

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 106 & 107/05

**BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE G. SMITH J.A. (Ag.)**

**ANDRE WARREN v R
TERRENCE WARREN**

Applicants unrepresented

Dirk Harrison and Mrs. Nadine Atkinson-Flowers for the Crown

October 27, 2008

ORAL JUDGMENT

MORRISON, J.A.

These are two applications for leave to appeal against convictions and sentence in the Gun Court Division of the Circuit Court held at St. Ann's Bay in the parish of St. Ann. The convictions relate to the offences illegal possession of firearm and rape. Both applicants were indicted on an indictment which charged four counts. They were both charged with illegal possession of firearm, abduction and rape. After hearing the evidence, the learned trial judge determined that they were guilty of illegal possession of firearm and rape. However, he discharged them in relation to abduction.

The issues in this case turned entirely, as the learned trial judge said, on the credibility of the complainant. There was no issue of identity. Both applicants, who are cousins, were well known to the complainant. Indeed one of them, Andre Warren, is the father of a child with the complainant's mother. The other applicant, Terrence Warren, is also known as Wayne, and we will refer to them hereafter as Andre and Wayne.

The evidence was that on the evening of 25 April 2005 both applicants arrived one after the other at the home of the complainant. She was told by Wayne, who was the first to arrive, that a friend of hers who was his girlfriend, wanted to see her and on the basis of that she set off in a car, driven by Andre, with both of them to visit her friend Dawn. At a point, Wayne indicated that they needed to get some gas, so they made a detour for that purpose. They then proceeded at Andre's suggestion along the highway to get fish. They stopped at Runaway Bay at a bar where Wayne bought some drinks, two Guinness, rum cream and some rum. The complainant was handed the rum cream but she did not have a drink. They then continued driving towards Discovery Bay. They turned off into an area in which there was a marl heap on the way to Rio Bueno. The car stopped some distance down the road.

The evidence is that Andre first drew out a machete from a black 'scandal bag' and then produced a firearm which he pointed at the

complainant and then demanded sex from her. When she resisted, he dragged her into the bushes and ordered her to remove her clothing and to bend over on a rock, with her back to him. At this point Wayne, who had up to then been an onlooker, intervened, saying "mek me go first"; and proceeded to have sexual intercourse with her in that position. After Wayne had had his way with her, Andre then pulled him away, saying "my time how" and then proceeded to have sexual intercourse with her from behind also. After a while, Andre instructed her to lie down on his shirt and pants which he had spread on the ground and proceeded to have sex with her again. Still not satisfied, he then withdrew and demanded that she perform oral sex on him. This was too much for Wayne, who successfully interceded on her behalf, but then himself proposed anal sex to her. But Andre it was who then intervened, ordering her to put on her clothes, threatened her again with the gun, and, after demanding assurances from her that she was "not going to talk", ordered her back into the car which was then driven off, this time by Wayne. The ordeal over, she was finally taken to her home. The complainant's evidence was that she had at no time consented to sexual intercourse with either of the applicants.

When she got home she received a phone call from Andre telling her that she should not tell anyone what had happened and that even if she planned to talk by the next day he would be gone to Curacao.

Counsel for Andre, who cross-examined first, put it to the complainant that she had had consensual sexual intercourse with him. It was not entirely clear from the subsequent cross-examination on behalf of Wayne what his defence was. As it turned out, both applicants gave sworn evidence and Wayne, who was the first one who according to the complainant had had sexual intercourse with her, agreed that he had intercourse with her and said that it was consensual. Andre denied having had intercourse with the complainant while they were parked close to the marl heap, but said that they had all stopped at a bar while on the way back, then went to a certain club and that he had then gone off somewhere with the complainant to try and get some food to eat. It was at that point they went down to the beach where she had sexual intercourse with him, which he said was consensual sex. At the end of the day the defence of both applicants, therefore, was that sexual intercourse had in fact taken place with the consent of the complainant and both denied that a firearm or any other weapon had come into play.

The learned trial judge stated that the credibility of the witnesses was critical and it is enough to say that he rejected the evidence of the applicants and he found that they were not impressive and he rejected their testimony. He looked back at the Crown's case and found the complainant to be a witness of truth and on that basis he found both of

them guilty of illegal possession of firearm and of rape. His directions were adequate in all respects and it is difficult to see what other verdict he could have come to on this evidence.

In relation to count 2 which charged both applicants with abduction the learned trial judge took the view that abduction is committed when a person takes away a woman or detains her with intent to carnally know her and that there must be a detention apart from a detention during the commission of the sexual act. He accordingly he took the view on this evidence that abduction had not been made out as a separate offence and he therefore found both applicants not guilty on that charge.

The learned trial judge was of the view that in all of the circumstances the offences called for condign punishment. He took the view that this young lady had been forced to have sexual intercourse against her will and that she had in fact been humiliated by both of the applicants. He also took the view that by the conduct of the defence in fact that process had been exacerbated rather than mitigated. He did take the view that Andre was the leader and that in fact it was he who had initiated the whole event by being the one who had possession of the firearm, had the machete and by being the one who initiated the idea of raping the complainant. His sentence in relation to illegal possession of the firearm was that Andre should be imprisoned at

hard labour for 15 years and Wayne, who the learned trial judge described as a follower rather than a leader since he was not in possession of the gun, but acted in concert, he sentenced to imprisonment for 10 years.

In so far as the rape was concerned with regard to Andre, the judge regarded him as having betrayed the trust that the complainant would have in him as someone who had a relationship with her own mother and sentenced him to 20 years imprisonment on the charge of rape. Wayne, again the follower, he sentenced to 15 years imprisonment for rape. These sentences were to run concurrently.

Having considered the facts of the case carefully, we have come to the view that there is no ground upon which the applications for leave to appeal can succeed. The applications for leave to appeal are therefore dismissed. The sentences should commence on the 30th September 2005.