CA - CRIMINAL LAW - Rape - Identification - Inconsistencies between complainant's evidence at preliminary enquiry and trial - whether identification evidence adequate/satisfactory - lack identification - failure of trial judge to adequately warn/direct jury - verdict of jury unreasonable and cannot be supported by the evidence - Appeal allowed, conviction quashed, verdict of acquittal entered

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 89/90 OF 1986

✓ comp.

COR: The Hon. Mr. Justice Rowe, P.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R. v. HUGH ALLEN &
DANNY PALMER

L. Jack Hines for the appellant Hugh Allen

Delroy Chuck for the appellant Danny Palmer

Garth McBean for the Crown

22nd July & 20th October, 1987
& February 5, 1988

WHITE, J.A.:

A single judge granted leave to appeal on two grounds: (1) the unexplained inconsistencies between the evidence of the complainant at the trial and her deposition at the preliminary enquiry; (2) the nature and quality of the identification evidence.

After hearing the arguments relative thereto, we allowed the appeals, quashed the convictions, and entered verdicts of acquittal. In keeping with our promise, the reasons for that decision are now rendered.

First, the facts which lead to the charge of rape. The complainant gave evidence that at about 3:00 a.m., on

Friday, May 9, 1985, while she was asleep in her room at Rum Lane, she was awakened; then she saw two men in her room. She said she was able to see them by means of a light which was in the yard. This light shone into her room. She said she did not know these men before, although she said she knew the appellant Danny Palmer by a nickname of "Fire Bun". She pointed to the appellant Hugh Allen, as the other man. Palmer, she said, had something looking like a gun, which he put at her neck. On this assertion, she was later shown to have said at the preliminary enquiry that the object placed at her neck was an icepick. However, in her evidence-in-chief, the complainant said she was told that if she screamed she would be killed. She was told to take off her clothes, and when she had done this, first Palmer, then the appellant, Allen, had sexual intercourse with her without her consent. They repeated these acts of sexual intercourse.

According to her evidence, Phillip Flemming, who was charged and convicted along with the two appellants, but who did not appeal his convictions, came into the room, where she had allegedly been raped. The complainant said she used to see Flemming pass by her residence at Rum Lane. When Flemming came into the room, he reprimanded the appellants for their behaviour. He invited her to put on her clothes as he would take her home.

Allen and Palmer went out of the room. The complainant left the premises with Flemming, who led her by the hand into the yard where he lived. When she asked why he was not taking her to the home of her sister-in-law as he had promised, he gave her an excuse. She told him she wanted to take a bath. While she was bathing she heard sounds on the

roof of the house in which she then was. To her enquiry about this noise, she said Flemming told her that it was the other two men who were coming back for her, and he promised to defend her from them. The sounds continued, which further frightened her; she said she ran from the bathroom into Flemming's room. He assured her that he would defend her. Flemming went to the door of the room and after about three minutes he returned; then the noise stopped.

Thereafter, Flemming told her he wanted to have sexual intercourse with her, and when she protested, begging him to remember the ordeal she had just been through, he threatened that if she did not agree he would open the door and "let the men finish me off." In this dilemma and on the instructions of Flemming she lay on the bed, and he had sexual intercourse with her. She said she had no recourse but to submit to him. Thereafter, she put on her clothes and he accompanied her to the yard of Lola Lawrence, her sister-in-law. Flemming told Miss Lawrence that he had seen two men, "Fire-Bun" and Hugh George, raping her; that he rescued her. He left her with her sister-in-law.

Later on that day she made a report to the Central Police Station. She was later examined by a doctor.

On the next day, Saturday, she said the appellant, Palmer, came to her and said 'that if we take his name to the station he would burn the house down, and would kill us.' She reported this to the police at the Central Police Station. Accompanied by a policeman she went on to Rum Lane in Kingston, where she saw and pointed out Palmer, who was taken into custody. Later, on that same Saturday, at about 9:30 p.m., she pointed out Flemming to the police, who took him into custody. In relation to the appellant Allen, she said that

from the time of the assault on her in her room at Rum Lane, she never saw him again until she saw him at the Sutton Street Court, where the preliminary enquiry was held.

