

NMLD

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 69/95

**BEFORE: THE HON. MR. JUSTICE FORTE, J. A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.**

R. V. MALCOLM HIGGINSON

Maurice Saunders and Delroy Chuck for Applicant

Kathy Pyke for Crown

23rd September & 24th October, 1996

GORDON, J.A.

On 19th May, 1995 the applicant was convicted in the High Court Division of the Gun Court in Kingston on three counts in an indictment which charged in count 1 illegal possession of firearm, in count 2 rape and in count 3 robbery with aggravation. He was sentenced to concurrent sentences of imprisonment at hard labour for five years, ten years and seven years respectively and in addition was ordered to receive six strokes with a rod of Tamarind switches.

The trial occupied five days. The complainant was examined, cross-examined and recalled for further cross-examination as the Crown's case was presented on her evidence, which was uncorroborated, and on the formal evidence of the investigating officer. The complainant testified that on 25th July, 1993 about 2.30 p.m. she went to the Papine area in St. Andrew to visit her boyfriend who worked at a funeral parlour at 5 Golding Avenue, Mona Commons. She was walking on a track when she saw the applicant whose name she did not know but she had seen him on several occasions before and knew him as an associate of her boyfriend. She and the applicant conversed as she sought to ascertain the whereabouts of her boyfriend and while they spoke a young woman who the applicant claimed was his girlfriend came up and the applicant left with her promising to return. After the applicant left the complainant was suddenly pounced upon by a group of men who held her at gun point and took her to a room behind a funeral parlour nearby and they in turn raped her. The applicant entered the room. He also had a gun and she appealed to him for help but he joined the others and raped her. She was also robbed of a watch and \$200 in cash. Her ordeal lasted for several hours and on her release she went home. Fearing reprisals she did not report the crime immediately but did so some nine days later. During her ordeal one of her assailants spoke the name of the applicant and was rebuked. She gave this name to the police and on 29th October, 1993 the applicant was arrested on warrants and charged with the offences.

The applicant gave evidence. He admitted seeing the complainant on the afternoon of the 25th July, 1993. They spoke, then they repaired to his room behind the funeral parlour and they indulged in consensual sexual intercourse. He denied being a party to gang rape. The defence suggested if there was gang rape it was

subsequent to the act of intercourse by consent between the applicant and the complainant and that the applicant was not a party to the gang rape. In cross-examination the applicant admitted that the complainant in the circumstances in which they were involved had ample time to scrutinize his features. He called character witnesses who included Father Orville Shields of the St. Thomas Aquinas Church Papine.

Thirteen grounds of appeal admittedly prepared by Mr. Saunders and signed by the applicant were filed. Mr. Chuck prayed the Court to order the preparation and production of a full transcript of the proceedings to enable the preparation of other grounds of appeal if the applicant considered it necessary. Mr. Chuck's motion was denied. He then proceeded to submit on the one ground of appeal he chose to pursue, ground 7.

"7. The learned trial Judge erred in law when during the course of the trial when Counsel for the Appellant was cross-examining the complainant in relation to her opportunity to see and/or observe her assailants and the physical conditions which existed at the time when she alleges that the Appellant entered the room he stopped Counsel from continuing cross-examining of the complainant on that area of the issue of identification."

Mr. Chuck submitted that identification was a live issue and it was not properly addressed by the learned trial judge. He failed to warn himself of the dangers inherent in identification evidence and the language he used failed to show his mind was adverted to the requisite caution.

Miss Pyke contended on the contrary that the frequency with which the judge adverted to the identification evidence, although he ruled it was not an issue, is a certain indication that his mind was adverted to the dangers inherent in such evidence

and he approached it with caution. Furthermore the learned trial judge's adoption of counsel's submissions demonstrated an awareness of the issues raised.

