JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No.108/1974

BEFORE: The Hon. Mr. Justice Edun, J.A., (Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.

REGINA v. LESTER GUYAH

Chester Orr Q.C. and R.A. Stewart for the Crown.

B. Macaulay Q.C. and Pamela Benka-Coker for the Appellant.

30th and 31st October, and
6th December, 1974

HERCULES, J.A.:

Lester Guyah was convicted in the Home Circuit Court in May, 1974, on a 2-count indictment charging (1) Rape and (2) Robbery with Aggravation. A single judge, Swaby J.A., refused leave to appeal against conviction in respect of Count (1) but granted leave to appeal against conviction in respect of Count (2). It would be convenient to refer to Lester Guyah hereinafter as the Appellant.

On the 31st October we allowed the appeal on both counts and promised then to put our reasons for so doing in writing. We now keep our promise.

Pamela Grant gave evidence that about 9.30 p.m. on 5th October, 1973, Appellant held her up on Oakland Road, Kingston, threatened to shoot her if she said anything, then took her to the back of premises where there was a burnt house. When she got to the back of the premises the Appellant and two other men each had two acts of sexual intercourse with her against her will. While Appellant was having sexual intercourse wit her, one of the other two men took her wallet out of her bosom and put it back. But later, during the fifth act of sexual intercourse, Appellant put his hand in her bosom and took away her wallet containing $1.60. After her sex ordeal the police arrived, the three men ran to escape but the police held the Appellant. She described the Appellant as the shortest of the three and said that he was wearing a plaid shirt.

She said it was dark but she was able to see the colour of his clothes from the light which shone somewhere along Oakland Road. In any event she conceded that it was neither a near light nor a bright light, but she was able to make out the clothes although she could not make out the face - it was only when she got to the police station she was able to recognise the person as the Appellant. She believed that the police beat Appellant and put him in the trunk of the car.

The only other witness as to part of the Oakland Road drama was Constable Davis. At one stage he said that he held Appellant and the other two men escaped over the fences. Later on he said that he did not see any of the men jump over the fence. He said that Pamela Grant told him that when she arrived on the premises, Appellant took out a change purse from her bosom with $1.60 cash. This, be it noted, is not the course of dealings with the change purse as described by Pamela Grant in her evidence. The Constable contradicted Grant further by testifying that it was dark around the burnt out house - there was no light around that particular area. He also denied Grant's evidence of her belief that Appellant was beaten by the police and that Appellant was also put in the trunk of a car. He explained any injuries Appellant sustained as caused when he tried to escape by jumping over several fences. Indeed, in his entry in the Station diary he noted that Appellant received some small cuts all over his body and was a patient at Kingston Public Hospital under police guard. When this Constable was reexamined he said he could not say how Appellant got the cuts.

But it appeared that it wasn't really those cuts that caused Appellant to be hospitalised. Dr. Roje, called by the Defence, said that on the night of 5th/6th October, 1973, he assisted in performing an operation on Appellant for a bleeding wound in the lower left quarter of the abdomen; at the end of the operation a single bullet was removed from Appellant's body. The bullet had caused a serious injury which, without the operation, was likely to threaten Appellant's life. The doctor thought that the wound was a fresh one inflicted within twelve hours before the operation and he would not have thought that a person with such an injury could stand up and have sexual intercourse twice as related by Pamela Grant.

There was the further medical evidence of Dr. March - a witness called by the Crown. Pamela Grant had given evidence that she used her panties to wipe her private parts after sexual intercourse. Dr. March expressed the opinion that if Appellant had sexual intercourse twice with Grant in a standing position and while bleeding from a gun-shot wound, he (the doctor) would expect to find blood on the panties if they were used to wipe Grant's private parts. But there was no blood on the panties.

The most amazing point in the whole case, however, is that Constable Davis swore that he did not know that Appellant sustained a gun-shot wound and that a bullet was removed from Appellant's body. Of course, he knew that Appellant remained in hospital for eight or nine days, but he maintained that no firearms were discharged that night.

Obviously then Constable Davis could not be regarded as a truthful witness and caused the learned trial judge to direct the jury at pages 16/17 of the summing-up:- "Had it been the evidence of Constable Davis alone which you had to go by I would probably say something smells." The learned trial judge then proceeded to leave Pamela Grant's evidence by itself to the jury. The result of this is that Davis proved to be a totally discredited witness and his evidence is to be regarded as nugatory.

The Appellant gave sworn testimony to the following effect: I am the wrong man. I happened by chance to be on Oakland Road, going about my lawful business. The Police, in chasing certain wrongdoers, fired shots; the wrongdoers escaped and I got shot, so the police held me. I was not caught in the burnt out premises and I had nothing at all to do with the offence of either Rape or Robbery with Aggravation. I called Dr. Roje to substantiate that I was shot and had to undergo surgery. That doctor would not have thought that I could have had sexual intercourse in the manner described by Pamela Grant. This view was supported by Dr. March called by the Crown. I am being framed.

As against this plausible explanation given by the Appellant, the learned trial judge left the jury with only the evidence of Pamela Grant. In viewing the evidence as a whole, however, it is clear that there were significant inconsistencies in the testimony of Pamela Grant vis-a-vis the evidence of Davis. The jury were directed that they could

disregard Davis, and if they believed Grant, they could find Appellant guilty. But would such a verdict have been reasonable on the showing of Grant by herself? We are afraid that several matters would have to be resolved before it could be held that Grant's testimony alone could found a reasonable verdict.

To begin with there was unchallenged evidence that the Appellant was shot before the police took him to the station and then to the hospital. The critical question is where and when. Was it on Oakland Road or in the back of the burnt out premises? The Appellant said that he was shot in Oakland Road and that there was no question that he had gone to the back of the burnt out premises. It is very curious indeed that there was nothing forthcoming from Pamela Grant about shots being fired by the Police that night.

