[2010] JMCA Crim 79

JAMAICA

IN THE COURT OF APPEAL OF JAMAICA

SUPREME COURT CRIMINAL APPEAL NO 93/2007

BEFORE: THE HON MR JUSTICE HARRISON, JA
THE HON MISS JUSTICE PHILLIPS, JA
THE HON MRS JUSTICE MCINTOSH, JA

PAUL ALLEN v R

Glenroy Mellish for the applicant

Jeremy Taylor, Mrs Ann-Marie Feurtado-Richards and Miss Kelly-Ann Boyne, for the Crown

11, 12 October and 20 December 2010

MCINTOSH, JA

[1] The applicant was convicted in the Western Regional Gun Court holden at Montego Bay in the parish of Saint James on 26 June 2007 for the offences of illegal possession of firearm, rape, indecent assault and robbery with aggravation. He was sentenced to serve terms of imprisonment of eight, 20, three and 10 years respectively with the order that the sentences of 20 years and three years be served concurrently but consecutively to the sentence of eight years, and the sentence of 10 years be served consecutively to the concurrent sentences of 20 and

three years. This, by my calculation, meant that the total term of imprisonment imposed was 38 years.

[2] The applicant applied for leave to appeal against his convictions and sentence and his application was placed before a single judge of the court who refused it on 5 October 2009. He now renews his application before us, as is his right.

The Grounds of Appeal

[3] Originally the applicant filed two brief grounds of appeal with his application, namely, (a) unfair trial and (b) insufficient evidence to warrant a conviction and sentence. He left the provision of any further grounds of appeal to his attorney-at-law at the appropriate time and this was done on 28 June 2010 when his attorney, Mr Glenroy Mellish, filed two supplemental grounds of appeal as follows:

> "a. The learned trial judge erred in law in failing to adequately and properly direct himself on the Defence of Alibi. This failure resulted in a substantial miscarriage of justice.
>
> b. In arriving at his verdict the learned trial judge failed to consider or take sufficiently into consideration evidence supportive of the Applicant's defence of alibi."

[4] Mr Mellish sought and was granted the leave of the court to argue these supplemental grounds under which, he said, the two original

grounds would be subsumed. Before turning to the arguments in the application, however, we will briefly examine the evidence at trial, review the learned trial judge's summation and thereafter consider the merits or otherwise of the complaints arising therefrom.

The Evidence

[5] In proof of its case, the Crown relied on the evidence of four witnesses, chief among them being the complainant, whose evidence may be summarized thus:

I. On 26 October 2006 at about 9:30 pm as she walked along Creek Street, Montego Bay, in the parish of Saint James, she encountered a young man whom she did not know before. He pulled a gun from his waistband and ordered her to go with him so he could look in her bag to see what it contained. After marching her hither and thither, along the road, he eventually led her up the steps of an upstairs premises and there, after telling her to undress and to assist him to do likewise, he had sexual intercourse with her without her consent, indecently assaulted her and afterwards robbed her of cash amounting to $1,550.00. When she was able to leave, she made her way home where she told her mother of her night's experience.

II. About a week later she saw the applicant on St. James Street in Montego Bay. He beckoned to her but she did not tarry. She was with a male friend and when she told him what the applicant had done to her he chased the applicant with a machete but gave up the chase after a while. She later saw the applicant while seated in a taxi and he had threatened her by indicating with his hand drawn across his throat in a cutting motion signifying, to her mind, that he would cut her throat or kill her.

III. Her next sighting of the applicant was on the day of his apprehension. She had seen him in the town and had gotten assistance from her sister's friend, a police officer, who held him and took him to the police station where she made a report. When asked why she had not made a report on the night of the incident or before the date of his apprehension, she said her siblings were alone at home that night and she did not want to leave them and after that night she figured that " if I let it rest everything would just die down and be forgotten".