Identification was the vital issue in the case. It is part of the evidence that the appellant, Hugh Allen, was not put on an identification parade. This was the overriding consideration in that both appellants in their unsworn statements had put up an alibi. Therefore, it behoved the trial judge to assist the jury to arrive at a true verdict by proper and relevant directions on that issue.

Indeed, at page 18 the judge did point out to the jury the importance of the factor of identification, with the caveat that if the failure to put Hugh Allen on an identification parade put the jury in any doubt they should acquit Allen.

On the issue of identification which had this overriding importance, the judge first of all told the jury at pages 7 and 8:

> "When you come to consider the question of the identification made by the complainant you must examine carefully the circumstances in which that purported identification was made. What has been underscored throughout this case is the opportunity to see - the question of light - what light was available for her to see. You will have to consider the nearness of the persons who were her alleged attackers, and each of them, and what distance the person was to the complainant, whether or not the complainant's observation was impeded in any way and whether or not the person had the opportunity ... had known the particular defendant before, and if the complainant had known any defendant before, for what length of time.
>
> You will also have to consider this question of identification in the context of any inconsistent statement that the complainant made. And I'll illustrate it

> "by this: You do recall that it was suggested to her that at the preliminary examination she had testified that an ice-pick was held at her neck by one of her attackers. At court here she says it is a gun. If an inconsistency such as that makes you wonder whether or not you can accept her evidence it means that you will have to reject her evidence."

Again at page 12:

> ".....what was projected was that there was not sufficient light in the house for her to see who her assailants were, to recognise them, and you will have to consider this question when you consider her description of the object as a gun at her neck, and the fact that it was demonstrated to her that she was recorded as saying at another time and place, that it was an ice-pick."

He again emphasised the importance of light, in all the circumstances in the following words at page 25:

> "She denies that it was dark in the room, members of the jury, and it is for you to consider, as I said earlier on, in this context of available light, whether or not you can be satisfied about her identification of each of the two men. Be very careful of this question as regards Palmer and be very careful of it as regards Allen for whom an identification parade was never held and whom she only identified by his presence in court and having not seen him between the interval of the alleged act at 43 Rum Lane and when next she saw him at court."

The submissions to us substantially complained of the directions of the learned trial judge which were wholly deficient on the critical issue of identification and on the important aspect of the light. The significance of this is highlighted by the denial of Miss Cameron that she had previously said that when Flemming, otherwise called "Lenkiroy" came into the room, he lit a match and held it up. At that time one of the appellants was on top of her. When the

deposition on this point was shown to her, she said she did not remember having said so at the preliminary enquiry. This conflict in her evidence was referred to by the judge at page 33 when he reminded the jury that "Miss Cameron is not saying that she saw these men by the light of a match, but there is evidence coming from Mr. Flemming that this match was struck and presumably flared some light into the room." He rightly pointed out to the jury that there was no evidence of the sort of match that was lit. So that in that situation, it was incumbent on him to stress to the jury the inadequacy of light which would negative considerably any process of identification which the complainant chose to follow thereafter. What is inescapable is the realization that the complainant was unable to see clearly enough to later identify anyone.

Admittedly, the complainant never in fact identified Hugh George Allen to the police. On this she agreed with her deposition in which she said "I did not identify Hugh George to the police." As a matter of fact, under cross-examination, she admitted that at the preliminary enquiry she had said "I told Collin who told me to call George name instead of Oscar." Collin who was her boyfriend, was not called by the Crown, although from her evidence he had been beaten and was taken out of the room by Palmer, when the appellants invaded the room. The witness' ability to properly identify her assailants as the result of her own observations was sorely nullified by the instructions which she said Colin had given her. She thus became a suspect witness in respect of the appellant Allen, even allowing for the serious experience she had undergone. To this end it was not enough for the judge to remark at page 25:

> "If you accept that on the previous occasion, as the deposition would indicate, she used those words, you have to consider the effect of those words. It was submitted yesterday to me that this bit of evidence was such as to undermine her credit so much that it would be unsafe to leave the matter for your consideration at all."