The learned trial judge commenced his summation with a review of the charges in the indictment then he said:

"Well, the main issue as I see it is the credibility of the complainant. On the other vein the accused man, Mr. Saunders who represents him says the other issue of vital importance is the question of visual identification and also the question of consent because the defence is that, 'I did have sexual intercourse with the complainant on the afternoon in question in my room but it was with her consent and only the two of us alone were there and there was no question of any firearm involved.' Now, the Prosecution's case is that several young men up to about ten (10) or even twelve (12) she mentioned at one time I think and including the accused man sexually assaulted her that evening in a room at the back of the funeral parlour on the Mona Commons across the road from the University Hospital main gate and several young men including the accused raped her and assaulted her in all sorts of fashion and that more than one of them had guns and in fact that this accused man was armed with a gun. She only knew his name because during the incident one of them referred to him, called out his name, Malcolm, and he as it were rebuked the person saying, 'Don't call my name.' So what the Defence is saying on the occasion, if it is accepted is that she was raped by so many men on that day and it was not at the time when he had sexual intercourse with her and on the occasion when so many men raped her she must have been so confused that she would not be able to make a positive identification of anyone or any member of those persons. So to that extent the question of identification would arise."

He then continued:

"So as I said the main issue is whether the complainant can be believed when she said that she was raped by so many men on that day and that the accused man was one of them. It must be said at the very outset that there has been no

corroboration at all and as to the other issue in the case whether she was held up with a firearm or not or whether she was robbed of any jewellery or money that is another question of fact but also in those cases there have been no other evidence to support the evidence of the complainant. It is her evidence alone that the case must be judged on as far as the Prosecution is concerned ...".

The learned trial judge then proceeded to review the evidence in detail and referred to the identification evidence given by the complainant: The occasions on which she had seen the applicant prior to the incident, the view she had of him at the time of the incident, she saw his entire structure including a full view of his face he wore no disguise. She heard his name called - 'Malcolm' and she gave this name and a description of him to the police. The incident in the room took place in daylight and light came in through the glass windows in the room. The judge in his summation then referred to the evidence of the applicant and his admission that the complainant had enough time to study his features albeit this was when they were having consensual sexual intercourse.

The judge made further reference to submissions by the defence and the Crown on the issue of identification and on corroboration, he found that "on the charge of rape there has been no corroboration". He proceeded "I am warning myself of the danger to convict on the uncorroborated evidence of the complainant in this case and I have looked at her evidence on several occasions, I have considered it, ..." "The complainant says there was one incident -- the complainant says that there was no incident with the accused man alone and then afterwards other men, she said it was never like that."

Following a review of the evidence tendered by the defence with particular reference to the character evidence the learned trial judge concluded:

"Now, having considered the evidence given and heard the submissions made by Counsel on both sides I have no doubt in my mind that the evidence of the complainant is a true version of the incident of that afternoon that there was one incident which lasted over a longer period and that the accused man was among the number of men who assaulted that girl that evening in that back room there, that she never consented to their having sex with her and that they were armed with firearms. There is no evidence in this Court that this accused or anyone of the men there had a licence to hold firearm and I find that they forcibly took this girl into the room, forcibly sexually assaulted her, forcibly took her property from her and more than one of them forcibly had sexual intercourse with her on several occasions and that the accused man as I said before was among them."

We accept the submission of counsel for the Crown as sound in law. The careful and thorough assessment of the evidence by the learned trial judge, his focus on the issue of identification and his expressed awareness of the lack of corroboration clearly indicated that he approached his functions with the caution and care the authorities prescribe and he "heeded his own warning" see **R. v. Alex Simpson; R. v. McKenzie Powell** (unreported) C.A. 151 89 & 71/89 delivered 5th February, 1992.

There was no corroboration of the complainant's evidence on any of the charges in the indictment, her evidence stood alone and the learned trial judge had the advantage of seeing and hearing her examined and cross examined at length. He gave a thorough and fair assessment of the evidence and his conclusion we find is unimpeachable. Reckord J, correctly adjudged the issues on the credibility of the complainant giving just consideration to the identification evidence. The issue of identification was indivisible in so far as it touched and concerned the applicant's involvement in the three counts in the indictment.

The application for leave to appeal therefore fails. The sentences should commence on 19th August, 1995.