Nmcs

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 215/06

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

FITZROY FULLER V. REGINA

Miss Althea McBean for the Appellant.

Mesdames Paula Llewellyn Q.C. and Sasha-Marie Smith for the Crown.

16th June, 2008

Oral Judgment

COOKE, J.A.

1. The appellant, Mr. Fitzroy Fuller, was on the 23rd November, 2006 convicted by a jury presided over by Mr. Justice Donald McIntosh. He was convicted on two counts, the first of which was for abduction and the second for attempted murder. For these offences he was sentenced to three years and fifteen years respectively and sentences were to run consecutively.

2. A synopsis of the facts as outlined by the learned crown counsel was as follows. On the 10th November, 2005 the virtual complainant was at " a dead yard" or what we in Jamaica call "nine night'. She left at about 9:45p.m. While she was walking along the Kellits Main Road she was apprehended from behind when a male grabbed onto her and put his hand over her mouth. At first she

thought it was somebody she knew but her discriminating eyes made her realize that it was not so.

3. She was dragged into the cane field and onto a track where her assailant ordered her to remove her clothing to which, with much fortitude, she replied "you will have to kill me first". He then used the knife to cut off her outer clothing leaving her in her underwear.

4. They were wrestling and she managed to disarm him of his knife. But her disarming him was only for a short time as he stepped in her chest and regained his threatening weapon. She was on the ground. He was on top of her, endeavouring to get between her legs for about half hour during which time she said she saw his face. This lady put up quite a fight and he could not succeed. He then dragged her to another part of the cane field. There she sat on a stump and for about half hour a conversation took place. Then he ordered her to lie down and she refused.

5. The outcome of all this was that she got stabbed. The evidence of the doctor as recounted by the learned trial judge was that there were three lacerations: one to the neck which was approximately 20 cm, one to the right part of the chest which was about half inch and one to the right upper back which was about half inch. What is significant is that just before the wound to the chest was inflicted, the appellant used the word "straight to yuh heart".

6. The virtual complainant was hospitalized for some six days and apparently because of her injuries she was housebound until the 23rd December. On this day she went up to Kellits and at the Ewarton taxi stand, which is the place where the commuter would go to get a taxi going to Ewarton, she saw her assailant. She called the Crofts Hill Police Station. The appellant was accosted and reduced into custody.

7. One of the critical issues in this case is that of identification. The attack in this regard is as follows:

> "The evidence in respect of identification took place in circumstances which were unreliable and directions given to the jury were insufficient in this regard."

In her oral presentation to us counsel for the appellant submitted that there were two errors. The first was that the learned trial judge did not alert or bring to the jury's attention two weaknesses in respect of this visual identification. The first pertained to the fact that it was moonlight and the second pertained to the difficult circumstances. The evidence of the virtual complainant was that it was full moon and it was bright. She had sufficient lighting to be able to make a proper and correct identification.

8. It is indeed true that the learned trial judge never used the word weakness in respect of the quality of the lighting provided by this full moon. Nonetheless, we are of the view that omitting to use the word weakness does not detract from the overall tenor of his summing-up in this regard, as it seems

to us that he left it to the jury as he was obliged to do, to say whether or not there was adequacy of lighting which was provided by the full moon. So in respect of the first error, we do not think that there is any merit.

9. In respect of the second error pertaining to the assertion of difficult circumstances, counsel for the Crown, the learned Director of Public Prosecutions, pointed out that the description of difficult circumstances cannot be isolated from the total circumstances which obtained at the time. We think that there is merit in that submission, because it is impossible to divorce difficult circumstances from all that had taken place. In this particular case, there are at least two half hour segments when there was this opportunity for the complainant to view the features of her attacker. So it is approximately an hour. Therefore, we are of the view that the attack on the summing-up in respect of difficult circumstances does not carry the force suggested by counsel.

10. In respect of the second count, the ground of appeal was that the judge failed to give adequate directions on the offence of attempted murder. This is what the learned trial judge said:

> "The second offence is attempted murder, I must tell you that an attempt is defined in law as an act to commit a crime and that is itself a crime. Before the accused can be convicted of this offence, it must be proved that he had intention to commit the full offence, and in order to carry out that intention, he did an act or acts which pointed towards the commission of that offence, and that act or acts were directly, immediately, or not hereby remotely connected to the commission of it and doing of which

> cannot be reasonably regarded as having any other purpose than the commission of the specific offence, and that offence here is that of murder."

Miss McBean did not find it possible to subject this passage to any criticism and therefore ground 2 is without merit.

11. We have given consideration to ground 3 which pertains to the question of sentences. Miss McBean's submission was that there should not be consecutive sentences in a situation like this as the offences arise out of the same set of circumstances. We do not agree. The abduction and attempted murder arise out of two distinctive sets of circumstances. They do not bear any relationship to each other. It is not like the situation where you have smoking and possession of ganja. Furthermore, in the circumstances of this case, looking at the term of 18 years in a global way, considering what this appellant did, it cannot be said that the sentences were manifestly excessive.

12. The appeal against convictions and sentences is dismissed. The convictions and sentences are affirmed. Sentences are to commence from 23rd February, 2007.