JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 35 & 38/94

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA
vs.
HORATIO MARTIN
RICHARD LEVY

Delroy Chuck for Martin

Lord Gifford, Q.C. for Levy

Miss Kathy Pyke for the Crown

April 28 and June 12, 1995

WOLFE, J.A.:

At the outset of the hearing of these applications, Lord Gifford, Q.C., informed the court that Mr. Chuck, who had earlier been present in court, had asked him to advise the court that he appeared on behalf of the applicant Martin and that having read the summation there was nothing he could usefully urge on behalf of the applicant Martin.

Martin had been so advised and has accepted the advice of counsel. We agreed entirely with Mr. Chuck. There was absolutely no merit in the application. The single judge who refused leave to appeal summed up the situation thus:

> "The live issue was identification and the learned trial judge dealt with it adequately. His directions to the jury were full and lucid."

The verdict was inevitable on the evidence adduced by the prosecution.

Lord Gifford, Q.C. for Levy was not of the same mind as Mr. Chuck. He sought and obtained leave to argue two grounds of appeal. He further sought leave to adduce fresh evidence. This was, however, refused for reasons which will be stated herein.

The applicants were indicted in the Home Circuit Court, each for two counts of rape committed on D.W. on 30th March, 1992. They were tried before Smith, J., sitting with a jury, and were convicted. Martin was sentenced to nine (9) years hard labour and Levy to twelve (12) years hard labour on each count.

Having regard to the grounds of appeal, only a brief summary of the evidence is necessary for purpose of this appeal.

D.W., a young woman 21 years of age, a nurse maid residing at Seven Miles, Bull Bay, attended a dance at

"Super D Club" in Harbour View on March 30, 1992. She left the dance about 2:00 a.m. and was on her way home being towed on a pedal cycle by one "Prickle". On reaching Harbour View Drive-In Cinema she came upon the applicants and other men. She was literally abducted by the two applicants and taken into bushes at Melbrook Farm where the two applicants and four other men satisfied their sexual appetite. At least two of the six men compelled her to indulge them in oral sex. Both accused men were known to her before the morning of the incident.

Lord Gifford, with his usual candour, conceded that the identification was strong on the face of it. He said that on the evidence, given the length of time and the conditions which existed at the time of the offence, there was ample opportunity for recognition. The incident took place over a period of two hours.

Ground 1:

> "1. That the learned trial judge erred in law in directing the Jury that they could infer that in using the words to the Investigating Officer, 'Officer a lie she tell pon me. A Junior rape her sir', the accused was admitting that he was present at the crime (see pp 7-8, 17, 22) It is respectfully submitted, (a) that the words are not reasonably capable of bearing the said inference, and (b) there could be no guilty inference put upon such words

> "allegedly spoken in September 1993 in relation to a rape committed in March 1992. Nor could such words be evidence which supported the evidence of the complainant (p. 17)."

Having regard to the nature of this ground of appeal, it will be helpful to set out certain extracts from the summing-up of the learned trial judge (pp. 7-8):

> "Say for example, I think Mr. Williams is asking you, where the police, Constable Dewar or Corporal Dewar, said that, I think it is Levy, the accused Levy, said after cautioned, when the warrant was executed, 'Officer, a lie she a tell pan me. A Junior rape her, sir,' the first thing you must ask yourselves, do you accept Detective Corporal Dewar that that was said by Levy? That is the first thing you have to decide and if you are sure that it was said, you go on now to say what does it mean. What does it mean? A part is saying, 'A lie she a tell pan me.' As judges of the fact (sic), you must look at the whole statement and say where the truth lies. If it was said what inference you are to draw from it? Because you are entitled to reject that part, 'A lie she a tell pan me.' You might think it is self serving and you won't attach much weight to it. But the other part now, 'A Junior rape her, sir,' you might, as judges of the facts, well say, 'We accept that it was said.' What does it mean? Is it that he might have heard, somebody might have said so and he is just saying

"what he heard or is it that he is saying that he was there? 'I know this is Junior,' bearing in mind, too, that in evidence here, he is saying, 'I don't know Junior.' So it's for you looking at all the evidence, the entire evidence, to say what you make of it as judges of the facts. So that is inference, members of the jury."

Page 17:

"Now, suppose you accept what Corporal Dewar said, what the accused Levy is alleged to have told him. If you accept it as a fact, if you are sure that he said that to the police, how you look at it? Now, I told you that you may draw inferences and so on. If you find it as a fact that Junior raped her, what you make of that? But let me tell you this, as a matter of law, members of the jury, that it is open to you what inferences you draw but even if you draw the inference that he was there, that wouldn't be corroboration in the strict sense. It would have to go on, now, to prove that he himself also raped, also had sexual intercourse. So what it would do is support her evidence in a sense - that is if you accept it in that interpretation - that he was there but you would have to go on now to ask yourselves, looking at the evidence, whether you are sure that he also had sexual intercourse with her. So it would not be corroboration in the true sense. It would only put him there but not necessarily

> "saying that he had sex with her. So you bear that in mind, members of the jury, and see what you make of that. So that is corroboration."

