IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 50 of 1973

BEFORE: The Honourable President
The Honourable Mr. Justice Hercules
The Honourable Mr. Justice Swaby

R. v. Joseph Lao

Mr. Clinton Hines for the applicant
Mr. Glen Andrade for the Crown

November 16, 1973

HENRIQUES, P.

The appellant in this matter was convicted at the Home Circuit Court on the 11th day of April, 1973, on an indictment charging him with murder, of the offence of manslaughter and sentenced to ten years hard labour. He applied for leave to appeal and the application was granted.

The incident out of which the death of Sydney Davis resulted took place on the night of the 12th of April, 1970, when the deceased along with his girlfriend, Winsome Howell, were in the vicinity of Girling Street in Kingston, and she had just left Davis when she was accosted by four men, one of whom held her, and Davis who was in front of her turned back and faced the men with his hand in his pocket and said, "I don't like that" and at that moment she observed for the first time a gun in the appellant Lao's hand and that the appellant Lao shot the deceased and the deceased cried out, "Lord Jesus Christ, I dead." The four men then, according to her testimony at the trial, took her to a place which was described differently as a building, a shack or a room and there proceeded to rape her one by one.

Learned attorney for the appellant has complained, namely, that in this case the verdict of the jury was unreasonable and cannot be supported having regard to the evidence.

/He further -

He further contends that the conviction was unsafe and unsatisfactory, and that in fact the state of the evidence at the end of the prosecution's case was such that the learned trial judge ought to have withdrawn the matter from the jury. He has high-lighted certain areas of the evidence which he says support the contention that he is urging before the court. He points to the accounts of the conversation which the girl is alleged to have had with the police; that the version of the conversation which she gave to Constable Baldwin Sterling was different in a material respect from the version that she gave to Detective Corporal Morrison. He further points to the varying accounts as to the different places where the girl alleges she had been taken to be raped. He stresses the evidence of the doctor which was to the effect that this girl of some fifteen years was virgo intacta, and contrasts that against the evidence of the girl, which was to the effect that she had been raped by four men, one after another, and submits that in those circumstances the girl's story cannot be believed because if that had been so, then obviously, she could not have been virgo intacta.

But his main complaint and perhaps the main unsatisfactory feature of the case, he submits, was the question of identification. And on that the evidence was that there were two vehicles, one in which the appellant was travelling with the police officer and in another the girl with another officer, one vehicle before the other. And the girl is alleged - and having seen the appellant in the vehicle in front of her - to have said, "That is the man who raped me."

So, on this question of identification, he cites the case of Narine Ramroop v. The Queen, 2 W.I.R. at p. 259. In that case the headnote reads as follows:

> "On the trial of a person charged with murder, the only evidence to connect the prisoner with the commission of the crime was that of a witness whose credit was severely

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"shaken and who identified the prisoner by answering, "Yes, this is the man I saw with the gun," when the prisoner was taken to him and he was asked, "Is this the man you saw with the gun?" Against that evidence the defence was an alibi.

Held: that the conviction was unsafe."

In that case, reference is made to two English cases, the case of Dickman and the case of Chapman, and when the judgments in those cases are looked at, it is clear that the identification of the appellant in those cases was induced in some manner or another by the police, as indeed it was in Ramroop's case.

In the instant case, it cannot be said that the identification was in any way induced deliberately by any action of the police. The method of identification was in fact adverted to by the learned trial judge at page 17 of the summing-up:

"Now, Mr. Foreman and members of the jury, the next thing you have on this question of identity of Lao is that on the 13th of January, 1970, in the morning at the Admiral Town Police Station she said that she was coming from the doctor when she saw the accused, Lao, in a police jeep. Mr. Foreman and members of the jury, you have to ask yourselves, was this an accidental meeting? was this an accidental situation in which she was seeing this man Lao that morning? You have to ask yourselves, and don't be afraid to ask yourselves about it; or was this a plan by the police? Because if it were a plan that she and the accused Lao were going to meet outside that Admiral Town Police Station that morning, this would be a very serious breach of ethical conduct on their part because the danger here would be that she would see a man there and say, "He is the man who I saw last night shoot Davis" when in truth and in fact she may not be sure at all. The proper way, it seems to me, would have been to hold an identification parade, put him on an identification parade with other men of similar description like himself, people coming from the same station in life as he come from to give her an opportunity to test her ability to pick him out. Because as I say, I foresee grave dangers in this type of identification."

The learned trial judge was in effect there saying to the jury that they should approach this particular method of identification with care and caution. He is doing no more. The case of The Queen v. John reported in 1973 Criminal Law Review, p.113 and in The Queen v. Howick in 1970 Criminal Law Review, p. 403, required of him to do, that is, to point out that the particular method is

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not the best form of identification but they were to view it with care and with caution.

Counsel has stressed, and indeed, it cannot be denied that there are unusual features about this case. But counsel has also admitted that all these matters were discussed before the jury, and indeed, that the learned trial judge dealt with them in his summing-up. Nevertheless, the jury convicted.

The matter is one which is not entirely free from difficulty and the Court has given anxious and mature consideration to this matter. Fortunately, there are principles which have been laid down which can guide us to resolve matters of this kind, and in particular, to deal with the ground of appeal which has been urged here, and they are to be found summarised in Ross on The Court of Criminal Appeal, First Edition at p. 88:

> "It is not sufficient to establish that if the evidence for the prosecution and defence, or the matters which tell for and against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal - that the verdict was against the weight of evidence - is not a sufficient ground. It does not go far enough to justify the interference of the Court. The verdict must be so against the weight of evidence as to be unreasonable or insupportable. Nor, where there is evidence to go to the jury, is it enough in itself that the Judges after reading the evidence and hearing arguments upon it consider the case for the prosecution an extraordinary one or not a strong one or that the evidence as a whole presents some points of difficulty, or the members of the Court feel some doubt whether, had they constituted the jury they would have returned the same verdict, or think that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a Court composed as a Court of the appeal that such cases should practically be retried before the Court. This would lead with a substitution of the opinion of a Court of three Judges or the verdict of the jury."

/And in -

And in Archbold, p. 341 par. 934 it is stated on a ground of appeal of this nature:

> "The court will only set aside a verdict on this ground, where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

This Court is unable to say, in view of the fact that the evidence was fully ventilated before the jury both by the attorney who appeared in the case and by the learned trial judge, in his summing-up, that it can interfere or disturb with the conviction of the appellant. His appeal is therefore dismissed.

He has further appealed against the sentence, and it is urged that the sentence is manifestly excessive - the young man with no previous convictions - but the circumstances point to the fact that this was a plan of action executed by a gang in which a firearm was used and the use of that firearm led to the death of a citizen.

The Court, in all the circumstances, and in view of the prevailing conditions in the community at the moment cannot say that the sentence passed is manifestly excessive. His appeal, therefore, with regard to sentence is also dismissed.

It was pointed out to us by his attorney, or the attorney for the appellant that the appellant has been in custody over a long period of time and that there was a previous trial which was aborted and that in effect he spent some three years in custody. In the circumstances, the Court will order that the sentence run from the 19th of April, 1972, which was the date of the termination of the first trial of the appellant.