IV. In answer to questions from defence attorney she said she had passed several persons on the road before the applicant took her to the steps but she had sounded no alarm. After the incident, as she sought to make her way home, she came near

to the Barnett Street Police Station but she had not gone there to make a report. She confirmed that her parents were strict and that she was required to be at home by 5:00 pm. Failure to comply with this requirement, she said, would be upsetting to her parents and she would have to provide an explanation for her tardiness. In this instance she did not return home until around 12:30 am and she had not called her mother to say that she would be late.

[6] Evidence was also adduced from the complainant's mother, to whom she had made a report on reaching home that night. It was her testimony that her daughter had telephoned her and as a result of her daughter's request, she had gone out to the road to meet her. It was a little after midnight when she saw the complainant emerge from a taxi, looking "ragged". She was crying and did not speak but when they reached inside their home, she asked what was wrong and the complainant told her that she had been raped. The complainant's mother said the complainant gave her details of her ordeal – how her assailant pulled a gun, pointed it at her and told her to come with him, took her upstairs a building; continued to point the gun at her; told her to strip and when she obeyed, he proceeded to rape her and ask her to perform oral sex on him. The complainant's mother recalled her daughter also telling her that she noticed that her assailant walked with a limp.

After speaking to her she did not take the complainant to the police station to make a report as she was scared, "very very scared because I lost my daughter in a very similar manner as that". She told defence attorney that the complainnat had disclosed that she was making the telephone call from the taxi stand where she was about to enter the taxi bound for home. She confirmed that her daughter was expected to be home by 5:00 pm and said she would not be in agreement with her staying out late.

[7] The Crown also led evidence from Special Constable Omar Daley who apprehended the applicant on 18 November 2006 at about 6:00 pm after the complainant had approached him and pointed out the applicant to him. When he held the applicant and told him of the complainant's report, his response was, "Me? Me? I don't know her." He said the applicant had told him that he was a patient at the Cornwall Regional Hospital but he never made any enquiries there to ascertain whether this was so or not. The Crown's case then concluded with questions from the bench to the officer who charged the applicant, namely, Special Corporal Latitia Scully. She too had informed the applicant about the report she had received from the complainant and when she cautioned him he replied "MI nuh know nothing bout dat."

[8] The applicant gave sworn testimony and called four witnesses. He began his evidence with the events of 18 November 2006, the date when he was taken into custody. He said he was on his way to meet a friend who was to give him some funds and as he was early he stood talking to some friends when the police accosted him, one with a long gun, and "grab mi up drape mi up". So "mi sey to the man whey yu a hurt mi up so and mi a sick man". When the officer told him of the allegations he said "…if a robbery take place on 26th of October it is not me because I was in the hospital". He said he was in the Cornwall Regional Hospital for a chop wound to his left leg, inside the knee and above the knee (although his witness Dr Lindo was later to say that the October admission related to a history of blows to the head). He sustained these wounds at Aquasol Beach on 14 July 2006 and was receiving treatment in the form of dressing, injections and tablets.

[9] He said he was discharged from the hospital on 26 October 2006 at about 8:00 am but he did not leave. He had called a friend for assistance to go home but was not successful, so he had stayed at the hospital on the ward until the following night, that is, 27 October. His leg, he said, was in a bad condition –" swollen so big and shine". He was supposed to have surgery on it but he was unable to have that done because of the swelling. Meanwhile, he was unable to walk swiftly or to run. He said he could try to hop "or maybe put pressure on the right foot most" but he

could not walk on the foot on 26 October. He said he then had a "crutch stick" to assist him to walk.

[10] That day, he had gone mostly to the third floor where Dr Lindo's office is. He said he was upset at being discharged. He remembered going to the third floor at "about 8:00 pm, maybe 7:00, something to 8:00" and he went back to his ward (5 East) at about 8:30 pm to 9:00 pm, escorted by a lady friend, Marsha, who works in a gift shop on the third floor. He did not walk with the complainant up to Clever's Plaza that night at about 9:30pm and did not hold her up with a gun, did not rape her or indecently assault her nor did he rob her of her ratchet knife and her money. In other words, he took no part in the incident related to the court by the complainant.

