Freetown
July 3,
1961

Ames P.
Benka-Coker
C.J.
Bankole
Jones J.

[COURT OF APPEAL]

HADJI ALPHA CONTEH . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Cr. App. 2/61]

Criminal law—Rape—Assault with intent to commit felony—Inconsistency between acquittal on second count and conviction on first.

Appellant was committed for trial on a charge containing three counts, namely, rape, assault with intent to commit a felony and assault occasioning actual bodily harm. Appellant pleaded not guilty to all counts. The assault relied on by the prosecution for proof of the second count was the same as that relied on for proof of lack of consent in the first count. The assault referred to in the third count was separate and took place at a different time and place. At the close of the evidence, appellant was acquitted on the second count, but convicted on the first and third.

Held, that, since the acquittal on the second count implied that the assault with intent to ravish had not been proved, the conviction on the first count must be quashed since it was founded on the same assault.

James E. Mahoney for the appellant.

John H. Smythe (Solicitor-General) for the respondent.

BANKOLE JONES J. The appellant was committed for trial on a charge containing three counts. The first count was for the rape of one Umu Kamara. The second was for assault with intent to commit a felony contrary to section 38 of the Offences against the Person Act, 1861, the particulars being:

> "Hadji Alpha Conteh on or about the 25th day of December, 1960, at Magburaka in the Tonkolili District in the Protectorate of Sierra Leone assaulted Umu Kamara with intent to ravish her."

The third count was for assault occasioning actual bodily harm.

The appellant pleaded not guilty to all counts.

The assault relied on by the prosecution for proof of the second count was the same as that relied on for proof of lack of consent in the first count. It was the holding of the complainant's throat by the appellant with one of his hands, which is not by itself an indecent assault.

The assault referred to in the third count was quite apart and took place a few hours later at a different place and in public.

A person charged with the offence of rape is in danger of being convicted of the offence of indecent assault but is not in danger of being convicted of the offence of assault with intent to ravish. There was no medical evidence indicative of an indecent assault; and the case for the forcing of the woman was that her refusal to allow sexual intercourse with her was overcome by the holding of her throat, or by fear caused thereby. The case for the prosecution seems a little uncertain as to that. It is to be presumed that at the outset the case was that the appellant assaulted the complainant with intent to ravish, and that he went further and carried out his intention and did rape her, the

assault having put her in fear and overcome her refusal. It would assume that the first and second counts were framed so as to ensure a conviction on the second, if the evidence did not go to the length of the first.

The first witness for the prosecution was a medical officer and the second was a laboratory superintendent. Neither gave any damaging evidence, and the latter, who had examined a lappa and a blanket sent to him, found " no trace of spermatozoa on either."

The third witness was the complainant herself, whose evidence, if true, incriminated the appellant. Her cross-examination indicated that the defence was going to be that the complainant voluntarily had sexual intercourse with the appellant. Her evidence had included an allegation that she had made a complaint to a woman, Balay Bakarr, that " early that morning the accused had gone into my room and had had sexual intercourse with me."

The fourth witness was a boy who had been sleeping in the next room.

Then, as the record states, " at this stage Mr. Collier for the Crown states that he offers no further evidence on counts 1 and 2."

The woman, Balay Bakarr, was then called, but neither examined by the Crown, nor cross-examined by the defence.

In his summing-up the learned judge commented, adversely to the defence, " that there was not the slightest suggestion put to her by the defence that no complaint was made to her." With respect, our opinion is that the onus was on the prosecution to establish affirmatively that a complaint was made to her.

There followed three witnesses about the third count, and a last witness intended to prove cause to put in evidence a deposition, but leave to do so was refused.

The case for the prosecution then closed.

Mr. Mahoney for the defence submitted that as to counts 1 and 2, the accused should not be called upon for a defence.

Counsel for the Crown in reply said: " In view of the steps already taken I have come to the conclusion that there was conflict in the evidence, I do not think that I can properly reply on counts 1 and 2."

However the learned judge ruled that there was a prima facie case to answer on the first count, but that a prima facie case had not been made out on the second count and " he is acquitted and discharged on that count." The assessors were directed accordingly and each gave an opinion of not guilty on count 2.

There was then a short adjournment, after which the appellant changed his plea on the third count to guilty. The court directed the assessors to express the opinion that he was guilty on that count, which they did.

Mr. Mahoney then stated: " that the defence rests its case on the submission made earlier on that the case for the prosecution is one as regards the first count in which no reasonable judge and jury would have convicted " and closed the defence.

Mr. Collier did not address the court and the assessors. He said " that in view of the course he had already adopted as regards the first count he does not wish to address the court and assessors."

The learned judge summed up as to the first count and the appellant was convicted.

Mr. Mahoney's argument before us is that it was inconsistent to convict the appellant on count 1 after his acquittal on count 2, which implied a finding that there had been no assault by the appellant: he also argued that there was

evidence which should have led the learned judge to say that the prosecution had not proved the lack of consent, proof of which was upon them, and that the evidence for the prosecution was inconsistent.

Mr. Smythe has argued that the two counts are distinct and separate and that the conviction on the first was proper, notwithstanding the acquittal on the second. This may be so, in a general sense. We are, however, of opinion that in the particular and perhaps peculiar circumstances of this case, it was not possible.

The acquittal of the appellant on the second count implied that the assault with intent to ravish was not proved and the conviction on the first count was founded on the same facts as negativing the consent of the complainant.

Consequently we think, but with reluctance, that the conviction and sentence on the first count must be quashed and they are so quashed.

The conviction and sentence on the third count are not affected, of course, and stand good.

Freetown
July 5,
1961

Ames P.
Benka-Coker C.J.
Bankole Jones J.

[COURT OF APPEAL]

MICHAEL J. M. HAROUN . . . . . *Appellant*

v.

GEORGE BERESFORD COLE . . . . . *Respondent*

[Civil Appeal 22/61]

Valuation of property—Compensation for making valuation.

Abraham J. Milhem Haroun died testate, leaving an estate which included a third share in several properties in Freetown. Appellant was one of the executors of the will, and he instructed Mr. C. B. Rogers-Wright to obtain probate. To do this it was necessary to know the value of the deceased's share in the properties, and Mr. Rogers Wright instructed respondent to make a valuation. Respondent did so, arriving at a value of £104,000, and then made a charge for his services of £3,120, which was 3 per cent. of £104,000. Appellant paid £2,100, but refused to pay the balance of £1,020. When respondent brought suit for £1,020 and obtained a judgment, appellant appealed.

Held, that the charge of £3,120 was unreasonable having regard to the circumstances of the case.

Rowland E. A. Harding for the appellant.
Mrs. Ursula D. Khan for the respondent.

AMES P. This is an appeal by a defendant from a judgment of the Supreme Court given for the plaintiff for £1,020 and costs.

Abraham J. Milhem Haroun died testate leaving an estate, which included a third share in several properties in Freetown. The defendant/appellant was one of the executors of the will and he instructed Mr. C. B. Rogers-Wright to obtain probate. It was, of course, necessary to know the value of the deceased's share in the properties and Mr. Rogers-Wright instructed the plaintiff/respondent, who is an auctioneer and valuer, to make a valuation.

It is disputed as to whether the contract was that the respondent should find the value of the deceased's third share or the whole value of the properties, but,