JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 99/88

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

v

DONOVAN MCFARLANE

Application for leave to appeal

Carol Malcolm for the Crown

January 30, 1989

WRIGHT, J.A.:

On the 27th of April, 1988 in the High Court Division of the Gun Court before Mr. Justice Wolfe, the applicant, Donovan McFarlane, was convicted on both Counts of an Indictment charging him with Illegal Possession of Firearm and Rape. From these convictions and sentences he seeks leave to appeal. His application for leave to appeal has been considered by the single judge who pointed out that the issue of identification was the live issue and it had been critically considered and resolved by the learned trial judge.

The complainant in the case, Miss Rosetta Terrelonge, apparently a lady of some years, testified that in the early morning of the 2nd of February, 1988 she was awake in her room. She had got up and gone outside, from where she returned, intending to shell some peas. The time was about 3.00 o'clock in the morning. She closed the door on returning inside but did not lock it and while she was sitting on her bed the door was pushed open. Electric light was on in the room at the time. She saw a man whom she identified as the applicant enter the room. He told her that police was in the area. She disputed that saying she would have

heard them when she went outside and she had not heard any such thing. He then approached the bed, sat on it, after having shown her a gun. She jumped off the bed and ran out of the room but he chased her to the toilet where she endeavoured to lock him out but he forced himself in and succeeded in raping her. There was no light in the toilet because after threatening to shoot her if she gave him any trouble he had turned off the light. Accordingly, the opportunity for observing him was limited to her view of him in the room which she estimated to be about three minutes. While she was in the toilet, he dealt her blows with the gun and when he was through with her he went away leaving the premises through a hole in the fence.

She went to the Denham Town Police Station and made a report and later described the incident to her relatives. Two days later, on the 4th, she received a report from her son following which she went to the Denham Town Police Station where she reported her information to Inspector Walker who, apparently up to then, had not known of her ordeal. He took her to the Kingston Public Hospital where the applicant was seen in a ward sitting in a wheel-chair.

Describing what happened when she went to the hospital with the Inspector the complainant said that -

> "I identified the man that raped me. Before I step in I saw him, I don't know his name. He was sitting in a wheel chair."

After that she went outside and she could not say what transpired. Inspector Walker testified of her coming to the station and his accompanying her to the hospital and of her pointing out the applicant at which time he grumbled something but he was not too clear about what the applicant was saying that -

> "woman get raped and they want to say is him."

He was arrested on the same day and when cautioned he said 'is not me rape her ma'am'.

His defence was an alibi. He said he was at home and when he went out on the road two men held him up and one said that he had raped his woman and they were taking him to station but on the way one shot

him and left him and it was to a passing policeman that he reported his ordeal and he took him in the radio car to the Kingston Public Hospital. That is how he came to be there.

So the real issue in the case was one of identification. It is true that from the testimony of the complainant she had not seen the applicant before that night but she testified that the lighting in the room was sufficient to enable her to see him before the light was turned off, and if she was to be believed, as she was by the learned trial judge, there was no prompting on the part of anyone which enabled her to identify him when she went to the hospital because before she entered she saw and recognised him. The evidence in our assessment justifies the conclusion to which the learned trial judge came and we can see no reason to interfere with the conviction or the sentence. He was sentenced to 10 years at hard labour on the first Count and 12 years on the second Count. The convictions and sentences are affirmed and it is ordered that the sentences begin at a date 3 months from the date of conviction.