JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 39/2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE DUKHARAN, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A .

ISAAC ALFRED V REGINA

Herwin Smart instructed by Palmer, Smart & Co., for the applicant

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions, and Mrs. Tracey-Ann Johnson, Crown Counsel for the Crown

October 5, 16 and 30, 2009

PANTON, P.

1. The applicant was tried on February 14 and 15, 2007, in the Westmoreland Circuit Court before Mrs. Justice Cole-Smith and a jury for the offence of attempted murder. He was convicted and sentenced to life imprisonment with a specification that he be not eligible for parole before serving fifteen years. On October 16, 2009, we refused leave to appeal, and ordered that the sentence run from May 15, 2007. We promised then to put our reasons in writing, and this we now do.

2. The indictment on record as well as the evidence gives the date of offence as 30th October, 2004, although the summation speaks of the 20th October. The latter is taken to have been an error in recording. On the date in question, the applicant, according to the complainant Mr. William Hogg, entered the latter's

residence, threatened him with death, wounded him, tied him up and threw him into a tank that was partially full of water.

3. Mr. Hogg managed to help himself to the top of the tank and was later taken to the Savanna-la-Mar Hospital for treatment. This was followed by further treatment abroad. Mr. Hogg received wounds to his head and other injuries to his neck and other parts of his body. He was clearly traumatized by the incident, and it was some time before he was able to give a written statement to the police. He had however given the police a verbal report while he was a patient at the Savanna-la-Mar Hospital. In that report, he had named the applicant as his attacker. He had also named the applicant when he was being rescued from the top of the tank by Mr. Calon Jackson, a builder, who had visited Mr. Hogg earlier on the afternoon of the attack.

4. The applicant said he was a resident of the parish of Portland and was not in Westmoreland on the date of the incident. He admitted that he and Mr. Hogg were involved in another Court matter in Westmoreland at the time of the incident, but denied the allegations of the prosecution as to the injuries to Mr. Hogg and his being thrown in the tank.

5. The learned judge instructed the jury that this case depended on the correctness of the evidence of identification and the credibility of Mr. Hogg. She gave appropriate directions in this regard and reminded the jury of the evidence that was presented. She also gave the standard directions as to the burden and standard of proof. The jury returned the adverse verdict in twenty-nine minutes.

6. Learned counsel, Mr. Herwin Smart, in challenging the correctness of the verdict and the sentence, relied on the following grounds of appeal:

> "GROUND 1
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> The verdict is unreasonable and cannot be supported having regard to the following:
>
> (a) The Learned Trial Judge failed to address the Jury as to fact and law in respect of the evidence regarding the identifying of the accused by way of confrontation at the police station:
>
> I. That the Appellant was not well known to the Complainant as [i] the Complainant only gave one name to the police (*page 31 lines 2-5*), and [ii] a period of over a year elapsed between the date of the offence and the identification of the Appellant by the Complainant.
>
> ***R v Leroy Hassock 15 JLR p.135;***
> ***R v Brown et al (2001) 62 WIR 234;***
> ***R v Noel Williams (1997) 51 WIR 202.***
>
> II. That the foregoing has to be examined within the context that the Complainant said that inside the house was dark (*page 20 lines 16-18*) [See Notes of Evidence *p. 35*] and that there was no evidence of the time that the Complainant had to see the face of the intruder. The evidence of time only spoke of the time the intruder was in the house (*page 21 lines 8-11*)
> [*See Notes of Evidence p37*].
>
> Therefore in the circumstances the learned Trial Judge ought to have upheld the No-Case submission.
>
> GROUND 2
>
> That the sentence of the Court is manifestly harsh and excessive having regard to all the circumstances of the case that is inter alia he had no previous conviction for violence."

There was a third ground of appeal but this was abandoned before us.

7. In making his submissions, Mr. Smart said that at no time was any evidence given as to the opportunity the complainant may have had to see his attacker, adding that there was no evidence as to light. It was his view that an identification parade ought to have been held, given the fact that only one name was given to the police and that was the only name on the warrant. In respect of the holding of an identification parade, that would have been necessary if there was a doubt as to whom the name given by the complainant referred. In this case, there was no doubt on that score, so the holding of an identification parade would have been farcical.