[11] He was cross-examined at length. Crown Counsel asked about his ability to move around the hospital on 26 October, whether he had been assisted to the third floor and he disclosed that he had been unassisted but followed that by saying, "I could move around unassisted because there were wheelchairs so I get around in wheelchairs." He maintained his denial that he was the person involved in the incident related by the complainant, that he had walked with her for about 45 minutes before taking her to the steps where the sexual assaults took place, and added that on the date in question he "could not have moved around on my

own". He did admit however that that October he walked with a limp and was walking with a limp at the time of his apprehension.

[12] His first witness was Dr Francis Lindo under whose care he was during his stay at the hospital. The doctor spoke of two such occasions, one in July 2006 when he was admitted with multiple machete injuries and the other on 21 October of the same year when he was admitted with a history of blows to the head. His records revealed that the applicant was discharged on 27 October. He imparted other information recorded by nurses who were on duty but he was not in a position to confirm those notes (as the learned trial judge reminded defence attorney of the requirements of the Evidence Amendment Act for the line of questioning upon which he was embarking and indeed the learned judge made no reference to that information in his summation). The doctor was able to speak to the presence of the applicant during his stay at the hospital only in the morning hours when he saw him on the ward up to 27 October, the date of his discharge.

[13] Dr Lindo further testified that when the applicant was first discharged after his July admission, the condition of his leg had reached a stage where outpatient care was considered appropriate and in October he could walk. At that time there was an obvious deformity of the leg in that there was bowing with shortening. He had a weak right arm from a

condition he referred to as "crutch palsy" resulting from his use of crutches. When questioned further by defence attorney about the system of record keeping at the hospital, Dr Lindo said that the nurses work on shifts ranging from 7:00 am to 3:00 pm, 3:00 pm to 10:00 pm and 10:00 pm to 7:00 am and each nurse who starts a shift is required to make a physical check for the patients on the ward. Notations concerning the patients were to be made at the change of shifts but sometimes a nurse may be late for her shift and the note was made at the actual time that the patient was seen. If a nurse is unable to account for a patient, it would be a very serious disciplinary infraction and accordingly, if the applicant had left the ward between the hours of 8:30 pm and 11:56 pm, he would have expected a record to have been made of that event.

[14] Miss Marsha Gardener from the third floor gift shop testified that she saw the applicant on the third floor, on 26 October 2006, at about 4:30 pm. On his request, she afforded him a telephone call and also purchased some food for him. When the food arrived, she assisted him to the fifth floor as he said it was time for him to return to the ward. He was walking with a stick and she carried a bag which he had with him and the food. That was "about 6:30 to 7:00 or thereabout", she said, and "I actually followed him to his bed", but she did not know if he got into the bed because "I left that area". She told Crown Counsel that she had left

the third floor some minutes to 8:00 pm and could not say where the applicant was between the hours of 9:30 pm and 12:00 midnight.

[15] After much effort and assistance from the learned trial judge, the defence was eventually able to identify two nurses whose notes were thought to be of relevance to the defence and evidence was adduced from the final witnesses for the applicant, Nurse Sophia Cameron and Nurse Maxine Anderson. The former said she reported for duty at Ward 5 East, a male ward, on 26 October 2006 at about 2:30 pm. She recalled the applicant being a patient there under her care on that date and she had made notes relating to his return to the ward at 8:30 pm. She was at the nurses' station when she saw him coming in from the main entrance/exit. She had reminded him that he was to go home and he had responded that he wanted his foot to be painted before leaving. She saw him going towards his bed but she could not see his bed from the nurses' station and was unable to say if he was in his bed up to when her duty ended at 10:00 pm. She was unable to say where he was between 8:30 pm and 10:00 pm and could not remember if he walked with a limp at the time he was under her care. She would make notes of what occurred during her shift and if a patient left the ward with her knowledge, it would be recorded. The closing notes for the night were made at 8:30 pm but if anything unusual had occurred thereafter it would have been recorded.

