CRIMINAL LAW – Appeal from Circuit Court – Rape – Whether verdict unreasonable and against weight of evidence – whether indictment badly drawn – whether jury misdirected re common design – whether trial judge advanced reasons why Crown case shunned by JAMAICA accepted – whether defence inadequately put – whether sentence harsh and excessive. Application for leave to appeal refused.

No cases referred to.

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 10/88

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

REGINA

VS.

LANZIE ROBINSON

L. Cousins for the Applicant

Miss J. Straw and Miss F. Brown for the Crown

May 24, 1988

ROWE P.:

Lanzie Robinson was convicted before Mr. Justice Wolfe and a jury in the St. Catherine Circuit Court on the 13th of January, 1988 for Rape and he was sentenced to a term of imprisonment of twelve years at hard labour.

Mr. Leslie Cousins who appeared for him at trial appears for him on the hearing of this application for leave to appeal and he has advanced five grounds in support of the application.

The Crown's case was that on the night of the 20th of May 1987, a young lady who had been attending training classes in Kingston was minded to return to May Pen where she lived and she went to the Three Miles roundabout and there waited for transportation.

She waited quite late into the night and at about 10 o'clock a van drove up and stopped beside her. There were two men in this van and she was offered a lift. She explained where she wanted to go and the men in the van said: 'Yes', they were going in that direction and would happily take her. She said too that she was unwilling to go because she was the only person standing there and they waited around but nobody else having joined them she eventually accepted the ride in the vehicle. She said that the two men in the vehicle made her sit between them and they were laughing and talking between themselves as they drove along.

She said that when they got to Caymanas Park or a road turning to Caymanas the vehicle turned off the road and she asked the driver: "Where are you going?" He replied: "Just cool". He said he wished to go to visit a friend and to pick up something. Then, the woman said, they drove into a dark bushy place, stopped the van and once the van stopped they pounced upon her. Both men pushed her into the back of the vehicle, and ordered her to take off her clothes. She said she refused and both men took off her clothes and both men assaulted her.

She said that one man, later identified as Horace Stewart, raped her while the other man whom she identified as the applicant "was sucking her tongue out of her mouth."

While the two men were so engaged two security guards came on the scene and the young woman ran naked out of the van to them and asked for help. The security guard said he saw the two men on top of the girl. Horace Stewart alighted from the van without any trousers while the applicant came from the van without being fully clothed.

Both men were taken to the Police Station from where Horace Stewart escaped.

The prosecution's case was that this woman had not consented to and had had no intention of having intercourse with any of these men.

The defence of the applicant was that he hired Horace Stewart to take him from Kingston to Spanish Town. When he got into the vehicle he fell asleep and he was so asleep when he realised that the van had stopped at Three Miles. He said that Stewart picked up a girl and after she came into the van he did not pay them any attention. He again fell asleep. The next thing he realised was that the van had stopped in some bushes off the Caymanas road. He said that when he got up he noticed that Stewart was attempting to interfere with the girl and he told Stewart that the girl could be his own sister and therefore Stewart should leave the girl alone. The applicant said that just then he had the urge to urinate and so he came out of the van and went into the bushes in order to do this. He never returned to the van and he was actually outside calling to the man Horace Stewart and telling him to leave the girl alone when the security guards approached. He said that he took absolutely no part in the assault upon the girl and that the security guard did not see him in the van.

The learned trial judge left to the jury the issues which were raised at trial viz., the issue as to discrepancies, and the defence of the applicant that he did not take any part at all in the assault upon the girl.

Mr. Cousins has attacked the verdict and the sentence on a number of grounds. The first ground is that the verdict was unreasonable and against the weight of the evidence. He said that the only thing that the applicant could be convicted of, if he was to be convicted at all, is of indecent assault, in that he did not do an act penetrating the girl so as to be capable of being guilty of rape.

He said that the indictment as drafted was faulty because it alleged that the applicant committed rape when on the evidence he did not penetrate the young woman.

The learned trial judge had heard similar submissions from Mr. Cousins and he directed the jury that on the ground of common design two men could be charged with and convicted of rape, although only one person had succeeded in having full sexual intercourse at the time when the incident was foiled.

We are of the opinion that the indictment was properly drawn, on the basis that the applicant was aiding and abetting in the commission of the rape upon the girl in that the allegation was that he had assisted the other man, Horace Stewart, to strip the girl of her clothes, and that he was kissing her passionately, in such a way that the girl described his action as "sucking her tongue out of her mouth", at the time when Horace Stewart was in fact having sexual intercourse with her. Further, as the learned trial judge quite properly held, the indictment based on common design was correctly drawn and we find no substance in Mr. Cousins' complaint on ground 1.

The applicant's counsel complained that the learned trial judge misdirected the jury on the issue of common design because there was no evidence on which this could have been founded. He developed this by saying that the learned trial judge should have put side by side with the direction that the men were acting in concert, the possibility that Horace Stewart could have been acting independently of the applicant and therefore the applicant need not have been in any way concerned with what the man Horace Stewart was doing. Mr. Cousins said the applicant's defence being that he was asleep at many of the material times, that he had reprimanded Horace Stewart, that he had come out of the vehicle and gone into the bushes, that he had not assaulted the girl in any way, the learned trial judge was under a duty to tell the jury that Horace Stewart could have been acting independently.

In our view that was exactly what the learned trial judge did. He left to the jury the defence which the applicant raised and he told the jury expressly that if they believed or were in doubt as to the

applicant's account, then he was to be acquitted. On the crown's case there was no question of one man acting independently of the other. Both men had stripped her of her clothing and in the assault both of them were gratifying their lusts, one by sucking her tongue, the other one having actual sexual intercourse with her, all at one and the same time. We therefore find unsupportable the complaint of Mr. Cousins that on the Crown's case Stewart could have been acting independently of the applicant.

Another ground of appeal was that the learned trial judge in his summing-up so advanced reasons as to why the crown's case should be accepted, that the defence was inadequately put to the jury. Counsel said that the judge was overly passionate in his summing-up to the jury.

We have looked at the summing-up and we do not find any instance of the learned trial judge advancing improperly the case for the crown nor did Mr. Cousins in his address to us point out any passages from which this complaint could arise.

Finally counsel argued that the sentence was harsh and excessive. He called it barbarous and he said that the sentence of twelve years was being imposed on a person who did not penetrate and at most had only indecently assaulted the complainant by kissing her.

We are unable to agree with these submissions. In the first place, on the crown's case which the jury seemed to have accepted completely, these two men, one aged twenty-nine, (Stewart's age we do not know), lured this girl into the vehicle, took her into the bushes and both of them at one and the same time sexually assaulted her. This is one of the most depraved of the cases that has come to our attention in recent times and we think that had this girl not been saved by the security guards the applicant might have gone on to do further physical

and mental harm to her.

In the circumstances of this case we do not at all think that a sentence of twelve years at hard labour is harsh or excessive. The application for leave to appeal is refused. The sentence will run from the date of conviction.