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J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 59/72

Before: The Hon. President
The Hon. Mr. Justice Luckhoo
The Hon. Mr. Justice Swaby (ag.)

R. v. Herman Jackson

Mr. G. Andrade for the Crown

Mr. S.C. Morris for the Appellant

24th October, 1973

Henriques: P.

The Appellant in this matter was convicted in Clarendon Circuit Court in May Pen on the 22nd of March, of the offence of attempt to commit rape, and sentenced to six years hard labour and ordered to receive five lashes. He applied for leave to appeal on the 4th of April, 1972. His application was refused on the 23rd of February, 1973, and he further applied to the Full Court for leave to appeal against his conviction. That application came before the Court on the 4th day of April, 1973, when he was given legal aid by the Court and a transcript of the notes of evidence was ordered.

The trial arose out of an incident which took place on the 10th of November, 1971, in May Pen, Clarendon. On that night, Charmaine Campbell, a young girl of about 15 years along with her sister, Alice Campbell, a younger girl of some 8 years went to a shop somewhere in May Pen. While they were walking along the road they met the Appellant who enquired of them as to the whereabouts of Denbeigh Crescent. Charmaine offered to direct him to Denbeigh Crescent when she was returning from her mission to the shop. The Appellant then accompanied the two girls along the Main Street, in May Pen and during the course of their walking along, he began a conversation in which he spoke to them of his ability to deal in

/witch-craft....

witch-craft and to kill people by means of witch-craft. Charmaine Campbell, according to her testimony, became afraid, and the Appellant then ordered her to go to a place called Penguin Key, and she felt obliged to do so on account of the fear she had of him. They came upon an open lot, whereupon the Appellant then told her to go to a certain house and get some money from a woman who lived in that house; money which the Appellant said was owed to him by the occupant of the house. She obeyed him in view of the fact that she was frightened from the conversation which had taken place. And while she was on the way to the house the Appellant suddenly stopped her, told her that he wanted to have sex with her, took out a knife, threatened her with the knife, subsequently put away the knife, took out a gun, threatened her with the gun, started pulling down her panties and ~~then took out his penis~~ and tried to insert his penis into her private parts.

On witnessing this awful sight, the young girl, Alice Campbell ran off and apparently encountered and spoke to two couples who were in the vicinity, who immediately went upon the scene, whereupon the Appellant then made off. The two children in distressed condition went home and Charmaine Campbell made a report to her mother and then they visited the police station. Within 45 minutes the two girls and a party of policemen went to the home of the Appellant.

It is the circumstances surrounding what happened at the home of the Appellant and in particular his identification as the assailant of this young girl which is complained of; and the learned attorney for the Appellant states that what transpired there vitiated the entire trial.

The grounds of appeal are as follows:-

- (1) the Learned Trial Judge did not adequately or at all direct the Jury on the question of identity.
- (2) the procedure by which the accused was identified was irregular. The facts on which the witnesses based their identity was never substantiated in Court, so that the Judge actually left it to the Jury to accept that because

/the....

the witness had identified the Accused on the night he was arrested, that identification was enough for them to say that the present Accused in the dock was one and the same person.

- (3) the two witnesses were ~~in~~ each others' presence when the complainant indentified the Accused and as such the second identification by the witness was not an idependent corroboration of the complainants identification of the Accused.

At the hearing this morning, the Appellant sought leave to add another ground of appeal in regard to this question of identification, and this is as follows:-

"That the Learned Trial Judge misdirected the Jury on the question of corroboration, in that the Judge directed the Jury that there was corroboration of the complainants evidence by the sworn evidence of Alice Campbell."

He further complained in ground 2, that corroboration was not adequately dealt with by the Trial Judge, and in ground 3, that the Learned Trial Judge did not put the defence adequately to the Jury, and lastly, the verdict was unreasonable and could not be supported, having regard to the evidence.