8. So far as the lighting and the ability to see are concerned, the entire body of evidence has to be looked at to see if there is substance in Mr. Smart's complaint. There is no doubt that the complainant and the applicant know each other well. The applicant was employed to Mr. Hogg for "just about a month or six weeks" (p.5 notes of evidence). That was about 1999 and, during that period, the applicant lived in a cottage owned by Mr. Hogg. The question is whether the complainant was correct in saying that the individual who came to his premises, tied him up and threw him in the tank was the applicant.

9. The evidence as to time may be gleaned from Mr. Calon Jackson. He visited Mr. Hogg at about 4 to 4.30 p.m., left and returned at about 8 p.m. When he returned, he had no difficulty, it would seem, in seeing and recognizing Mr.

Hogg on the tank. According to Mr. Jackson, he was able to see because of "two dusk to dawn lamps" with "big lights" that are at "either corner of the house" (p.107, lines 16-22 transcript). The jury would have been well within their bounds to infer that these lights came on automatically when dusk commenced. Prior to that, there would have been daylight. On that basis, Mr. Hogg would have had ample opportunity to see the individual who took him from the inside of the house and rolled him over into the tank.

10. The earlier evidence indicates that Mr. Hogg and his attacker were in close proximity for a significant period of time. When he first saw the applicant, the estimate of distance given was of about six feet apart (p.12 - notes of evidence). At that time, Mr. Hogg said he saw his entire body. Thereafter, there was movement from one section of the house to the next. Then there was the use of belt, tape and neckties by the applicant to tie Mr. Hogg's hands and to place same around his neck. All this activity was at close quarters, lasting for about three quarters of an hour (p.37, line 7). At page 36 of the notes of evidence, the following is recorded:

> "Q. Mr. Hogg, when you say you see Isaac in your house, how you see him?
>
> A. In the day, that time the night don't come yet." (lines 16-18)

This clearly indicates that the jury had evidence that the applicant arrived at the premises during daylight, even if it may be inferred that he left after nightfall.

11. Mr. Smart cited authorities which he claimed were supportive of allowing this application for leave to appeal. We did not agree with him. First of all, he referred to ***R v Hassock*** (1977) 15 JLR 135. That was a case dealing with confrontation. The headnote reads, in part:

> "Held: (i) that where an accused person is unknown to the witnesses before an alleged incident and his guilt rests solely on visual identification by those witnesses an identification parade should be held;
>
> (ii) that the practice of confrontation with a view to identification in those circumstances is to be condemned;"

In the instant case, the witness and the applicant know each other, and the witness called the name of the applicant at the very first opportunity that he had to do so. Mr. Smart also referred to ***R v Gavaska Brown and others*** (SCCA Nos. 84, 85 and 86/99) delivered on April 6, 2001, and ***Williams v The Queen*** [1997] UKPC 11 (13th March, 1997). However, there is nothing in these judgments that supports the contention of the applicant. In ***Gavaska Brown*** there was a good deal of discussion on confrontation, and reference was made to cases such as ***Hassock*** (supra). There was confirmation of the legal position that where a suspect is well-known to the witness, confrontation is permissible in this country – unless the suspect asks for the holding of an identification parade. The Court stated a body of rules to ensure fairness where confrontation is contemplated – see page 17 of the unreported judgment. In ***Williams,*** their Lordships of the Privy Council endorsed that which was stated in ***Hassock*** as being the proper practice in respect of confrontation. They also agreed that

"confrontation, if it is to be resorted to at all, should be confined to rare and exceptional circumstances".

12. Mrs. Johnson submitted that the Court ought to be guided by the judgment in ***Goldson and McGlashan v The Queen*** (2000) 56 WIR 444. There, the Privy Council reaffirmed "that if the accused is well known to the witness, an identification parade is unnecessary and could ... be positively misleading".

13. We are satisfied that the jury had sufficient credible evidence on which to convict the applicant, and they were properly directed by the learned trial judge. Notwithstanding the efforts of Mr. Smart, we found no merit in the grounds that were filed and argued. We deliberated on the sentence that was imposed and affirmed that it was appropriate in the circumstances. This was a serious unwarranted attack on a senior citizen, aged 92. Had it not been for his agility and presence of mind, the charge against the applicant would no doubt have been one of murder.

14. In the circumstances, as stated earlier, we refused the application and ordered the sentence to run from May 15, 2007.