[16] Nurse Anderson testified that she also was on duty at the Cornwall Regional Hospital on 26 October. At first she was assigned to Ward 8 but after 11:00 pm she was re-assigned to Ward 5 East where the applicant was a patient. She had established his presence there at about 11:58 pm by a bed check, but she had not actually seen his face. She was however able to say that someone was in his assigned bed. At that time most of the patients are asleep under their bed sheet. When she was taken around by a nurse on the ward that night, she knew that there was a patient in the bed though heads were covered. The applicant appeared to her to be asleep but she was unable to recall if he was one of the patients under the sheet. Next morning she saw him before her shift ended but she was unable to recall where on the ward he was.

The Judge's Summation

[17] From the outset the learned trial judge identified the primary issue as one of visual identification. He gave himself the appropriate **Turnbull** warning and within that context, carefully analysed the evidence of the sole identification witness, the complainant. He considered her evidence concerning the timing of her statement to the police and accepted as a weakness what was pointed out by the defence, that is, that her evidence of identification was not as cogent as it could have been, had she given a statement and given a fairly full description of the applicant

before he was apprehended. The learned trial judge referred for instance to her description of the gait of the applicant and said that that was not necessarily as strong a point in the identification evidence as it would have been had it been said at a time and captured in some permanent form prior to her sightings of the applicant after the incident. He also referred to the absence of corroboration for her identification evidence, she being the sole witness as to his identification (see pages 158, 159).

[18] The learned judge also considered aspects of her evidence which had not been recorded in her statement to the police and her explanation for not making her report right after the incident as well as the evidence adduced in cross-examination that she had passed several persons while the applicant had walked her up and down the road but made no alarm. Neither did she make a report at the Barnett Street Police Station which was within walking distance.

[19] He particularly reviewed the evidence of the opportunities which, on her testimony, the complainant had to see the face of her assailant whom she said was the applicant - the viewing distances and time as well as the lighting conditions. He examined the evidence as it related to each offence and was satisfied that the prosecution had established that the court had the requisite jurisdiction to hear the matter and that the

offences charged were committed. The big question, he said, was, by whom?

[20] He referred briefly to the evidence of the complainant's mother and the police witnesses before turning to the evidence of the applicant, reminding himself that the applicant had nothing to prove as the burden was always on the prosecution throughout the trial. Nonetheless, he carefully reviewed the evidence of the applicant affording it the same analytic eye with which he assessed the prosecution's evidence and, inasmuch as the gravamen of the applicant's complaint is centred on the learned trial judge's treatment of his alibi defence, I now focus on what he had to say in that regard.

[21] The applicant's testimony, he said, was of being on the hospital ward until 27 October. At pages 177 – 178 of the transcript, the judge said:

> "So, he is saying at 9:30 on the 26th of October he was on the ward at Five East. He says in any event the condition of his leg was bad, it was swollen big and shine. … He was not able to run or walk swiftly as a result of the injury. On the 26th of October he said he could not walk on the foot and would require the assistance of a stick."

The time line was of particular significance to the learned trial judge. Inter alia, he noted that the applicant had spoken of leaving Ward 5 East on 26 October and had given the time of his return to the ward as between 8:30

pm and 9:00 pm escorted by Miss Gardener. (It is to be recalled that the time she gave for this assistance was 6:30 pm to 7:00 pm).

[22] The learned trial judge also referred to the cross examination of the applicant which he said was designed (i) to explore his movements from the ward to the third floor where Marsha was; (ii) to deal with the question of whether he was called Indian (as the complainant had testified that on the night in question, after the sexual assault and as they had come down the steps, a man had greeted the applicant calling him "Indian". His response to the question was that he was called Indian but he would correct persons who called him by that name); and (iii) to address the issue of whether he walked with a limp in November when apprehended by the police. He agreed that he did.

