

NMY

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 88/99

COR. THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

SICCATURIE ALCOCK

V

REGINAM

Oswest Senior-Smith for the Appellant

Marva McDonald-Bishop and Tricia Hutchinson for the Crown

17th, 18th January, and 14th April, 2000

LANGRIN, J.A.

The applicant was convicted by Mrs. Justice Norma McIntosh (Ag.) in the High Court Division of the Gun Court held in St. James Circuit Court on an indictment charging illegal possession of a firearm, rape and robbery with aggravation. He was sentenced to 15 years at hard labour on each of four counts to run-concurrently. Having been refused leave to appeal against his convictions, he has now renewed his application.

The case for the prosecution is that on the 9th November, 1998 about 1:50 a.m. while the complainant and Raylando Excell walked on Windsor Road, St. James, accompanied by another couple, the accused and a male companion who

was armed with a gun pulled up in a grey Toyota Starlet motor car at the feet of the two females and accosted them.

The accused was the driver of the motor car which bore the registration number 2003 BW. While the applicant remained in the car, the armed man alighted and robbed Raylando Excell. Subsequently, the complainant and her female companion were taken away in the said motor car where the complainant was robbed of her jewellery by the armed man while in the company of the accused and raped by the accused man.

In his defence the accused said while making a statement from the dock that the complainant was mistaken and that he was not guilty of the charges. Also he was not in Montego Bay at the time and "as a rasta he would not do anything like that . What Mr. Williams said was true".

Mr. Oswest Senior- Smith, Counsel for the applicant argued his first ground of appeal which he formulated as under:

"The learned trial judge erred in allowing into evidence and further using as a foundation of the evidence of identification the purported identification of the applicant by the virtual complainant, whereby the mode of identification was contrived and deliberately contaminated".

The circumstances of the identification were that Detective Corporal Emsley Williams was on 16th November, 1998 about 3:30 a.m. on mobile patrol in Montego Bay dressed in plain clothes. He was accompanied by another policeman when he received a telecommunication message and proceeded to

Gloucester Avenue. On reaching near to Club Paradise he saw a grey coloured turbo starlet motor car bearing the licence number 2003BW. He stopped the car, which was being driven by the accused who was alone in the car. He identified himself to him as a police officer and told him of the information he had received that the occupant of the car was involved in a robbery in the Coral Gardens area the previous week. The accused said, "not me, not this car", because he had only come to Montego Bay the day before to visit his mother in Flankers. While he was talking to the accused a group of about five persons walked up to where they were. S. L. who was among them then spoke in the presence of the accused.

I will now outline briefly certain portions of the evidence of Detective Cpl. Williams, a witness for the prosecution:

Examination in Chief

"Q. Tell us what she said?

A. She said, 'Officer is me call the police. This man and him friend, pointing to the accused man, hold wi up, rob wi and carry mi and Charmaine go rape wi.' The accused man took off a tam he was wearing and said,, 'Look at mi good'. I there and then cautioned him.

Q. When he said, 'Look at mi good.' To whom was he referring?

A. He was talking to S. He said, 'I a rasta I don't do those things'. He ask her what time she said this happen.

Q. Who ask her what time?

A. The accused man, he said, 'what time you said this happen? And she said, 'last week'. The accused man said, 'It can't be, because the last time I come to Montego Bay it is just little after Sun Fest'. I then asked S if she is sure that this is the man she is talking about.

HER LORDSHIP: Yes?

WITNESS: ... she said, 'yes, I can't miss him', because he did the most talking and she can't miss that voice. I then ask him if he is the owner of the car and if he allowed anybody else to drive the car and he said the only person apart from him that drive the car is his cousin and his cousin cannot drive come to Montego Bay. I then ask S. what part did this man play in the incident, she said he drove the car his friend robbed them and he had sex with her. I then escorted the accused man to Coral Gardens Police Station and handed him over there".

Cross examination

"Q. So, my understanding of the evidence so far is that it would not be true to say that you asked - did you hear any police officer ask Miss Lyle, 'is this the man'?

A. I did not hear that.

Q. Could anybody else have heard Miss Lyle tell you that she had called the police?

A. Yes.

Q. Such as?

A. There were other policemen there, sir. The accused was there.

Q. I put to you that she told you no such thing?

A. She did.

Q. Told you no such thing?

A. She did."

It is pertinent to juxtapose this evidence with that of the complainant S.L. Mr. Senior-Smith contended that the identification evidence should be excluded as it did not preclude the dangers of mistaken identification and was derived only after a prompting by a police officer. Learned counsel then

adverted to the examination of the witness by the learned trial judge which reads as follows:

"HER LADYSHIP: And on the 16th of November, when you went out to Gloucester Avenue and you saw- What did you see? First I should ask you when you went out to Gloucester Avenue what you saw first- When you went to Gloucester Avenue, you got a telephone call and you went to Gloucester Avenue, what did you see first?

WITNESS: The first thing I saw was like the police cars a lot of policemen standing around walking down on the sidewalk. I saw the car going down I saw the man, his back was turned, he was talking to the police.

HER LADYSHIP: You said, I saw the man," what do you mean?

WTNESS: The accused.

HER LADYSHIP: His back was turned to you and he was talking.

WITNESS: Yes, he was pleading

HER LADYSHIP: Was there anything that was familiar to you?

WITNESS: The voice. That is when I said, 'Yes I recognise the voice', and he turned around.