On page 26 he continued:

> "If she said that, what do you make of it? Is this something that you would regard as undermining her testimony or not? It is open to you - this is my own opinion, you need not accept it - it is open to you to find that that bit, if it was said, undermines her testimony, and at the same time you can put a certain construction on it, merely that she is asserting that she did not identify George to the police and that she told Collin."

Although the judge left the issue of identification to the jury, it is clear that the inconsistencies related above, should have alerted him to a more careful analysis of the effect of those inconsistencies. More was required than the terse sentences -

> "If it undermines her testimony it can be so regarded. If you find that it does not undermine her testimony it is a matter for you."

These remarks fell far short of what was required for a full direction to the jury. It was certainly incumbent on the judge to direct the jury in what way her testimony at the trial which was in conflict with the deposition would constitute the undermining of the evidence which she gave at the trial, no less as to what would be the result if they found that the discrepancy was material. This standard was not met merely by telling the jury that it was a matter for them. This defect became glaring in the absence of any mention of the omission of any explanation by the witness for

what was a serious inconsistency in her evidence, upon which the prosecution entirely depended for a conviction. There was no explanation which dissipated the inconsistency, and had the proper directions been given, the jury would undoubtedly have rejected the complainant as a witness of truth in so far as concerned the identification of the appellant Allen.

There is still the matter of the dock identification which counsel for the appellant Allen, rightly complained about and/which Mr. McBean, counsel for the Crown, conceded was "unfair by itself". Despite this concession, Mr. McBean submitted that although the directions did not in terms refer specifically to dock identification, the directions of the learned trial judge were such as to make it clear to the jury how unsafe dock identification was. Mr. McBean supported this submission with the following passage which appears on page 39 of the summing-up:

> "As regards the accused Allen, you must be very careful and in fact very, very cautious inasmuch as there was no opportunity, there was no identification parade, between the time of the incident and the time when Allen was brought to court. Whether or not she was prompted, it is not for you to speculate, but if you have some doubt as to whether or not she has been prompted it means that you could not be sure of the case against Allen. Nevertheless, if you have considered all the circumstances and all the considerations as I have indicated and you are satisfied to the extent that you feel sure, it would then be open to you to return a verdict of guilty against Allen as well."

This passage, Mr. McBean said, must be read with the passage on page 25, cautioning the jury to be careful of the fact that the complainant had not seen Allen since the incident until he appeared at the Sutton Street Court. These passages, submitted Mr. McBean, were sufficient to enable him

to distinguish this case from the reported decision of R. v. Noel Absolom and others [1973] 12 J.L.R. 1074 which was cited by Mr. Hines as relevant to the duty of the trial judge where dock identification is the main-stay of the Crown's case.

In that case the sole issue related to the identity of one of the accused, Collins, in the commission of the crime. No identification parade was held in respect of Collins, but two eye-witnesses identified him at the preliminary enquiry. The judgment of the Court of Appeal which was delivered by Graham-Perkins, J.A., at page 1076 summarised the evidence as follows -

> "There was not a single factor pointing to the accuracy of the identification of Collins by Smythe and/or McLaughlin while he was in the dock at the preliminary enquiry. There was certainly no evidence of any admission by Collins that he was at or near the scene of Campbell's death. Nor was there any particular feature or characteristics about Collins that would aid either Smythe or McLaughlin in their identification of him. In so far as Collins is alleged to have been involved, the events of the fatal night as described by Smythe and McLaughlin could not be said to have afforded the best opportunity to either of observing the features of a man whom neither had seen before. Neither Smythe nor McLaughlin had been able to give a description of Collins to the police. In these circumstances, involving as they did, evidence which at its best was far from weighty, the jury should have been alerted to the very grave risks of identification in the dock. Nowhere in his summing-up did the learned trial judge attempt to so alert the jury. In the particular circumstances of this case we are of the view that this failure on the part of the trial judge was a very serious error which may very well have resulted in a miscarriage of justice."

