J A M A I C A

IN THE COURT OR APPEAL

~~SUPREME COURT~~ CRIMINAL APPEAL NO. 230/76

BEFORE: THE HON. MR. ~~JUSTICE~~ WATKINS J.A. ~~(Presiding)~~
THE HON. MR. JUSTICE MELVILLE J.A. (Ag.)
THE HON. MR. JUSTICE ROWE J.A. (Ag.)

REGINA

v

MILTON SIMMS

June 1 and 2, October 21, 1977

Mr. Richard Small for the applicant

Mrs. S. Lewis for the Crown

WATKINS J.A.

By a majority (Rowe J.A. dissenting) on June 2, 1977 we allowed the appeal in this matter, set aside the conviction and ~~sentence~~ and ordered the entry of judgment and verdict of acquittal. Counsel for the appellant asked that we put our reasons in writing. We promised that we would do so and we now do so.

The indictment charged the appellant that on September 20, 1974 in the parish of St. Mary he had sexual intercourse with W, the prosecutrix without her consent and at the trial before Ross J. and a jury which was concluded on November 17, 1976 a verdict of guilty was recorded agains him.

The prosecutrix and one Mr. X lived as man and wife in a district in St. Mary. In the evening of September 20, 1974 they both repaired to a local pub for drinks. They did not, however, leave the pub together. It was X who left first. Up to the time of his departure, W he said, had had two drinks. W did not agree with him. She said that she had had but one. Her story was that she left the pub for home in the region of nine O'clock. On her way home she met the appellant. He spoke to her. She said that he said to her that for a long time he desired to have intercourse with her. He held, her

took her to a riverside near a library and there he raped her. Whilst the act was in progress a man came by and she said that he said "Cho Melty, you can't do Massy that". She did not appeal to this man for help. In fact, she said that she was frightened lest this man should come and do her the same thing. She said that when it was all over she reported the incident to her husband who accompanied her to the nearby Gayle Police Station. There the Police noticed a bruise on her left knee. The Chief Forensic Officer wh examined the garments which she had been wearing said that he found semen on her pantie and on the hem of her skirt but these might have been on these garments as early as a month before this incident. Mr. X testified that his wife had on occasions been drunk, that on this occasion when she came home he heard her saying to herself "Milton should'nt do this to me, Milton should'nt do this to me," whereupon he asked her what had happened and she narrated to him the incident of the sexual assault. The applicant's story was that he had seen W at Joyce's bar on the evening of the date charged. When he left between 7.30 and 8 O'clock W was already quite drunk and talking loudly. From Joyce's bar he went to another bar where with friends he continued drinking. He did not know what time he reached his home for he too was quite drunk. He did not sexually assault the prosecutrix 'on that day or at all'. Both W and the applicant agreed that they had known each other for sometime.

On these facts it is plain that the three questions for the jury were (a) did the act of intercourse with the prosecutrix take place (b) if so, was it against her will and (c) was it the applicant who had done it? As there was no evidence whatever corroborative of the prosecutrix's account, her credit on all these issues became the central issue. As both prosecutrix and applicant were known to each other, the matter was moreso one of recognition by the prosecutrix of the applicant than of identification, but as was said by Lord Widgery in R v Turnbull (1975)

3 All E.R. 549 at 552 letter'd:-

> "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

The prosecutrix had been drinking. In the sworn testimony of the appellant she in fact was drunk. When she arrived home her husband's testimony was to the effect that she was muttering to herself, and it was he who asked her what had happened. It was not she who had spontaneously complained to him. If there had been a sexual assault it was under cover of the night that it had taken place. The quality of the recognition therefore called for careful examination by the jury, upon equally careful direction by the learned trial judge. Was the prosecutrix drinking or drunk, and, if, so, was her judgment impaired or affected thereby? What was the condition of the night in terms of light or darkness? Could the prosecutrix have been mistaken? In her muttering to herself did she call the name "Milton" because of what the passer-by had said or did she really and correctly recognise her assailant to be the appellant? Unfortunately, the summing-up does not disclose any attempt whatever on the part of the learned trial judge to bring these considerations to bear upon the issue of the credit of the prosecutrix or of the quality of her recognition or identification of the appellant. True indeed, his last words to the jury were in these terms:-

> "If ..... looking at the evidence you are satisfied so that you feel sure that W is a reliable and truthful witness, then even though there is no corroboration in this case, it would be open to you to convict the accused on the evidence of W alone although there is no corroboration".

In this final direction the jury was invited to focus attention on the truthfulness of the prosecutrix, but equally relevant to the matter of identification or recognition of an accused party, is whether the identifier, however truthful, was mistaken or not, inasmuch as a mistaken witness can be a convincing one.

