JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 78/86

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

ANTHONY STERLING

Michael Erskine for the Applicant

Garth McBean for the Crown

October 21, 1987 and March 25, 1988

WHITE J.A.:

The following are the reasons for refusing this application for leave to appeal by Anthony Sterling against his conviction for Rape.

The offence was committed on the 21st April, 1985, after the complainant, a young woman aged sixteen years was accosted by the appellant. At about 8:00 p.m., on that date she was walking with friends on the street in Ziadie Gardens and had in fact stopped to talk with Vernon, a friend of the applicant when the latter came up, grabbed her by the hand and said to her: "Charmaine, you and I are going to have sex tonight." Despite her screams and her resisting him, he pulled her towards and into, his house. In the house, he pushed her on to the bed. She was still trying to fight him off, but he unclothed her. During this she told him she wanted to go to the bathroom. He allowed her to go to the bathroom. She locked herself into the bathroom. However, the applicant succeeded in getting into the bathroom; he pulled her back into the room and on to the bed; he had sexual intercourse with her. He then left the room.

Her ordeal was accentuated by the efforts of the other man, Vernon, to have sex with her without her consent. During the wrestling with Vernon, the applicant came back into the room, and encouraged her to allow Vernon to have sex with her. Vernon was unsuccessful and left. Thereafter, a third man came. He grabbed her by her hair and pulled her on to the bed. She struggled with him; they fell on the floor, and the appellant, she told the Judge and jury, came back into the room, held her legs apart while she was on the floor, thereby enabling the other man to have sex with her. This man when he was leaving said, "Next." A chinese man, with the assistance of the third man, opened her legs and the chinese man had sex with her.

After this she saw her pants on the wardrobe; she took them down. Again, the third man came into the room, held on to the pants and said he had not got his money's worth. At the same time, the appellant, Vernon, and the chinese man were outside at the window looking into the room. It was the appellant who told the third man to leave her alone. She put on her pants; the appellant pushed her blouse and brassiere and under-wear through the window. She took them. To get out of the house, she had to climb on a chair then over a wall, and she left the premises. On her leaving, she asked the appellant for her earrings which had fallen off during her struggle with Tony. He told her she could not get them until she came back.

Evidence was given by a Mr. White, whose house was the destination of the complainant and her friends before she was accosted by the appellant. Mr. White said that the complainant came to his house. He stated that she arrived at his house at about 10:30 p.m., whereas her friends had arrived there at about 7:00 p.m. to 7:30 p.m. She was crying, and complained that some boys held her up, took her to a house and raped her. He took her to the Police Station, where a report was made.

The appellant was arrested by Detective Acting Corporal Forbes, to whom the report was made by the complainant and Mr. White. He went with her to the premises where the rape had taken place. He saw the appellant on the 12th July and told him that the complainant had reported that he along with other men had sexually assaulted her on the night of the 21st April, 1985. The accused man said: "Is mi girlfriend, Officer." He arrested the appellant on a warrant charging him with rape. The accused did not say anything after he was cautioned.

The cross-examination of the complainant projected an intimate relationship between her and the appellant. He gave evidence that this relationship started from the Summer of 1984. He related that on several occasions, she and he had had sexual intercourse. She willingly had sexual intercourse with him. No one else was present on any of those occasions. Certainly, there was sexual intercourse between them on the 31st March, 1985. Her attitude towards him seemed to have changed on that occasion after she read a letter from a girlfriend of his in New York. They had sex after the 31st March, on a Sunday when she came to his home between 7:00 p.m. to 7:30 p.m. She left at about 9:30 p.m. to 10:00 p.m. He saw her in June and asked her why she had told the Police that he raped her. At the same time, he offered her a pair of earrings which he had for her, and she made a rude reply to him. She had left them on the window ledge at his house on the last occasion when they had sex. He denied the allegations made by the complainant. No witness was called for the defence.

Several grounds of appeal were raised before us. These canvassed the Judge overstepping the proper limits in exercising his right to express his views on the evidence, and in so doing denying the accused a fair and impartial trial. Another complaint was that the trial Judge failed to put adequately or at all the defence to the jury, or alternatively, the defence was put in such a manner that the appellant was deprived of the right of having his defence considered fairly, impartially and objectively by the jury.

