JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 24 and 121/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA
vs.
CHURCHILL McDONALD
ANTHONY BROWN

Robin Smith for McDonald

Anthony Brown unrepresented

Terrence Williams for the Crown

October 7, 9, 10, 1991 and March 9, 1992

WRIGHT, J.A.:

On October 10, 1991, we treated these applications for leave to appeal as the hearing of the appeals which we allowed. We quashed the convictions, set aside the sentences and entered a verdict and judgment of acquittal and promised to put our reasons for so doing in writing. We now honour that promise.

In the High Court Division of the Gun Court, Saint Andrew, before Pitter, J. on February 20, 1991, the appellants were convicted and sentenced on an indictment containing three counts as follows:

Count 1: Illegal Possession of Firearm.

McDonald: Seven years imprisonment at hard labour.

Brown: Five years imprisonment at hard labour.

Count 2: Rape.

McDonald: Ten years imprisonment at hard labour.

Brown: Seven years imprisonment at hard labour.

Count 3: Robbery with Aggravation.

McDonald: Seven years imprisonment at hard labour.

Brown: Five years imprisonment at hard labour.

Both sought leave to appeal against these convictions and sentences and the application of appellant Anthony Brown was entertained by granting him leave for extension of time within which to appeal.

The evidence has this peculiar feature that both the appellants and their alleged victim are well known to each other but that is not the only peculiarity about the case. Churchill McDonald, who at the date of the charge - March 18, 1990 - was three months short of his twenty-second birth-day, is a tailor who worked out of his No. 7 Gem Road address and Anthony Brown, then fifteen years and eight months, was his apprentice who lived with his mother and other family members at No. 12 Gem Road but spent much time at McDonald's home. The virtual complainant in the case was one N.E., a young woman who lived at No. 5 Gem Road. She was learning dressmaking and frequently visited McDonald's home to seek help in the art of cutting.

Her complaint was that at about 3 o'clock in the morning of March 3, 1990, she was awakened by a sound and when she opened the door of her sewing room the appellant McDonald, with a knife in hand, sprang through an open window. While he was telling her to stop her screaming, the appellant Brown, whom she called Ray, entered with a gun in his hand. While McDonald was holding her around her neck he told Brown to shoot her but instead Brown hit her in her forehead with the gun. McDonald

then took the gun while Brown tore off her panties and then had sex with her followed by McDonald. And while McDonald was raping her Brown pulled her ring from her finger. Her three-year-old child who was in the room began crying and McDonald picked her up and threw her on the bed and told her to quiet the child. Brown next took up a Sony tape recorder and McDonald asked about her earrings. She replied that she had left them at the jeweller. Her account was not accepted. She sought help from the adjoining tenant but when she opened his door he was absent. She ran out into the road after she saw her assailants jumping over her back fence; then she ran to McDonald's home just four doors away on the opposite side of road and called McDonald's mother and spoke to her. Responding to a sound at the back fence she went to the back of the house and saw "somebody coming over the fence." She next ran next-door and then when she looked in the direction of her gate she saw a jeep with soldiers and police, and coming behind the jeep was McDonald holding the hand of her little girl. The jeep stopped and she reported to the police that McDonald had robbed and raped her. She couldn't recall his exact response but she said he denied the charge. She took the police to McDonald's home and discovered the back door ajar and Brown asleep in bed dressed in a pair of short pants over another pair. She pointed him out to the police as one of her assailants. She then claimed that when they came to her house McDonald was dressed in the outer pair of short pants which she now saw on Brown. According to her, Brown said nothing. The police took them away to the police station and then about 6:30 a.m. she accompanied the police on a search and found her missing tape recorder underneath a broken-down portion of the fence behind McDonald's home. She said she had known McDonald for about four years and saw him regularly and that the incident in her house had lasted between twenty-five and thirty minutes. She was enabled to see him by the glare from a light bulb in her sewing room which adjoins her bedroom as well

as the reflection from the street light through her louvre window.

Dealing further with the vital question of identification, she testified as follows:

"Q: Now I want you to tell me this, when Churchill came into the house, you noticed anything about his face?

A: He had a piece of cloth around his face.

Q: What part of his face?

A: Like hereso (indicating eyes).

Q: You mean covering his eyes?

A: Like it rest on his forehead. Piece of the material broad like that from 'bout here but me could still see his eye and so forth (Witness indicates three inches).

Q: Now you say you could still see his eyes what about the lower section of his face, was that part covered?

A: No, sir.

Q: Another thing, did this piece of cloth remain on his face whilst he was in the room or what, anything happened to it?

A: While him was on top of me it keep on running down and him was drawing it up...

Q: Tell me this, did the piece of cloth in any way prevent you from knowing who the person was?

A: No, sir."

Cross-examination revealed that the two windows to her room were curtained and that there was one room between her room and the street light so that the street light could not shine directly into her room. As a matter of fact, she said she did not at first know who the person was. McDonald was a good friend of her baby's father and she admitted that while her baby's father was abroad she had another boyfriend, the discovery of which caused him to cease sending her money. She denied accusing McDonald of informing her baby's father and also that the present charges against McDonald were attributed

to that fact. She admitted visiting McDonald while he was at the police station but denied suggesting the payment of money to dispose of the charge.

Constable Deon Lumsden, who was in the jeep, said his party was first stopped by a man who made a report to him. They went to Gem Road where he saw N.E. who reported that "two men break into her house and held her up with a gun and raped her." While talking to her he saw:

> "...a man dressed only in a pair of jeans pants with a baby girl beside him and he was coming in our direction and N.E. pointed on him and said 'Se one of them deh Officer'."