The next point raised by Counsel for the appellant related

to the evidence adduced by the Crown concerning the passerby's observations. Was this evidence admissible? Counsel's contention was two-pronged. First, he contended that it was not as such evidence at all, being merely self-confirmatory, but more importantly, he urged, it did not form part of the res gestae, being the utterance of a mere passerby or stranger. Secondly, Counsel argued that even if the evidence were admissible, its prejudicial value far exceeded its probative value and on that account ought to have been excluded, or alternatively the clearest directions on the limited utility of this evidence ought to have been given to the jury but this was not done. I will deal first of all with the contention that the res gestae rule does not extend to the hearsay evidence of a mere bystander or stranger to the event. This contention is not supported by authority. In Milne v Leisler (1862) 7 H & N 786 at p. 796 an obiter diction takes it for granted that the exclamation of "shame" by a bystander in a running-down case, if made at the time, would be admissible in evidence, and in Davies v Fortier Ltd. (1952) 2 All E.R. 1359 a witness was allowed to prove that a deceased workman said "I ought not to have done it" within two minutes of the accident in respect of which his personal representatives were claiming damages under the Fatal Accident and Law Reform Acts (see Cross on evidence 3rd edition p. 465). The bases on which the res gestae rule rest was stated by Lord Normand in R v Teper (1952) 2 All E.R. p. 447 at p. 449. He said:-

> "It is essential that the words sought to be proven by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstance, that they are part of the thing done, and so an item or part of real evidence, and not merely a reported statement".

Now, assuming the veracity of the prosecutrix's account, this passerby came on the scene whilst the sexual assault was in progress and he reacted to what he saw in the words, "Cho, Melty, you can't do Massy that". Accordingly the words uttered

were manifestly contemporaneous with the event and therefore satisfies the test of admissibility enunciated in Teper. In R v Christie (1914) A.C. 545 Lord Moulton said, however, (at p. 558):-

> "Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him".

Some questions therefore of the greatest import naturally arose out of the circumstances which gave birth to the hearsay evidence. Some may here be stated:-

(a) How long had this passerby known the appellant and the prosecutrix, assuming that by "Melty" and "Massy" he intended to mean these parties respectively?

(b) Was the prosecutrix known as "Massy"? She was not asked any questions as to this.

(c) What were the circumstances of darkkess or light?

(d) Who indeed was the passerby who knew both parties, was obviously sympathetic to the plight of one and yet did not tarry or report what he had seen to the police?

(e) Was he a person of good or bad eyesight?

All these questions which were accutely relevant to the quality of the identification could be answered only by the passerby himself and, without the benefit of such answers extracted perhaps in the crucible of cross-examination, the hearsay evidence, although technically admissible was rendered destitute of all probative value. Once admitted, however, nothing but a most emphatic and precise direction by the learned trial judge that the evidence was not corrobative or the identification evidence of the prosecutrix would serve to do justice to the appellant. This became urgent all the moreso in the light of the prosecutrix's surprising reaction to the presence of this stranger. His remark which not only strongly suggested that he knew both parties but also that he equally strongly

objected to the ordeal to which she was being put, would have been expected to awaken in the average person an instant cry or plea for help. The prosecutrix did not so react, however. Instead she said it only made her all the more frightened lest this passerby who had expressed his strong objection to what he was beholding would himself likewise sexually assault her. This inexplicable reaction of the prosecutrix undeniably lent colour to the contention of the applicant that she might indeed have been having intercourse with someone not the applicant, and being surprised by a passerby who knew both the prosecutrix and her husband, she feared that the passerby would report the incident to her husbend, and so she concocted the tale implicating the applicant whom she had seen at Joyce's bar whilst drinking. All these matters which bore so pointedly on the resolution of the primary issue in the case, namely whether it was the applicant who had sexually assaulted the prosecutrix, required to be placed in their relative scales in composite and coherent directions to the jury for their deliberate and weighty consideration. In fact, the learned trial judge failed to do this. The jury therefore did not receive from the learned trial judge the assistance which the issue demanded and to which they were entitled. The failure to crystalise the circumstances in which the prosecutrix purported to recognise the applicant together with the failure to draw attention to the weaknesses and dangers inherent in the testimony of this selfsame prosecutrix as to what the passerby had said had the effect of depriving the applicant of the substance of a fair trial and of the protection of the law.

We are not in a position to say that a reasonable jury properly instructed would inevitably have come to the same conclusion. Accordingly, we allowed the appeal treating the application for leave to appeal as the hearing of the appeal, set aside the conviction and sentence and entered a judgment and verdict of acquittal. The interest of justice would not in our view have been served by an order for new trial.