JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 233, 235, 236 & 237/88

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA vs. UTON STEWART
CYAN JOSEPH
JUNIOR SCARLETT
COREY FREDANKEY

Mr. Delroy Chuck for appellants

Miss Carol Malcolm for the Crown

24th & 31st July, 1989

CAREY, J.A.:

These appellants and another youth Duke Dawson (who has not appealed) were convicted in the High Court Division of the Gun Court held at Black River in St. Elizabeth on 1st December last before Theobalds, J., sitting alone, on an indictment which charged them jointly for illegal possession of a firearm and individually for rape. They were each sentenced to concurrent terms of 5 years imprisonment at hard labour.

The matter came before the Court by leave of the single judge who stated that it was unclear what standard of proof was applied by the learned trial judge in his adjudication at the trial of the appellants.

The victim of this crime, a school girl aged about 15 years, related that on 6th June, 1988 she lived at a district called Thornton in St. Elizabeth with a Miss C. On that night she was staying by a cousin because she was afraid to go home alone. While she was preparing to go to bed, she recognised the voice of one of the co-accused, Duke Dawson, who was indicating that Miss C wished her to come home. She did so accompanied by Duke Dawson and Uton Stewart. Dawson, as indeed another youth, Cyan Joseph were known to her. They both stayed at the same house as she did and slept on a bed in her room. Uton Stewart was a neighbour. After her arrival, she retired to bed. Later that night she was awakened by one Carl to find the back door open. Carl was armed with a firearm. He ordered her outside and into some bushes where he raped her. Five persons came from a breadfruit tree by her head and proceeded in turn to be intimate with her. The five persons were these applicants and Dawson. By the time she returned, it was 2:00 a.m. She made no report of this seemingly traumatic experience to her guardian whom she admitted was asleep in the house. Although she saw Carl on the following day while she was in the company of friends, she neglected to tell them of it, although she did intimate that he had held a gun on her. She also admitted that after she got up next morning, she conversed with Dawson and Cyan Joseph quite normally.

The applicants each made an unsworn statement, the effect of which was they were all at Stewart's house studying for an examination when Carl Robinson and MS came up. Carl called them all out on the road and on the pretext of showing them something pointed to an open lot opposite Stewart's home. After they had gone a chain, Carl pulled a gun and advised them that this was a hold-up. MS was ordered

to lie on the ground and remove her under-clothes. He then required of MS in rather vulgar terms if she had any vaginal infection to which she demurred. Next he ordered Cyan Joseph, Duke Dawson and Corey Fredankey to have sexual intercourse with her but although each went up to MS none of them were intimate with her. They were all ordered away under threat of death and having their house burnt down. He added for good measure that he would there make good his escape. They all did as they were bidden, leaving Carl and MS.

The learned judge was not unmindful of the curious tale told by the victim, and addressed that aspect in this way in his summation. He began by properly reminding himself of the dangers of acting on the evidence of a young person, and said at pages 74-75:

> ".....and it is a fact that a young person's imagination is prone to run away with them, and for this reason I myself directed what I would regard as certain very searching questions to the complainant. I asked her in particular about the door, the lock on the door, and other aspects of her case about which she was cross-examined by defence counsel, and it is my view that the explanation which she gave as to certain mysterious or strange aspects of her behaviour is on balance acceptable, and I accept it."

Shortly after that, he said this -

> "I accept her explanation in relation to the encounter with Carl when she told Bobby that, 'This is the man that held me up with the gun', but she never said that, 'this is the man that raped me'. But in any event, Carl is not the man on trial for rape or any offence in this court, it is these five men, and when I consider the overall effect of her evidence and weigh what she has said in the same scale in which I weigh the unsworn statements made by the five accused, then I have no hesitation whatever on balance, in saying that I accept the evidence of the complainant in the material particular, that is, that on the night of the 6th of June this year these five accused persons had sexual intercourse with her without her consent."

In the context in which these words appear, the learned trial judge was considering the credit of MS in determining whether her story was worthy of credence. He accepted her story having assessed the circumstances on a balance of probabilities. In doing so, we think he was profoundly in error, a conclusion which, we think, to be irresistible in the light of what he said not once but choose to repeat.

For a criminal charge to succeed, the tribunal, whether judge or jury, must be satisfied so that it feels sure that the prosecution witness is to be believed. The onus in the prosecution of a criminal case is a much higher standard than the civil standard of "on the balance of probabilities". Lord Sankey in Woolmington v. D.P.P. [1935] A.C. 462 at pages 481-482 made the following well-known observations which we feel constrained to repeat:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Proof of sexual intercourse without her consent which depended wholly on the credence given to the victim's evidence, was a material particular and we rehearse the learned trial judge's own words that -

> "..... I accept the evidence of the complainant in the material particular, that is, that on the night of the 6th of June this year these five accused persons had sexual intercourse with her without her consent."

The prosecution was obliged to prove that particular to the standard enunciated above. The prosecution failed to do so and the consequence must be that the conviction cannot stand.

We add that learned counsel for the Crown, on reflection, conceded, as we think, properly, that she could not support the conviction. It is not inapt to observe that the story of the victim was somewhat incredible.

For these reasons, we allowed the appeal, quashed the convictions and set aside the sentences. We directed that verdicts and judgments of acquittal be entered.

As Duke Dawson had not applied for leave to appeal, we suggested to Mr. Chuck that he act on behalf of that young man to secure his release.