Now, when the witness Charmaine Campbell, had given her evidence in chief at the trial, she was cross-examined at great length and vigorously by the Learned Attorney, Miss Thompson, who then appeared for the Appellant. And under cross-examination on page 24 of the transcript is to be found the following passage:

"Q: The police went to his house about how long after?

A: About 45 minutes.

Q: The police took you to his house? A: Yes.

Q: You did not point him out right away? A: Yes, I did.

Q: As you saw him? A: Yes.

Q: What you said: A: I said that he was the man.

Q: He was the man? A: Yes.

Q: /Didn't....

Q: Didn't you look at him for a very long time.... A: Yes.

Q:before saying this is the man, wasn't that what happened?
Try and remember, didn't you look at him for about ten minutes
or so before you said this was the man? A: Yes.

Q: You looked at him for about ten minutes before saying this
was the man; in fact Charmaine, when you saw him you were not
certain that he was the man, isn't that so?

A: No, I wanted to find out if he had the gold teeth first.

Q: You said you wanted to know if he had gold teeth. Did you
tell the police when you saw them about gold teeth? A: Yes."

And further on page 25 of the following passage:

"Q: In fact Charmaine, when you went to his house, wasn't this
man talking with the police long before you identified him?

A: No, when the police knocked at the door he came out and I told
him that he was the man and he was saying that he was not the
man, I told the policeman that he was the man.

Q: He was the man? A: That tried to rape me.

Q: As he came out, you told the policeman that he was the man?

A: No, about ten minutes.

Q: About ten minutes after you were there that you told the
police that he was the man? A: Yes.

Q: Before you identified him to the police as the man, wasn't
this man talking with the policemen that were there? A: No."

And on page 28 of the transcript, then under cross-examination:

"Q: Are you saying now that he spoke before you identified him?

A: No.

Q: No, what?

A: Well, when the policemen came, he asked why they call him out
of his house, or something of that sort.

Q: So he spoke before you identified him?

A: He spoke and I saw his gold teeth then.

/Q: You see....

Q: You see, I am suggesting that you are utterly confused as to the identity of the person you were with that night, isn't it so?

A: I am sure he was the man."

When the evidence of the girl, Alice Campbell, is looked at under cross-examination on page 38 of the transcript of the notes, we find:

"Q: Did you notice anything special about his face or any part of his face while he was talking? A: He had two upper gold teeth..

Q: Now, when you went back to Penguin Key and went to the house, you notice anything special about the man you pointed out?

A: Yes.

Q: What you notice about the man specially? A: His walking.

Q: Anything else?

A: And that he had in the same two upper gold teeth.

Q: He had in the same two upper gold teeth? A: Yes."

On the question of identification, the witness Clement Brown, the Constable who went, or one of the Constables who went with the young girl to Appellant's home stated in evidence:

"Q: When you went to the house with Charmaine, wasn't it some time before she identified the man? Didn't some time elapse before she said, 'that is the man who attempt to rape me?' A: No.

Q: I am suggesting that some time passed, you know, it was about ten minutes before she said, 'this is the man?' A: No.

Q: What, she pointed him out right away?

A: As the man came out.

Q: She pointed him out? A: Yes.

Q: Did you find any green shirt? A: Yes.

Q: You found a green shirt? A: Yes.

Now, Appellant who gave an unsworn statement from the dock, called a witness, one Hyacinth Smith, as to where he was that night. Hyacinth Smith who apparently lives in the same yard but in a different room had returned to those premises from the shop she had visited. And Smith went on to speak of the visit of the police party and the two girls to the

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home of the Appellant. And while she was being cross-examined by Learned Counsel for the prosecution; she was asked the following questions:

"Q: And did the ladies say anything about Jackson and the young girl?

A: One was crying and one was told him that, 'you attempt to rape my sister.'

Q: Did they state this just as they come and see Jackson or long after?

A: Same as the man hold him, and Jackson say, 'what I do', and the little girl say, 'you attempt to rape my sister.'

