JAMAICA

IN THE COURT OF APPEAL

R.M. COURT CRIMINAL APPEAL NO. 196/76

BEFORE: THE HON. PRESIDENT
THE HON. MR. JUSTICE HENRY J.A.
THE HON. MR. JUSTICE ROBOTHAM J.A.(ag.)

REGINA

v

CLIVE DUNCAN

Mr. Dennis Daley for the Applicant

Mr. Henderson Downer for the Crown

July 14, 1977
July 15, 1977
July 16, 1977
July 18, 1977
July 23, 1977

ROBOTHAM J.A. (ag.)

This applicant was convicted in the High Court Division of the Gun Court for offences of illegal possession of a firearm, for which he was sentenced to imprisonment for life; for burglary, for which he was sentenced to fifteen years hard labour; for rape for which he was sentenced to fifteen years hard labour and, in addition, to receive eight strokes with the tamarind switch, and also for shooting with intent for which he received a sentence of fifteen years at hard labour. He appealed and the appeal was heard on the 14, 15, 16 and 18th days of July, 1977 when judgment in the matter was reserved.

The case turns mainly on the identification of the applicant by Sharon Butler who was raped and by Joyce Fenton who was shot at. It is conceded on all sides that there were numerous lights in and around the house on this night in question. The applicant is alleged to have entered the room of Sharon Butler and sat on her bed and had a conversation with her whilst his accomplice was searching the room. In all, he was in this room for some twenty to twenty-

five minutes, for five or ten minutes of which time he was engaged in having sexual intercourse with Sharon Butler. At one stage he was sitting on the bed and looking down at her and trying to pull the covers off her, which she was resisting. He told her to take off her panties. At this time she saw that he had been armed with a gun from he entered the room and when she hesitated to take off the panty he told her that he would count three and at the end of that time if she had not removed the panty he would shoot her. She said in her evidence that when he was about to say 'three' she removed the panty. One can well imagine the intense concentration that she must have been focusing on him whilst he was counting to three if she could see when he was about to say 'three'. It can hardly be refuted that she had ample time and opportunity to identify the accused.

She subsequently pointed him out on an identification parade held at the Constant Spring Police Station. It was suggested that she was able to do this by means of a keloid which the accused had on his back. At the station all the men were put on the parade without shirts. According to the Police this was because the accused himself refused to put on a shirt despite having been asked by the sub-officer conducting the parade if he wished to have a shirt on. At the parade, Sharon Butler, the girl who was raped, after going up and down the line asked the men to turn their backs and when they did so she pointed out the applicant as her assailant. It was suggested to her that she was able to do this because the applicant had been paraded before her at Maverley Police Station the Sunday before and the keloid had been pointed out to her. Joyce Fenton was also alleged to have been at the station when this was done. Suffice it to say that she denied this in cross-examination and the constable also denied that any such thing took place at Maverley Police Station. The learned trial judge had all this before him and he rejected the suggestion that any such impropriety took place at the identification

parade. One cannot help but ask why would it have been necessary for her to point him out by means of a keloid if she had this opportunity to see him whilst he was in the room and if he had in fact been paraded before her at the Maverley Police Station? Joyce Fenton when she went to identify the applicant did not make any such request and she had no hesitation whatsoever in pointing him out as the man who shot at her on the night in question.

It is true that the learned trial judge lapsed somewhat into error when he made reference to the applicant having possibly taken off his shirt whilst he was having sexual intercourse with Sharon Butler. The evidence was clear, as given by Sharon Butler herself, that the applicant had on his shirt all the time. However, she stated that when she pointed him out at the parade she had already recognised his face before she asked the men to turn their backs and it was not by the scar on his back that she was able to identify him. It is somewhat surprising that both counsel for the Crown and counsel for the defence allowed the judge to lapse into such an error without saying something at that stage. It has repeatedly been said that counsel should not sit by and hear a judge misquote the evidence and say nothing at the time with a view to taking advantage of it before the Court of Appeal. This practice is undersirable and should not be encouraged.