Be that as it may, if it was in Oakland Road before sexual intercourse, then Appellant, on the medical evidence, would not have been able to commit the two acts of sexual intercourse subsequently at the back of the burnt out premises. How indeed could Pamela Grant have then completely escaped contact with blood flowing from Appellant's bullet wound? Moreover, if it was at the back of the burnt out premises, at what stage, before sexual intercourse or after sexual intercourse? Before, the position would be the same as being shot in Oakland Road - a physical incapability. After, why would Grant, who gave evidence of beating of Appellant by the Police, not have had something to say about the shooting?

Therefore, the failure of the evidence for the Crown to resolve those matters, places a question mark against Grant's evidence. Was she assisting to cover up something? As the learned trial judge asked the jury: "Is she tainted too?" When and where was the Appellant shot? It might very well have been as he testified in his defence.

But a further point of unreliability emerged from Grant's evidence purporting to identify Appellant. According to her the Appellant was standing face to face, so near as to be having sexual intercourse with her, yet, in the light that she claimed to be present, she could not make out the face. She could only make out the clothes until she got to the police station where she was able to recognise the

person as the Appellant. We hasten to point out that we have not lost sight of the evidence, such as it was, that Appellant was apprehended in the back of the premises. Since, however, Grant did not make out the face previously, it is to be presumed that at the station she recognised him by the clothes. She certainly could not recognise him by the face that she could not make out before. Complaint was made that in the summing-up as a whole the palpable weakness of the identification was not adequately dealt with by the learned trial judge. (See Arthurs v. Attorney-General for Northern Ireland (1971) 55 Cr. App. Rep. 161 and R. v. Long (1973) 57 Cr. App. R. 871). The learned trial judge contented himself with reminding the jury of Grant's evidence on the point, and without any specific guidance, merely left it to them to say whether they accepted her as a witness of truth or not. There was substance in the complaint, for the jury might well have taken a different view if they were adequately directed. Mr. Orr conceded that the learned trial judge did not give the usual detailed directions as to identification.

In the end the learned trial judge told the jury that in so far as Count 2 was concerned, the evidence disclosed a case of Larceny from the Person rather than a case of Robbery with Aggravation. It is our view that, on the evidence, the learned trial judge was right in leaving the lesser offence of Larceny from the Person to the jury, for it is permissible at common law to convict of a lesser offence if that lesser offence is an ingredient in the more aggravated offence charged. In Robbery with Aggravation the first thing that the prosecution must do is to prove Larceny and then go on to prove that that Larceny which they have proved has occurred in certain particular circumstances. (See R. v. Desmond and Hall (1965) 49 Cr. App. R. 1.).

But the offence of Robbery with Aggravation, Sec. 34(1)(a) of Cap. 212, the Larceny Law, as amended by the Law Reform (Mandatory Sentences) Act, 1972, attracts a penalty of imprisonment not exceeding 21 years, whereas the offence of Larceny from the Person, section 18 of Cap. 212, attracts a penalty not exceeding 10 years.

The jury disregarded the directions of the learned trial judge and found Appellant guilty of "Robbery". The learned trial judge imposed a penalty of 7 years with hard labour in consideration thereof.

No doubt his sentence on that count would have been less than 7 years if the verdict was returned as directed. In effect at any rate this would not have availed Appellant anything since the sentences on both Counts (Count 1 - 9 years) were ordered to be concurrent.

But in view of the apparent misunderstanding between the learned trial judge and the jury as to the correct verdict on Count 2, we agree with Swaby J.A. in granting leave to appeal in respect of that count. Mr. Orr again conceded that that conviction ought not to stand. We could not agree more, especially as we do not lose sight of the unsatisfactory nature of the evidence as to how the "Robbery" took place.

Nine grounds of appeal were filed and argued. Substantially they have all been touched upon in the foregoing. But ground 4 actually encompasses the points made on all the other grounds. Ground 4 calls upon this Court to determine whether it would exercise the jurisdiction conferred upon it by Section 13 (1) of The Judicature (Appellate Jurisdiction) Law, 1962, which provides:

> "The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence ....."

The provisions of Section 13 (1) of The Judicature (Appellate Jurisdiction) Law, 1962, are identical in terms to the provisions of Section 4 (1) of the English Criminal Appeal Act, 1907. In the case of R. v. Barnes (1943) 28 Cr. App. R. 141, Humphreys J. in the Court of Criminal Appeal referred to the provisions of Section 4 (1) of the Criminal Appeal Act, 1907, and, in particular reference to the provision that the Court shall allow the appeal if they think that the verdict of the jury "cannot be supported having regard to the evidence", said at p. 142:

> "Those last words have been interpreted in more than one case in this Court as amounting to this: if the Court thinks that the verdict is, on the whole, having regard to everything that took place in the Court of trial, unsatisfactory."

We would unhesitatingly exercise that jurisdiction in favour of the Appellant. In the opinion of the Court the verdicts on both Counts were unreasonable, having regard to the evidence, and there was a miscarriage of justice on the part of the jury in convicting the Appellant on that evidence, his own answer to it being really left totally uncontradicted.

The question of a retrial was canvassed by both sides. That such an order should be made depends on the particular facts and circumstances of each case, and should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person. On the record of this case the interests of justice do not call for a new trial and such a course would manifestly cause an injustice to the Appellant.

In the result the application for leave to appeal in respect of Count 1 is granted and the hearing of the application is treated as the hearing of the appeal. The appeal on Count 1 and Count 2 is allowed. Both convictions are quashed and sentences set aside.