We can find no basis for complaint. The applicant Levy, when arrested and cautioned, is alleged to have said, "Officer, a lie she a tell pan me. A Junior rape her." The learned judge was duty bound to assist the jury as to how they ought to approach this statement. If the jury accepted that the applicant had made the statement to Corporal Dewar they would have been entitled to ask themselves how did he know that Junior had raped her . Was this something which he had heard or did his knowledge come from the fact of his being present when Junior raped her, bearing in mind that the complainant's evidence is that Junior did in fact rape her.

At no time did the learned trial judge ever suggest that if in their examination of the statement they concluded that his knowledge of Junior having raped the victim was derived from his being present at the time that such a finding would inevitably result in his guilt. The learned judge made this abundantly clear when he said:

> "...even if you draw that inference that he was there, that wouldn't be corroboration in the strict sense. It would have to go on, now, to ask

> "yourselves, looking at the evidence whether you are sure that he also had sexual intercourse with her."

Further, the learned trial judge made it clear to the jury that merely finding that he was there could not by itself be regarded as being supportive of the complainant's testimony that he had raped her.

Lord Gifford, Q.C., urged that a statement made in 1993 could not give rise to an inference that the applicant had committed an offence in 1992. This submission arises from a failure to understand that the warrant which was executed upon the applicant was in respect of an offence committed in 1992 and, therefore, any response which he gave must necessarily be understood as related to the offence with which he was then taxed.

This ground lacked merit and accordingly failed.

Ground 2:

> "2. The learned judge erred in law in his directions or identification in that he failed to direct the jury that it was a specific weakness in the identification evidence, that the complainant could not have possibly known the appellant for about a year and seen him every day, as she claimed, since it was established by the evidence that he was in the General Penitentiary for 16 months and was released six and a half months before the date of the rape. (see pp 25, 36, 42). It

> "is submitted that the learned Judges direction to the Jury to 'say what you make of this' (pp 25, 36, 42) was inadequate in the circumstances to do justice to the Appellant's case."

The burden of this submission is that the learned trial judge failed to identify as a weakness in the identification evidence the fact that the victim had testified that she had been seeing the applicant every day for about one year prior to the incident. However, the uncontroverted evidence is that the applicant had been in custody at the General Penitentiary for a period of sixteen months and had only been released for six and a half months prior to the incident.

At page 35 of the transcript the learned trial judge addressed the matter in the following terms:

> "I think it was here that she went on to tell you that she knew the accused Levy for about a year before the incident and that she knew Martin for over one year. You must say what you make of this. And when we come to look at his evidence, especially Levy's evidence, I should say, as to time when he was in and out of D.P. (sic), you must say what you make of it."

then at pages 36-38 he reminded the jury of the arguments of counsel in the case as to the effect of the evidence of D.W.

and the applicant Richard Levy and then finally he told the jury:

> "That is his evidence, Members of the Jury. I quoted it as he said it and he continued to tell you that when he came out of the G.P. in 1990, September, his mother was not at home. His mother had migrated, I take it. And he told you that between September 1991 and March 1992 he didn't go back to Melbrook Farm. So you see, this is important what he is saying, that between September, 1991 and May 1992 he had not been back to Melbrook Farm. Therefore, he is saying Dotlyn couldn't have been seeing him every day in Melbrook Farm. You must say what you make of it, Members of the Jury. And of course, he denied that he raped her. He denied that he was there that night."

These passages demonstrate that the learned trial judge did bring to the attention of the jury the obvious error on the part of D.W. when she testified that she had been seeing the applicant for about one year prior to the incident.

Although he did not label it as a weakness it must have been clear to the jury that what the judge was emphasising was that the period for which D.W. had seen the applicant was less than one year as she had stated and therefore when they came to consider the accuracy of her identification they would have to bear in mind that she could only have

been seeing the applicant for a period of six or seven months rather than for one year.

We disagree with the complaint that the judge's treatment of this aspect of the evidence was inadequate.

APPLICATION TO ADDUCE FRESH EVIDENCE

Counsel for the applicant moved the court to grant leave to have the evidence of Lloyd Beckford, a brother of the applicant, adduced. The principles on which this court acts when considering the question of adducing fresh evidence are well settled.

The court will only grant such an application where it appears that the evidence is likely to be credible, and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of appeal and the court is satisfied that the evidence was not adduced in those proceedings, but there is a reasonable explanation for the failure to adduce it, which usually is that it was not then available.

In the instant case the evidence was clearly available. As to the explanation offered for failure to adduce it, we are of the view that the explanation is far from reasonable. Here is a man who knows he is to turn up in court to give evidence on behalf of his sibling, he becomes ill and is unable to attend and fails to inform counsel that he would not be able to attend because of illness and the reason for

not so informing counsel is that he did not know how to get in touch with him.

Further, having examined the affidavit in support of the application, we concluded that the evidence sought to be adduced was not likely to be credible. In the result, the application was refused.

It is for the reasons set out herein that we dismissed the application for leave to appeal and ordered the sentence to commence from July 29, 1994.