We think the evidence entitled the learned trial judge to find as he did that the identification in this case by Sharon Butler and Joyce Fenton was good and that there was no impropriety in it.

However, the case against the applicant did not rest only on the identification of him by Butler and Fenton. There was the evidence of the police officer who arrested and cautioned him, who said that on his arrest he said, "Ah nuh me one; Mickie was there too." This statement was accepted by the learned trial judge as

having been made by the applicant.

There was also the evidence that the accomplice of the applicant addressed him as "Come on Priestly." Mr. Daley for the defence argued that these words "Come on Priestley" which the applicant's accomplice was supposed to have used at the time when he was exchanging three shots with Joyce Fenton were inadmissible in evidence and ought not to have been used for the purposes of identification as, indeed, the judge said that he so found. On the use of those words, we think that they were sufficiently related in time to the entire transaction so as to form a part of the res gestae and as such were admissible in evidence and was something which could have been taken into consideration along with all the surrounding circumstances, including the fact the arresting officer also knew him as "Priestley" and that the applicant himself claimed that he was also known as "Presley".

We do not think that any lapse of the learned trial judge in his recounting of the evidence was sufficient to vitiate the conviction. One should bear in mind that a recounting of the facts at the conclusion of a trial before the Gun Court is not tantamount to a summing-up and it is not usually done with as much particularity as when one is summing-up a case to the jury. It might be well, however, for judges who conduct cases in the Gun Court to be warned that they should conduct such a summation with the same degree of particularity as they would in addressing a jury.

In so far as the ground of appeal relates to the interruptions by the trial judge, it is a mistake to think that a trial judge should sit as a statute during the course of a trial and see it going in various directions not in keeping with the proper administration of justice. His interruptions must not be biased one way or the other. Provided he maintains a fair balance there is nothing wrong with timely interruptions on his part. We do

not think the interruptions in this case can be said, as a whole, to have been prejudicial to a fair trial of the applicant.

In so far as the charge of illegal possession of a firearm goes, we are satisfied that Sharon Butler gave quite an adequate description of the weapon which the applicant had in his hand for the learned trial judge to have come to the conclusion that he was in possession of a firearm or imitation firearm in view of Section 20 (5) (C) of the Firearm Act, and we think that the conviction on that count must stand. We are satisfied also that she was raped by the applicant and that the house of Joyce Fenton was burglared on the night in question.

In so far as the count of shooting with intent goes, Mr. Daley submitted that the evidence was insufficient to support a charge of shooting with intent. He referred us to the case of Clinton Jarrett et al S.C.C.A. 97/75. Where on a charge of shooting with intent the person is actually shot or the firearm is recovered or there is physical evidence of damage done by a bullet there is no difficulty in the Crown substantiating the charge. Different considerations arise, however, where no firearm is recovered nor is a person hit by any bullet. In such a case, as was said in Clinton Jarrett's case, it is not possible to lay down any hard and fast rule as to the proof required to show that the object was a firearm. It is indeed a matter for the jury to decide whether or not as a matter of fact the object in question has been shown to be a firearm. The ingredients which have to be proved by the Crown is that Joyce Fenton was shot at, and that she was shot at with a gun. The evidence given by Miss Fenton, a person of experience in the use of a firearm, was quite clear. She said that she traded three shots with the applicant. She saw the flashes from his gun and she heard the explosions. She has been the holder of a firearm since 1967. On this evidence we feel that it was quite sufficient for a jury to say that she was shot at with a gun. We think that the conviction on the count

for shooting with intent must also stand.

The applications for leave to appeal are treated as the hearing of the appeal and the appeals are dismissed.

We do not consider that the sentences on the counts for bluglary, rape and shooting with intent were in any way manifestly excessive. The appeal against sentence is also dismissed.