Now, the grounds of appeal were elaborated upon before us by Mr. Morris, who now appears for the Appellant, and he has made certain submissions and urged certain arguments and states that what took place with regard to identification should lead us to the conclusion that that conviction ought not to stand.

The gravamen of his complaint is that the Learned Trial Judge ought to have dealt with it in an entirely different manner, that he ought to have stated to the Jury that the proper method of identification was for the Appellant to have been placed upon an identification parade and the witness called and thereupon asked to identify him if she could. And that this method of confrontation which he suggests took place amounts to a miscarriage of justice and ought to be condemned by the Court.

Now, the Jury, after being directed by the Learned Trial Judge, retired at 3:35 p.m. and they returned at 3:58 p.m. They were then asked the usual questions, and in answer to the question, if they were unanimous, they said, 'no'. The Learned Trial Judge then said, 'Mr. Foreman, I am afraid I can't take any other than a unanimous verdict at this stage. I have to ask you to retire again and see where you can iron out your problem. Is there any particular point that is giving you difficulty on which you require help?'

Mr. Foreman: May I say it is 6 to....

.../His Lordship: I don't....

His Lordship: I don't want to know how you are divided. is there any particular point which is giving you trouble on which I can help you on?

Mr. Foreman: Yes, sir, it is the identity of the Accused. One is not satisfied of it, one has not seen the gold teeth that has been mentioned in the upper set of teeth; as to the person walking, one suggested that he did not see the walking and that the person limped, that is why we have not reached a unanimous decision.

His Lordship: Miss Bennett and Miss Thompson, I am not quite sure whether I can ask the Accused to do anything?

Miss Thompson; Learned Attorney for the Appellant at the time said, 'I don't think so, sir.'

His Lordship: Mr. Foreman, I am sorry I don't think this is something I can help you on."

Learned Counsel for the Appellant has complained of the manner in which the Learned Trial Judge dealt with the predicament in which one of the Jurors apparently found him or herself. We are unable to see any merit in this complaint.

Then the Learned Trial Judge further proceeded to address these words to the Jury, 'I don't know whether it will help you, to remind you of the evidence. You have evidence from both of these witnesses, both Alice Campbell and Charmaine Campbell, that the person who they say committed this offence on this night was a short man, a dark man, a man of medium build, was a man who had two upper gold teeth and both of them told you that that man was the Accused. Both of them have also told you that before they identified this man at his home on that night, they recognised him as being the man whom they saw earlier on that night. I think in the case of Alice Campbell, she was the one who told you that the Accused or that man whom she identified at his home, she identified partly because she saw the gold teeth and partly because she saw him walking, and she told you that the man was the Accused. I don't think

/you....

you can have any doubt that the Accused was the man that they pointed out on this night. He himself has told you that he was the man that they pointed out. His witness has told you that he was the man that they pointed out. He has told you that he was the man that they pointed out and they have told you that he is the man that committed this offence. It is a matter for you to decide, whether you believe what they told you or not. He has told you, of course, that he is not the person, that he was elsewhere, and as I think, I told you, if you accept what he tells you, then he is entitled to be acquitted, if you are in doubt about it, he is entitled to be acquitted. If you are not sure whether he is the person who is alleged to have committed this offence, then, of course, he is entitled to the benefit of the doubt, he is entitled to be acquitted.'

We have examined with Counsel the evidence, and have taken into consideration the submissions which he has made, but we are unable to find that there was any impropriety in the method of identification in the light of the circumstances in the case. Although there may perhaps be some little justification for the view that the Learned Trial Judge might have dealt a little more elaborately with the question of the identification of the Appellant. We feel that, particularly in view of his almost final words to the Jury, he summarised the evidence in such a form that the Jury must have realised that the matter vital for their consideration with this question of identification, and the question was in the forefront of the minds of the Jurors. We are of the view, therefore, that the directions of the Learned Trial Judge were sufficient so far as the circumstances in this particular case were concerned, and we see no reason why the conviction should be disturbed. The Appeal is accordingly dismissed.