed the appeal on the ground that the verdicts were inconsistent since it was impossible to find a sensible, plausible and reasonable explanation for the different verdicts. In the Court's opinion, whether it was a case of perverseness or confusion, it could not be sure that the vice was not in the guilty verdict. The Court found that "no reasonable jury, properly applying their minds to the evidence, would have been capable of that type of mental gymnastics".

In *Charles* it is to be noted however that there were two charges only and they were so interconnected that it was impossible to separate them.

By contrast, in *McCluskey (1994) 98 Cr. App. R 216*, the appellant was charged with murder and affray, both counts arising out of the same incident. One of the directions to the jury was that if they convicted the appellant of either murder or manslaughter, there was no defence to the count of affray. Despite this direction the jury brought in verdicts of guilty of manslaughter, but not guilty of affray. On appeal, the Court, nevertheless, upheld the verdict of guilty of manslaughter on the basis that the jury's acquittal on the relatively minor count of affray could be regarded as no more than a conclusion that, having convicted the appellant of manslaughter, the second count was academic. It felt sure that insofar as there was any element of perverseness in the inconsistent verdicts, the perverseness lay with the verdict of acquittal rather than with the verdict of guilty. That was on the special facts of the case and also in the context of a summing-up that was in all material respects impeccable

In *R v Segal reported in Crim L R 324* the accused, S, had been indicted on two charges (i) driving in a manner that was dangerous and (ii) driving at a speed that was dangerous. He was acquitted on count one but convicted on count two. S appealed on the ground of inconsistent verdicts. The court noted that there was no rule of law that an inconsistent verdict had to be quashed and while the verdicts were formally and logically inconsistent there was nothing unsafe or unsatisfactory in the result.

It seems that on the authorities there is no general rule that all inconsistent verdicts must be quashed. The court must be first satisfied that no reasonable jury properly applying their minds to the evidence in the case could have arrived at the conclusion they had and that the verdict was so unsafe or unsatisfactory that it should not stand.

Returning to the facts of this case, there was no evidence of corroboration. The only witness apart from Vashtie was Geeta. She however, did not advance the case for the prosecution much further, at least on the question of penetration. She was sitting on the very bed at the time yet could say very little in relation to the assault on Vashtie. But her inability to expand on what took place could be attributed to the fact that she said that the appellant had turned off the lights moments before his attack on Vashtie. She said that she had been able to see when he took out his penis and then could only see it when he put it between Vashtie's legs. According to her, the appellant was standing in front of Vashtie, "wining up on her". Brief as her evidence was, it at least supported Vashtie's version of events to a certain extent. If the jury accepted that the lights had been turned off, then that is a sufficiently plausible explanation for Geeta not having seen the actual penetration and the repeated acts of rape and buggery in that sequence.

The medical evidence was helpful to the extent that it at least confirmed that it was unlikely that there had been penetration of the anus. As far as penetration of the vagina was concerned, it would have indicated that if penetration had been achieved it was no further than the hymen which remained intact. In rape, the slightest degree of penetration is sufficient for the offence to be committed. It is true that the doctor did opine that if the attack was an aggressive one he would have expected some form of bruising or tenderness to the hymen. There was none.

According to Vashtie, the appellant set upon her by inserting his penis into her vagina, causing her pain in that area. He asked her if she had had sex before and she said no. This was obvious from the medical report itself. She said that he was 'wining' on her and then turned her over and immediately inserted his penis into her anus. That caused her pain too. Within moments, he turned her over and

again penetrated her vagina and then once more into her anus. She herself complained of the pain this caused.

To arrive at the conclusion therefore that she had been raped but not buggered would on the face of it appear to be inconsistent verdicts. The jury, it could be argued, would have had to reject that part of her evidence relating to the act of buggery and accept that she was raped three times in succession. To reject that there was penetration of the anus and accept that there was of the vagina when the medical evidence supports neither conclusion and in fact leans more heavily in favour of non-penetration of the vagina is a strong indicator of inconsistent verdicts. Unless one could find a sensible, plausible and reasonable explanation for the different verdicts, the verdict should be quashed.

There is no complaint on the directions given and the trial judge did remind the jury that they had to deal with each count and the evidence in support of it separately and arrive at a verdict on each offence.

The weakness in the appellant's submission is that it fails to take into account the fact that he was convicted of 3 other sexual offences: serious indecency and 2 counts of indecent assault. That was a clear indication that the jury had rejected the appellant's version of events that nothing of the kind had taken place that night. By those verdicts, the jury had obviously accepted that the appellant had set upon the two girls and committed various sexual acts on them.

As to the offence of buggery, the jury obviously had the medical evidence in mind that there was nothing to indicate penetration of the anus and it is quite possible that on that evidence they were prepared to give him the benefit of the doubt. On the count of rape, however, they were not only mindful of the judge's direction that the slightest degree of penetration was sufficient but that in the course of his act, the appellant asked Vashtie if she had ever had sex before. It is possible that the presence of the hymen caused him to make the inquiry and

resulted in only partial penetration, at least in their minds. There was other evidence to support the fact that there was a violent confrontation in the room that night. Vashtie said that she was struggling violently with the appellant and there was evidence that he struck her over the left eye leaving it bruised.

In the final analysis, while on the face of it the verdicts may appear to be inconsistent there seems to be some plausible and sufficiently reasonable explanation for them. In those circumstances we do not agree that the verdicts were so unreasonable or inconsistent to warrant the interference of this Court.

The appeal would therefore be dismissed and the convictions and sentences affirmed.

R Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

A. Lucky
Justice of Appeal.