JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 91/88

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

REGINA

v

GLENROY O'MEALLY

D. Chuck for Applicant

P. Llewellyn for Crown

March 13, 1989

WRIGHT, J.A.:

This applicant was convicted by Wolfe J. sitting in the High Court Division of the Gun Court on April 22, 1988 for the offences of (1) Illegal Possession of Firearm and (2) Rape and was sentenced to imprisonment of 10 years and 15 years at hard labour, respectively. He now seeks leave to appeal against convictions and sentences. The single ground which, with the leave of the Court Mr. Chuck essayed to argue reads:-

> "The learned trial judge contravened a requirement of the constitution in that Contrary to section 20(6)(c) of the Constitution he failed to allow the appellant legal representation or failed to give reasons for depriving the appellant of legal representation throughout the trial."

Section 20(6)(c) of the Constitution provides that -

> "Every person who is charged with a criminal offence -

" (c) shall be permitted to defend himself in person or by a legal representative of his own choice."

The record of the trial begins thus:-

"Ms. Straw: Glenford O'Meally, before the Court, M'Lord. Mr. Smith is in Court 11, M'Lord, but he says he has not been retained.

His Lordship: How you say, Mr. Smith is your lawyer?

Mr. O'Meally: Is him usually defend me, sir.

His Lordship: He has a yearly retainer with you; I don't understand. I don't know because this lady has been coming here Mr. O'Meally, and she says is being threatened, she is afraid and I had to issue a warrant for her. You told me that Mr. Smith appears for you and I put the case for today and she has been arrested and brought here and now I am being told that Mr. Smith does not appear for you. I am going to start the case today. At least, I am going to take her evidence because the lady says she is afraid and your friend is threatening her. I am going to take her evidence. A Court has to take steps these days to preserve the evidence. Having told me all that is happening to her, I think I have a duty to ensure that the evidence is preserved. You will have to help yourself. I am going to finish this, this morning, so witnesses please return this afternoon."

The next page of the record shows that the trial began at 2.05 p.m. but Mr. Smith was not there. The witness gave her evidence and was cross-examined by the applicant challenging identification and setting up an alibi. The Court adjourned at 3.55 p.m. for the following day. Mr. Smith had not appeared.

At 11.22 a.m. next day, April 21 the trial resumed and continued until 12.05 when the adjournment was taken to facilitate the attendance of the applicant's brother whom he wished to testify on his behalf.

In the meantime the applicant had made an unsworn statement denying any knowledge of the charges and called his mother to testify on his behalf. The brother attended and gave evidence on the third day of the trial and up to that time Mr. Smith did not attend although it is clear from the first day of the trial that he was within the precincts of the Court and was aware of the trial.

Mr. Chuck at first thought that the learned trial judge was under an obligation to ascertain from the applicant whether he had paid his Attorney, and if not, then to adjourn the trial to allow him to obtain legal representation. The Court could not endorse any such view. It is patent from the records that the virtual complainant had attended on previous occasions and was present in Court when the case came up on April 20, 1988 only because she had been brought there on a warrant and was being held in custody. The learned trial judge accepted her explanation that her absence when she was required was due to threats.

It is a notorious fact that many witnesses have been eliminated and trials aborted as a consequence. Some of those witnesses were murdered on the way to Court. It is no secret that many witnesses risk their lives in coming to Court. If our system of justice depending as it does on the testimony of witnesses is to be preserved the predicament in which witnesses find themselves in performing their civic duty cannot be treated lightly. We are strongly of the view that Wolfe J. was eminently correct in the decision he took and that the ground of appeal is completely lacking in merit. Indeed, Mr. Chuck, frank as he usually is, capitulated to that view when he announced that the relatives of the applicant had attended Court and advised him that Mr. Smith had been paid to represent the applicant at the trial. That is a matter for which redress ought to be sought elsewhere.

The case is a particularly revolting one. Indeed, in the combined experience of the members of the Bench we have never encountered its equal.

At 1.30 a.m. on October 3, 1987 Princess Clarke was at her gate in Majesty Gardens talking to a boy called 'Nigger Charles' when they were abducted at gun-point by one 'Richie Bud' and another man. She was hit in the head with the gun and force-marched to the train line where a shout was made following which the applicant and three others appeared. That area was well lighted and the applicant spent some 15 minutes speaking with Miss Clarke in his endeavour to ascertain whether she knew him. Quite understandably, she denied knowing him but when he insisted that she knew him she concurred and sought to make capital of it. She said to him -

> "Like how yuh know mi yuh can give mi a chance and yuh alone have sex with mi."

to which he replied 'A nuh mi control dat'. He maintained he was not responsible for her but she pleaded -

> "If is rape you are going to rape mi yuh alone have sex with mi."

But inasmuch as no mention had up to then been made of sex, she was asked why did she make such a request. She explained that only two weeks before a door had been kicked off in Majesty Gardens and a girl abducted and raped so she feared a similar fate. Thereafter, when she refused the applicant's order to undress, he undressed her himself and proceeded with his three cronies in animal fashion to ravish her. After that, their beastly passion not fully sated, they further humiliated her by forcing 'Nigger Charles' at gun-point to have oral sex with her, after which the applicant took her part way and told her she could find her way home. Before parting company with her he said to her 'Meanwhile mi and yuh walking the only thing mi can do for yuh is don't mek them kill yuh because them did want to kill yuh'. She thanked him and ran off leaving her pantie which had been taken from her. She made her way to the Hunts Bay Police Station and made a report to Corporal Zelpha McIntosh who had her medically attended to and issued a warrant

for the arrest of the applicant who was known to her. Three days later, on November 6, the applicant was taken into custody by a party of policemen but when the warrant charging him with rape was read to him he responded, 'Officer, me couldn't rape that'.

Identification was the live issue at the trial because the applicant's mother and brother testified that the three of them were asleep in the same room on the same bed at the relevant time. Indeed, the mother made it clear that she could not have gone to bed without her twenty-one year old son being in bed and, what is more, she is the one who locks the door of that room at nights. But the resolution of the issue was assisted considerably by the cross-examination of Miss Clarke because she was then afforded ample opportunity to elaborate on his manner of dress, the occasions on which she used to see him and the fact that when they were smaller they lived opposite each other. This is how she put it responding to the applicant's question -

> "Q. Mi ever talk to yuh from mi know yuh?
>
> A. Of course you used to live in front of mi and mi and yuh run up and down and mi and yuh sister."

Indeed, she said her knowledge of him covered a period of six years.

The learned trial judge accepted the evidence of identification as satisfactory after paying due regard to the requirements for good identification evidence. We can find no fault either with his treatment or the conclusion to which he came.

The sentences of 15 years are appropriate to the crimes and we can see no reason for disturbing them. In the result, the application for leave to appeal is refused and we order that the sentences run from July 22, 1988.