

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 72/88

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

REGINA

v

PAUL ALLEN

Jack Hines for the Appellant

Y. Sibble for the Crown

February 27, 1989

WRIGHT, J.A.:

By leave of a single judge this case came before the Court on appeal to consider whether appropriate directions on visual identification had been given to the jury by the learned trial judge, Bingham J., before whom the case of rape had been tried with a jury on March 24, 1988. Accordingly, Mr. Hines sought and obtained leave to argue two Supplemental Grounds of Appeal viz.:-

- "1. The learned trial judge erred in law in that the crucial issue being one of visual identification there was no warning or direction in clear and adequate terms or at all of the dangers inherent in such identification. Neither was there any warning of the distinct possibility of the complainant making an honest mistake nor that a mistaken witness can be a convincing one and these omissions deprived the Appellant of the mantle of the protection from mistaken identity provided by the law.
2. That further, the learned trial judge's directions were wholly deficient on the said central issue of visual identification in that there were no directions as to how the Jury should treat with the circumstances surrounding the purported identification."

The facts giving rise to the appeal may be stated briefly. At about 11.30 p.m. on August 20, 1987 the complainant, Joan Poyser, was on her way to Reggae Sunsplash in Montego Bay when in the vicinity of Barracks Road and Hart Street she was stopped by the appellant, whom she knew before having seen him once before at a shoe market, and another man. Within touching distance of each other, he engaged her in conversation for about half an hour in an area lighted by street lights. At the end of that time she essayed to leave in order to rendezvous with her friends but was prevented by the appellant who told his companion to ensure that she did not leave while he absented himself. Promptly upon receiving such instruction, his companion flashed out a ratchet knife and held it at her throat. She remained in that condition until the appellant returned and led the way to a deserted house - the door to which was nailed up. With an ice-pick sticking in her back she was forced to climb through a window into the darkness of the house. When she refused to comply with the appellant's order to undress, he undressed her himself and thereafter the appellant, his companion and two other men who entered the house while they were there ravished her - the appellant doing so twice. And, indeed, so outrageous was the assault upon her that she protested - 'What oonu tek me fah? Pig?'. To this the appellant's companion responded - 'Me no care whether you a pig or you a human'.

The investigating officer testified that when he accosted the appellant during his investigations and told him that he was investigating a case of rape and he believed the appellant could assist him in those investigations the appellant replied - 'Me know the girl from Tucker long time'. At that point he was cautioned and then he continued, 'Me go with the girl, sah, and three other men came in the room on me'. After arrest and caution he confirmed what he had said before with the words, 'Just like whey me tell you'.

Implicit in these statements by the appellant is consensual sexual intercourse. But at the trial this was not his defence. He set up an alibi - he had left to Kingston on August 16 and did not return until August 22 and that was the defence left to the jury which they rejected.

Against the background of that evidence the learned trial judge did not embark upon any Oliver Whyllie - style directions on visual identification. For, indeed, what was really at issue was the credibility of the complainant as to whether she had met and spoken with this appellant in the light for about half an hour and that thereafter he led her away unwillingly to consummate his dark deeds in the darkness of this house.

Mr. Hines struggled valiantly to present arguments as to the need for directions on visual identification which at first he contended was a live issue. However, after an examination of the evidence and having the benefit of discussions with the Bench he capitulated conceding that he could not ignore the total effect of the summing-up having regard to the several aspects dealt with by the learned trial judge. Accordingly, he could not maintain that visual identification was a live issue or the only issue.

It is correct to say that Bingham J. had dealt carefully with the various aspects of the case affecting the credit-worthiness of the complainant and had juxtaposed the case for the prosecution and the defence on the issue of identification at page 16 thus:-

"As a matter of fact, Miss Joan Poyser said is only one previous occasion that she saw this accused, you know, at this shoe market. There is no evidence of any malice between them.

Of course, the defence is saying here; mistaken identity, you see. But, you see something, when you look at Joan Poyser's evidence, she says that the accused was one of the men. You have to ask yourself; she knew him before; was the half hour or the period of time on Barracks Road, was that ideal or adequate circumstance or opportunity for making a positive identification of him, this man whom she knew he is called Indian or Chinie-man?"

Thereafter he adverted to the episode with the Investigating officer and the statements attributed to the appellant on that occasion.

We are in complete agreement with Mr. Hines that visual identification was not a live issue requiring the treatment accorded to that issue. Further, we endorse as adequate and proper the treatment of the evidence by the learned trial judge. Indeed, if the jury accepted the case for the prosecution as they obviously did, any other verdict would have been perverse.

The appeal was for these reasons on February 27 dismissed, the conviction and sentence were affirmed. The sentence of 8 years imprisonment at hard labour was directed to run from June 24, 1988.