[23] As he reviewed the evidence of the applicant and his witnesses, the learned trial judge was careful to remind himself of where the burden of proof resided. Miss Gardener's evidence, the learned trial judge said, was an attempt by the applicant to account for his movements despite there being no duty on him to do so.

[24] The judge assessed the evidence of the defence witnesses, namely, Dr Lindo's evidence of the system of notations by both doctors and nursing staff in a docket; the evidence of the two nurses whose duty it was to record his movements but whose records were silent on admitted

movements by the applicant; and the evidence of Miss Gardener who related her recollection of the 6:30 pm to 7:00 pm time frame she gave to visiting hours which had commenced when she assisted the applicant back to the ward. What was of significance to the judge was that none of these witnesses could speak to the whereabouts of the applicant between the hours of 9:30 pm and 11:58 pm.

[25] This assessment led the judge to say, at page 184:

> "Now, …the main observation that I would make at this point … is this. The doctor tells us that … patients are not allowed to leave the wards and go about as they have a mind. If the nurse cannot account for the patient, that is a serious disciplinary infraction; it is required that movements of patients be recorded in the notes."

And later, at page 187 - 188:

> "So here, at least one or at least two movements of the accused man from the ward apparently between the 2:00 to 10:00 shift which are not recorded. So, this raises questions of the reliability of the record-keeping because the doctor is saying movements of patients or the account of patients, patients cannot wander around the shop like they are on a sightseeing tour. You have to account for them."

[26] Then, at page190 he continued his assessment by examining what he said must be taken to be the prosecution's argument namely that the applicant had left the hospital and was in the town at about 9:30 pm committing the offences as described by the complainant, walking her

around for about 45 minutes, from approximately 9:30 pm to10:15 pm, then returning to the hospital while the defence was denying this, saying that:

> "When you look at the totality of the evidence put forward by the defence albeit that there is no burden it is sufficient to cast doubt on the reliability and the accuracy of this witness."

So, the learned trial judge set about assessing, in his words, "the merits of these rival arguments" (see pages 190 to194). In so doing he again reviewed the prosecution's evidence of the opportunities that the complainant had to view her assailant and although he did not accept that the viewing time was as long as the complainant's estimated two minutes, according to her narrative, he nevertheless found that this was no fleeting glance. It was in adequate lighting conditions sufficient for her to recognize her assailant when she subsequently saw him 21 to 22 days later. The learned trial judge also again noted the weakness in the identification evidence where the complainant had given no description of her assailant prior to his apprehension as no report had been made.

[27] Then he examined the evidence of the defence. He said the defence placed reliance on the body of evidence dealing with the applicant in the hospital. However, he found that "such record keeping as there was really opens the possibility to the accused man leaving and not being recorded clearly open". He took account of the limp which the

applicant said was the manifestation of his injury and of the evidence of the complainant that someone had called him "Indian" that night and noted that he was called "Indian" though he said that he would correct anyone addressing him by that name, from time to time.

[28] He assessed the complainant's credibility and found that at the end of the day she did not appear to him to be "a manufacturer of evidence", and even though her statement came after the applicant's apprehension, he was satisfied that she had good opportunity to see her assailant and to be able to identify him. He noted the time they walked up and down and said that this was no fleeting glance but rather observation in prolonged circumstances particularly on the steps where the light was and she was looking at him.

