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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 107/02

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A .
THE HON. MRS. JUSTICE HARRIS, J.A.

CLIVE MARRIOTT V REGINA

No appearance for the applicant.

Mr. Dirk Harrison for the Crown.

October 17, 2006

Oral Judgment

PANTON, J.A.

1. This is an application for leave to appeal in a matter wherein the applicant was convicted in the St. Catherine Circuit Court as long ago as December 2001 for the offence of rape. He was sentenced to 10 years imprisonment at hard labour.

2. The circumstances indicate that this applicant who was known to the victim as "Pokey" and other persons (men), against the will of the unfortunate

female here had sexual intercourse with her. This took place at night, in an unlit room. It was not reported immediately. Indeed, the report seemed to have been made after several days had passed, and there had been whispers in the district wherein this incident had taken place.

3. The summing up does not meet with our approval in that, there was no direction given in respect of corroboration, and in addition, we are not completely happy with the definition of rape. We also note that there had been what may be regarded as an unnecessary adverse comment, made by the learned trial judge in respect of the applicant's failure to call his girlfriend, whom he said he had been with at the time this incident was alleged to have taken place.

4. It is true that the learned trial judge did say that "there was no burden on the applicant to call the witness" — but owing to the circumstances in which the comment was made, we think that the comment was totally unnecessary and it was prejudicial to a fair outcome. The most striking thing is the question of the failure to direct in respect of corroboration. With that being so, we are constrained to state that the application for leave to appeal should be granted. We treat these proceedings in which the applicant is unrepresented as the hearing of the appeal which is allowed. The conviction is quashed. The sentence is set aside.

5. We have given thought to the question of a retrial and that route does not find any favour with us. The applicant has been in custody since 2001. He has, in effect, served a substantial portion of the sentence that was imposed on him. Based on, the circumstances which have given rise to the quashing of the conviction, we do not think it is fair that he should be facing another trial. Accordingly, we are entering a judgment and verdict of acquittal.

PANTON, J.A.

ORDER

Application for leave to appeal granted; the hearing of the application is treated as the hearing of the appeal, which is allowed. Conviction quashed. Sentence set aside. Judgment and verdict of acquittal entered.