That person gave his name as McDonald and promptly denied the accusation. It is worthy of note that she did not name her assailants in her report. He accompanied McDonald to his home where he saw Brown dressed in a pair of khaki shorts lying on a bed. According to the officer, N.E. did not say anything about Brown who had accounted for his presence there by saying he had been watching television and had fallen asleep. Cross-examined, he admitted hearing Brown say that N.E. was lying because it was McDonald's mother who had come and awakened him and told him that N.E. had come there. He did not hear her say that Brown was wearing the pants that McDonald had worn to her house.

Detective Acting Corporal Allison Gilroy at the Central Police Station received the report, visited McDonald's home, spoke with his mother and after searching he found a Sony Radio Cassette under some zinc at the rear of the premises. It was claimed by N.E. but when shown to both appellants each denied any knowledge of it.

McDonald testified on oath denying the charge. He said it was his mother who woke him up and asked him what was N.E. outside calling him for? He went out on the road dressed as he was in a pair of blue pyjamas only to see N.E.'s child in the road. He took up the child and was walking with the child when he saw the jeep come along and then N.E. arrived and told the

police in the jeep that she had gone to McDonald's home and called him but got no answer. Next she said two men with mask came in on her and when she tried to turn on the light they broke the bulb. (In her evidence she did admit that the bulb was broken). She reported to the police that he, McDonald, "has the body of one of the men." The police remarked on the fact that he, McDonald, had her child. They went to his room and took his wallet but they found nothing belonging to N.E. At that stage she did not accuse Brown. Brown, who was then dressed in a pair of khaki pants, said she was lying in accusing McDonald because it was McDonald's mother who had come and awakened him. She then said that the pants on Brown looked like McDonald's pants. Whereupon Brown said, "N.E. I would not rape you because you come inna mi house several times and I even cut work for you."

He mentioned two matters of dispute with N.E. Unknown to N.E. he had had a relationship with one of her friends which occasioned a fight and as a result N.E. had accused him to the police of wanting to rape her, but nothing came of that. The other matter was that she held him responsible for informing her boyfriend of her relationship with other men while he was abroad as a consequence of which he had stopped sending her money. Cross-examined, he denied that the khaki pants worn by Brown were his and maintained his denial of the charge.

In an unsworn statement, Anthony Brown, who gave his age as sixteen years, denied going to N.E.'s home. Rather he said he was at McDonald's home that night because they had worked late after which he had fallen asleep watching television. He was awakened by McDonald's mother but that after McDonald left the house he had gone back to sleep and was subsequently awakened to find the policemen and soldiers in the house who were poking him in his side. N.E. said one of her assailants had the body of "one of them." He said she was lying and it was only after that the police decided to take him to the police station. He felt that N.E. was involving him because of the "ruption" between N.E.

and McDonald concerning N.E.'s friend and the fact that he spoke up on behalf of McDonald.

The single ground of appeal complained that the verdict is unreasonable and cannot be supported having regard to the evidence. The uncorroborated evidence of the charge of rape was brought into sharp focus bearing in mind the contention by McDonald that she had falsely preferred a charge of rape against him as a result of the fight which he said they had. It was complained, too, that no medical evidence was presented although N.E. said she had been medically examined. Though N.E. denied preferring the charge of rape against McDonald, she nevertheless admitted the dispute over the girl who was her friend. Her evidence required careful scrutiny. We are satisfied that the trial judge warned himself appropriately having regard to the nature of the evidence he was considering but we are less than satisfied with his application of the guidelines in assessing the evidence. For instance, on the question of the opportunity to recognize her assailants, he failed to take into account the fact that the street light did not shine directly into the room because of the other room which is closer to the street and would block direct light from the street light. Then, too, he accepted as conclusive the unsupported statement of N.E. that Brown was wearing the khaki pants which McDonald had on at the time of the assault. Against that there was the denial of McDonald and the statement of Brown that contrary to her evidence he was wearing only his own pair of pants over his briefs and not over another pair of pants. Also the manner in which he treated the presence of McDonald on the road with N.E.'s child seems passing strange. This is how he dealt with that aspect of the case: (page 67)

> "The accused man says he found her baby straying, he found it on the road. He knows her very well but he is taking it out on Maxfield Avenue. Now, one ask the question, why did he take this baby if indeed he did find the baby on the road, why didn't he take it back to the complainant. He didn't. He

> "took it on the road and whilst he was on the road there the accused, the complainant pointed him out."

Then later this: (page 69)

> "The accused man says that when he went out on the street he was in his pajamas, the police says no, he was not in any pajamas, he was in jeans, which is supported by the complainant. He was not in any pajamas at all. Again, what was he doing on the street at that hour; he was not coming from a dance and that particular, the operative time he is out there on the street; leaving his bedroom."

To say the least, such cogitation fits ill into an assessment of the evidence presented. It may be remarked, too, that the complainant did not support the police that McDonald was dressed in jeans. It was put to her that he had on a pair of blue pyjamas and she said it was "other pants." To our minds, this does not represent a balanced consideration of the evidence. McDonald is being blamed for playing the role of the Good Samaritan, against the background of N.E.'s own evidence that she ran out and left the child alone thus making way for the child to stray and be where the appellant McDonald said he found the child.

Although the trial judge did set out on the proper path in dealing with the evidence, we found that in the areas which we have highlighted, his failure to apply the principles properly was such as to give rise to a verdict which was unreasonable and could not be supported having regard to the evidence.

In judgments of this Court, too numerous to mention, great emphasis has been placed on the need for the appropriate warning in cases involving visual identification but it must be borne in mind that to mention the need for caution and thereafter to fail in the proper application of the guiding principles will be no less fatal than the failure to give the warning.

For these reasons the appeals were allowed as previously stated.