[29] The learned judge then concluded his assessment of what he earlier referred to as the rival arguments in this way (at page 194):

> "As I have said, there is no burden on the accused man to prove anything, but nonetheless, the records is (sic) such as they are, in light of the events, are not sufficient for me to say I should have a doubt, because he was in hospital, even making due allowance. These are proximate times given by Miss Gardener. If she is, as I said, she is accurate in what she says and the movements of the accused man in relation to her and those movements are absent from the records then that would tend to suggest that the records are not as reliable as

> they might have appeared. So that being so, I am satisfied so that I feel sure that Mr Allen was the man who had this firearm marching Miss Watson up and down the streets of St. James, St Claver's Plaza…"

The Arguments

[30] Grounds (a) and (b) were argued together by Mr Mellish. He first identified as the core of the applicant's complaint, that portion of the learned trial judge's summation (quoted at paragraph 29 above) where he referred to the hospital's record keeping as not being sufficient to raise a doubt in his mind about the prosecution's case (see paragraph 29 above). Mr Mellish argued that in those circumstances, the learned trial judge ought to have given himself a warning about a false alibi. The Crown's case, he said, could not stand if the applicant was at the hospital at the time he said he was, and if that alibi collapsed the judge was obliged to warn himself about the effects of a false alibi. In this regard, he invited the court to consider **Wayne Ricketts v R** SCCA No 61/2006, a decision of this court delivered on 3 October 2008, where a trial judge's duty to give a false alibi warning is discussed.

[31] Counsel summarized the main points of the applicant's complaint in his skeleton arguments. He said the learned trial judge:

- failed to consider and/or draw from the evidence inferences which were favourable to the applicant. (If there is an inference

favourable to the applicant, he said, that inference should be followed and there were aspects of the circumstantial evidence about which the learned trial judge made no express findings);

- erred in law in finding that the applicant was a patient for the purposes of the records of the hospital between 8:00 am and 8:30 pm on 26 October 2006 and therefore his movements needed to be recorded. (He said that the applicant had been discharged that morning, a fact corroborated by his witness Nurse Cameron, so there would have been no responsibility on the nursing staff on Ward 5 East to record his movements until he, in effect, re-admitted himself at 8:30 pm.);
- erred in rejecting the evidence of the applicant on the ground that the system of recording the movement of patients was inadequate; and
- reached a verdict that is therefore unreasonable and insupportable having regard to the evidence.

[32] He expanded his arguments by reference to what he described as weaknesses in the Crown's case, namely (i) the absence of corroboration for the visual identification; (ii) the timing of the recorded statement of the complainant and (iii) the limping of the applicant, evident on his arrest, being used as an identifying feature. These combined to create a real danger that the trial was unfair.

[33] Finally, he addressed the law as it relates to the duty of a trial judge sitting alone (see **R v Clifford Donaldson et al** [1988] 25 JLR 274 cited in **R v Balasal and Balasal and R v Francis Whyne** (1990) 27 JLR 507 and **R v Ruperto Hart-Smith** (1981) 18 JLR 467 where it was held that a trial judge has a duty to consider inferences both favourable and unfavourable to the accused and make express findings) and he reminded the court of the case of **Watt v Thomas** (1947) 1 AC 484 where an appellate court was held to be free to reverse a trial judge's findings of fact in certain circumstances, urging the court to find that the instant case falls within those circumstances.

[34] The attorneys-at-Law for the Crown treated with grounds (a) and (b) separately in their written skeleton arguments. In their oral submissions on ground (a), Mr Taylor, the learned Deputy Director of Public Prosecutions, referred first to the case of **Oneil Roberts and Christopher Wiltshire v R** SCCA Nos 37 and 36 /2000, a decision delivered on 15 November 2001 outlining the circumstances when a trial judge ought to warn the jury about rejecting the defence of alibi. He also referred to the case of **Jason Clive v R** (1994) 99 Cr App R 228 where it was held that on the collapse of an alibi defence if it is crucial to the prosecution's case and there is a risk that a jury might regard the collapsed alibi as confirming a disputed identification, then there is a need for a false alibi direction. However, Mr

Taylor argued that in the instant case there was no need for such a direction because the Crown's case did not depend upon a collapsed alibi defence (see **Wayne Ricketts**).