Mr. Erskine for the appellant recognised that the learned trial Judge had warned the jury not to be necessarily bound by his comments. But in this case his comments were such that none were favourable to the appellant. In fact, he argued, the Judge ridiculed the defence specifically, when he asked the jury to consider the character and behaviour of the complainant who on the appellant's story was willingly having sex with him even after she had read the letter addressing the subject of marriage with the appellant. The Judge posed for the jury's consideration, the existence of the letter and its location in the room bare of furniture except for a bed and a built-in wardrobe. He asked them to consider whether they accepted as a fact that she was, as was insinuated, having an affair with the accused, and at the same time having an intimate relationship with Mr. White. The question: "Did that girl strike you as such?" is an appropriate question to have been posed in all the circumstances of the case. As regards the reading of the letter, the Judge reminded the jury at p. 33:

> "Now, from the evidence given by the accused man, she had read the letter on the 31st of March; she was very angry; she issued threats; she felt jilted according to Mr. Pearson. Consider, she did not go to the police that night and report it anywhere, but she comes back willingly some weeks after, she comes and knocks at the gate, took him inside, they make love, she left in the usual way and she goes right up to Mr. White crying and report it to him. This girl who had threatened him on the 31st March, she returns some weeks later and according to him, walks into his parlour and she had sex with him. Do you believe that this girl that you saw give evidence here, would do such a thing to this young man? It is a matter for you, Madam Foreman and Members of the Jury."

He continued on p. 34:

> "But why would she be doing it on this occasion. She didn't do it at the time when she read the letter, when she is vexed and angry; she doesn't go to the station, goes back, has fun, has sex, and he is a romantic man, when she is leaving he must have kissed her then walked her to the usual spot he said, then she just changed suddenly from this darling of a girl and walked up to Mr. Whyte and plan up a lie, tell Mr. Whyte a lie, run to the station same night and tell lies. This is what the defence said happened."

We are unable to see wherein the trial Judge made such comments as would inordinately affect the independent assessment by the jury of the evidence which they had heard. Through the summing-up, he reminded the jury of the submissions made to them by Counsel who appeared for the appellant at the trial. We conclude that on the two points of complaint set out earlier the trial Judge did not in any way overstep the lines of proper judicial comment, nor did he fail adequately to remind the jury in detail of the defence story and its implications.

We were asked to critically comment on two passages in the summing-up which were quoted in the grounds of appeal. The first one appears at page 21 where the Judge advised:

> "As I told you, it is the crown who have to prove this case; you have to be satisfied about it so that you feel sure before you can give any verdict adverse to the accused. If you are not convinced about her truthfulness, then you have to go and consider the defence case, ..."

As quoted, this passage is incomplete in that the Record continues:

> ".... consider the crown's case. If you are not satisfied you say not guilty."

It would appear that here the Judge corrected himself by asking the jury to consider the Crown's case. Indeed, the last sentence is saying succinctly what he had earlier said to the jury in a more elaborate way when dealing generally with the standard and burden of proof especially bearing in mind his warning about it being unsafe and dangerous to convict on the uncorroborated evidence of the complainant.

Another passage which it was said showed that the Judge erred in law in his directions is at page 6:

> "The prosecution called Mr. White to prove what is called recent report or fresh complaint, but this evidence by Mr. White is not evidence of the fact complained of, but if you accept it, it is evidence of the consistency of the conduct of the complainant of the story told by her in the witness box, that is that she is speaking the truth since she has consistently told the same story from the very start and has negatived consent on her part."

Here again the passage when completed gives a fuller picture which when looked at, completely denies the complaint projected by the appellant.

On page 14 the learned trial Judge reminded of the submission by defence counsel that the doctor was not called by the prosecution. During the course of his directions hereon the Judge remarked:

> "I think that you, Madam Foreman, asked whether the doctor would have been able to help you to determine the number of men who had sexual intercourse with her, but as I replied to you then, that the doctor would not have been able to say how many men. If he had seen her immediately after, he could possibly say whether he saw any signs of recent intercourse. He would not be able to tell you the number of men. If the doctor had seen a smear and got it tested, you may very well find more than one type of semen. Semen is divided into categories, but you remember that she said that the accused man had used a condom, and another man deposited his semen on the floor, you would not find any semen there. So I don't know if the doctor would have been of any assistance in that regard."

We are at a loss to discover how this questioned passage in any way amounts to an error of law, much less affects the strength or weakness of the prosecution's case, when the Judge was at pains to advise the jury that they are to consider only the evidence which was placed before them, and not to speculate as to what a witness not called would have said, if called. His words on this page, rightly explained to them the points which could possibly have been brought out if the doctor had been called.

The fourth ground of appeal which was argued was stated thus:

> "That having regard to the evidence adduced by the prosecution and the defence put forward by the Appellant the Learned Trial Judge ought to have told the Jury that if they believe that the complainant consented to sexual intercourse with the appellant but did not consent to sexual intercourse with the other men then they should acquit him. This omission on the part of the Learned Trial Judge amounts to a mis-direction."

We are of that view as there was no basis of fact upon which the trial Judge could so direct the jury.

Lastly, we did not accept that the sentence was manifestly excessive.