HER LADYSHIP: You said what?

WITNESS: ... 'I recognise the voice'.

HER LADYSHIP: You spoke?

WITNESS: Yes, 'I recognise the voice'.

I was walking with my mother.

HER LADYSHIP: Now, did you say this softly or could he hear you? How close were you to him? Let us start there. How close were you to him when you said this?

WITNESS: I was not too far away from him. I was like here and he was like right where the court reporter is, and I said I recognised his voice and he turned around facing me and he said, 'Me Miss'?

HER LADYSHIP: Just a second. It is about eight to ten feet?

Mr. McKenzie: About eight feet, my Lady.

HER LADYSHIP: Mr. Fairclough?

MR. FAIRCLOUGH: Yes, ma'am.

HER LADYSHIP: He turned around and he said, 'Me Miss'?

WITNESS: Yes, ma'am.

HER LADYSHIP: Yes ?

WITNESS: When he turned around he said, 'Me?
And I said, 'Yes you'.

HER LADYSHIP: Had you yet spoken to a police officer?

WITNESS: That is when the police asked me if I know this man, and I said 'Yes, that is the man that raped me.'

HER LADYSHIP: Now, apart from the voice, when he turned around to face you, did you recognise anything about him?

WITNESS: His face, the height."

Counsel for the applicant argued that the issue of confrontation was not adverted to by the learned trial judge in circumstances where the said issue was adduced cogently in the evidence by the virtual complainant.

We were referred to a number of cases by counsel on both sides dealing with the important question of confrontation but it is only necessary to refer to *R v Errol Haughton and Henry Ricketts* (1982) 19 JLR116, where Carey J.A. stated the law in this way at page 121:

"Where a criminal case rests on the visual identification of an accused by witnesses, their evidence should be viewed with caution and this is especially so, where there is no evidence of prior knowledge of the accused before the incident. Where an identification parade is held as is the case where there is no prior knowledge of the accused, the

conduct of the police should be scrutinised to ensure that the witness has independently identified the accused on the parade. Where no identification parade is held because in the circumstances that came about, none was possible, again the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by a witness. It will always be a question of fact for the jury or the judge where he sits alone to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting. In a word, the identification must be independent."

In the instant case we think the learned judge properly advised herself of the caution with which she should approach the matter. In evaluating the complainant's evidence on this aspect of the matter she had this to say:

"In questions put to her by the court she testified that on the 16th of April when she went to the police, where the accused was apprehended, she heard him talking as she approached - Talking to the police. His back was to her and she said, 'yes I recognise the voice at this stage'. She said the accused turned to face her and said, me, miss? The officer who apprehended him, Detective Corporal Williams, testified that he did not hear any exchange of words but in cross-examination of the complainant on the 12th April, 1999, it was suggested to her, and she agreed, that she has said in her statement of the 16th that 'I identified the man at Gloucester Avenue by his voice.' So voice identification did arise before her testimony in this court.

I find that she had ample opportunity to hear his voice and be able to identify it, and she did identify it on the 16th of November, 1998. In addition, there is the evidence concerning the car which, in my view is cogent evidence to be considered together with the identification evidence. There is no denying that the

car belongs to the accused, he admitted this, and told the police that apart from himself only a cousin drives it and he can't drive it to Montego Bay.

Further, when the officer told him of the report his response was simply 'not me, not this car because I only came to Montego Bay yesterday', and other words. No indication that no one else had the car at the relevant time. Later he said, the last time he came to Montego Bay was little after Sun Fest with clear inference that he had not parted possession of the car at the relevant time. Where the car was also was he."

We think that the learned judge was correct in making these findings. The facts in our view demonstrated that the witness S. L independently and unaided identified the applicant.

The other complaint raised by the applicant is in respect to voice identification. The learned trial judge in reviewing her notes of evidence found no less than thirteen opportunities when the witness S. L heard the applicant's voice. The judge found that the witness spoke truthfully and that in making one of her reports to the police she mentioned that the applicant spoke a lot whereupon the police asked if she could identify him by voice and she responded in the affirmative.

The principles governing voice identification are admirably stated in the case of *R v Rohan Taylor et al* SCCA Nos. 50,51,52 & 53/91 judgment delivered March 1, 1993. Gordon J.A after reviewing the relevant authorities had this to say at page 13:

"In order for the evidence of a witness that he recognised an accused person by his voice to be

accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act...."

It must be understood that the learned trial judge found that the witness had sufficient opportunity to see the applicant's face and with the power of observation that she had displayed she was able to see enough of him so as to be able to identify him.

The evidence of voice identification was not decisive to the conviction in the case and the court is of the view taking the rest of the evidence into consideration that the conviction was correct.

The application for leave to appeal is treated as an appeal.

For the above reasons we feel constrained to dismiss the appeal. With respect to the complaint against sentence we are of the view that having regard to the appellant's previous good character, his age and his apparent settled life, and notwithstanding his reprehensible conduct, a sentence of 15 years imprisonment is manifestly excessive. We therefore substitute therefor a sentence of 12 years imprisonment.

Accordingly the conviction is affirmed. The appeal against sentence is allowed. The sentences of 15 years on each count is set aside. Substituted instead on count 1 is 10 years imprisonment at hard labour. The sentences on counts 2,3, and 5 are 12 years imprisonment at hard labour on each count. Sentences shall run concurrently and shall commence on 26th July, 1999.