[35] The judge did not outrightly say that he rejected the evidence of the defence witnesses, counsel argued, but found that they were not reliable. In other words, what the learned trial judge was saying was that they may have spoken the truth but their evidence did not go as far as it should if he was to place reliance on it. None of the applicant's witnesses were able to account for his whereabouts at the material time, counsel submitted, and what the learned trial judge was saying was that in the absence of anyone who was able to say that the applicant was seen by that person at the material time, he could not say that the alibi defence raised a reasonable doubt.

[36] Counsel further argued that although the judge did not overtly deal with the alibi defence, he repeatedly reminded himself of the burden and standard of proof right up to the conclusion of his summation and this would suffice as it was directly applicable to the defence of alibi. He referred to authority from this court on the adequacy of an alibi direction (see **Oneil Roberts and Christopher Wiltshire**) and submitted that, in the instant case, the summation of the learned trial judge addressed all the issues and was more than adequate.

[37] Mr Taylor's response to the arguments on ground (b) was brief. He said that the learned trial judge delivered all the requisite warnings including the **Balasal** warning on uncorroborated identification evidence. He demonstrated that he was aware of all the relevant principles and applied them to the particular facts of the case before arriving at his verdict. It was clear from his summation that the learned trial judge considered the evidence advanced in support of the applicant's alibi defence and rejected it as unreliable. The applicant has not been able to demonstrate that the verdict was unreasonable having regard to the evidence that was before the learned trial judge, nor has he been able to show that there was any resulting miscarriage of justice, he submitted.

Was a false alibi direction required in the circumstances of this case?

[38] Mr Mellish submitted that, but for the absence of a false alibi direction, the learned trial judge gave himself an "unimpeachable **Turnbull** direction". However, was such a direction necessary? It is our view that the learned trial judge did not reject the evidence that at some point the applicant was at the Cornwall Regional Hospital on 26 October 2006 and there was nothing in his summation that could lead to the conclusion that he regarded the defence witnesses as untruthful. He found their evidence to be unsatisfactory and unreliable as it did not address the whereabouts of the applicant at the material time. The alibi

defence had failed not because it was false but because the learned trial judge found that it was deficient. Whatever the reason though, it had clearly collapsed.

[39] The question which therefore arises is whether the failed alibi formed part of the Crown's case and, if so, whether there was a risk of this trial judge sitting alone as tribunal of fact and law, regarding the failed alibi as confirming this disputed identification of the applicant as the man who committed the offences described by the complainant (see **Pemberton**)? The answer, clearly, is a resounding no. The Crown was not relying on the failed alibi but on the strength of the complainant's evidence and, in his summation, the learned judge demonstrated, following the **Turnbull** guidelines, that he was satisfied to the required standard, with the quality of the identification evidence. At no point in his reasoning and conclusions did he give any indication that he regarded the failed alibi as supportive of the complainant's evidence of identification.

[40] It is certainly a correct observation that throughout his summation, the learned trial judge did not use the word "alibi" when referring to the case for the defence but it is quite clear from his analysis of the evidence of the applicant and his witnesses that he was mindful that the applicant had raised the defence of alibi and he examined the evidence in that light, taking careful note of the evidence advanced of the movements of the applicant on 26 October 2006. The authorities have repeatedly

made it clear that no special words need be employed by a trial judge when summing up a case providing that in so doing the judge demonstrates the application of the particular principles of law relevant to the circumstances of each case. This is borne out in **R v George Cameron** (1989) 26 JLR 453, a case referred to in **Balasal** where Wright, JA, dealing with **Donaldson** had this to say:

> "The relevance of this decision … is that it states emphatically that where the judge sits alone he is required to deal with the case in the manner established for dealing with such a case though he is not fettered as to the manner in which he demonstrates his awareness of the requirement."