Without itemising them, this passage adumbrates certain factors which in a given case are likely to cancel

out the maleficent effect of dock identificaiton, and so not render it nugatory. Dock identification is not necessarily nugatory considering the circumstances of any particular case. See, for example, R. v. Slinger [1965] 9 W.I.R. 271; Herrera and Dookeran v. R. [1967-68] 11 W.I.R. 1 per Wooding, C.J., Kirpaul Sookdeo v. The State [1972] 19 W.I.R. 407.

However, in this case, although the judge cautioned the jury, we do not accept that his warning was sufficiently strong so as to alert the jury that in the circumstances of this case, the dock identification was worthless especially considering the inconsistencies in the evidence of the complainant..

We would add to the authority cited by Mr. Hinds, the case of R. v. Errol Thomas, Errol Hanson, Michael Bailey [1978] 25 W.I.R. 495 in which Henry, J.A., speaking for the Court of Appeal, emphasised the directions necessary as to the danger of dock identification. In that case the applicants, Thomas and Bailey, were known to the principal prosecution witness, but Hanson was not. The witness gave no recognizable individual descriptions of the men who took part in the attack, and he next saw the applicants in the dock. It was held, inter alia, that the dock identification of Hanson called for the most careful and positive directions from the learned trial judge, as to the dangers inherent in it, and in the absence of such a direction the conviction of Hanson could not stand.

During the submissions by Mr. Hines that the judge should have pointed out to the jury why dock identification lacks quality, because on that occasion there is the natural propensity of the witness to think that the person arrested

is the person who committed the crime, his attention was directed to the last recited case, and we would underline our acceptance of his submissions by quoting this passage from the judgment of Henry, J.A., at pages 496I-497D:

> "Hanson was not known to the witness before the day of the incident, nor was another accused Livingston White who the witness said was one of the group of men who took part in the attack. No identification parade was held for either Hanson or White and at the close of the prosecution's case the learned trial judge directed the jury to acquit White. In relation to the persons not known to Mr. Blake before the day of the incident he had given only a general description of all of them to the police. He saw them for the first time after the incident in the dock at Half Way Tree charged with the offence. Two of the four persons charged were known to him before and on his evidence he was in no doubt that they took part in the attack. There was in our view a very real danger of the witness identifying the other two merely by association with the two who were known to him rather than by actual recognition and recollection. But there was an added danger. It is clear from the evidence that the police could not have identified Hanson and White from the description given by the witness Blake. That identification must have come from some undisclosed source. There was, therefore, the added danger of the witness making his dock identification merely because he believed that the police must have acted on reliable information in arresting Hanson and White. As the High Court of Australia observed in Davies and Cody v. R. (1) ((1937), 57 C.L.R. at p. 182):
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> > "his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question."
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> The circumstances called for the most careful and positive directions from the learned trial judge as to the dangers inherent in this dock

> "identification. No such directions were given although general directions as to the danger of relying on identification evidence were given. We were of the view, therefore, that the conviction of Hanson ought not to stand and counsel for the Crown very properly conceded this."

These applicable comments subserve the value of the identification which, in our view, was the central and principal point in this case.

Even accepting the complainant's evidence that Danny Palmer had come to her home and issued threats, and that she later pointed him out to the police, it was necessary for the judge to have given the direction that the jury were to be sure that the complainant had not made a mistake in pointing out Palmer. This, it must be stressed, was demanded by the circumstances as outlined by her. The opportunity for identification was the same as for the appellant Allen.

Here again, as was argued by Mr. Chuck, the credibility and reliability of the complainant was discredited by the inconsistencies in her evidence. The circumstances did require that this factor be brought to the attention of the jury if they were to assess her evidence of visual identification, giving due emphasis to her obvious difficulty to convincingly relate the sequence of important events or to remember her previous accounts thereof even when the relevant parts of her deposition were put to her.

Those considerations, therefore, led us to the conclusion that the verdict of the jury was unreasonable and cannot be supported by the evidence.