[41] In our opinion, **Balasal** really has no application to the circumstances of this case as the learned trial judge had not incorrectly applied any rule nor had he failed to apply any relevant principle. The trial judge in **Balasal** had failed to give the appropriate warning unlike the instant case where the trial judge gave the necessary **Turnbull** warning and demonstrated in the language he used that he had the corroboration warning in mind (see pages 158 and 159 of the transcript). Neither did the case of **Wayne Ricketts** advance the cause of the applicant as there was no need for a false alibi warning in the circumstances of this case. Ground (a) therefore fails.

Inferences and the Weight of the Evidence

[42] We find no merit in the applicant's argument that the learned trial judge ought not to have drawn inferences adverse to the applicant on the basis of omissions from his patient record because he was discharged that morning and there was no responsibility on the nursing staff to note his movements until he readmitted himself at 8:30 pm since up to that time he had ceased to be a patient. If his return to Ward 5 East was taken as an indication of his readmission as a patient, then there would be Miss Gardener's time frame to consider. That would raise a question about his movement between the 6:30 pm to 7:00 pm time frame, which she gave as the time she assisted him back to his bed on Ward 5 East, and 8:30 pm when Nurse Cameron said she saw him return and actually spoke to him. There was no evidence as to the procedure on discharge but it was clear that his docket was still on the ward and the bed to which he was assigned was still available to him. Then there was the doctor's evidence that the applicant was discharged on 27 October 2006. In our view, the learned trial judge was entitled, on the totality of the evidence, to his conclusion that he could not place reliance on such records as they were and that the defence presented was not capable of displacing the Crown's case.

[43] As the learned trial judge repeatedly reminded himself, there was no burden on the applicant to prove anything and ultimately a verdict adverse to the applicant must depend on proof of the Crown's case. It is for that reason that he returned to the evidence of the complainant to see whether the quality of the identification sufficed to make him sure that the applicant was correctly identified by her. Hence his assessment of "the merits of the rival arguments". The complaint that he failed to draw inferences that were favourable to the applicant's alibi defence was, in our opinion, entirely unfounded. There were many gray areas in the evidence of his witnesses from which no favourable inferences could be drawn. When the learned trial judge weighed the features of the identification evidence such as the opportunities to view the face of her assailant, the lighting conditions, the viewing time (this was no fleeting glance, he said), the name Indian by which the applicant admitted he was called, the limp (although he found that the evidence of the limp was not as strong as it could have been if it had come before the applicant's apprehension) against the evidence of the applicant and his witnesses which did not account for his whereabouts at the material time, he found that the latter did not cause him to doubt the complainant's evidence that the applicant was the man who had sexually assaulted and robbed her on 26 October 2006.

[44] We see the Crown's case as being even stronger than the learned trial judge portrayed it to be. For instance, the evidence of the limping assailant did not emerge for the first time in her statement to the police after the applicant's apprehension. It was the unchallenged evidence of the complainant's mother that the complainant had mentioned the limp to her that very night when they spoke about the incident. There was also the evidence of Dr Lindo that the applicant had a weakness in his right hand as a result of crutch palsy from which inferences could have been drawn when viewed with the evidence of the complainant that her assailant had difficulties using one hand to undo his pants and requested assistance from her to do so. After she had provided that assistance, he had used two hands to perform other actions. No questions were asked as to which hand had presented the difficulty but it would not have been unreasonable to infer that if the assailant had a problem with one hand, that would not be the hand in which he would have held the gun and so the weak hand would have been the one struggling to undo the buttons of his pants. This was another feature which could have been brought to bear on the identification evidence.

[45] It was clearly the view of the learned trial judge that since his witness Miss Gardener testified that she had assisted him to the ward and to his assigned bed at 6:30 pm to 7:00 pm and there was no note made by Nurse Cameron of that return which was no different from the one she

recorded at 8:30 pm, both occurring during her 2:00 pm to 10:00 pm shift, he was not prepared to place any reliance on her evidence that had there been anything unusual involving the applicant between 8:30 pm and 10:00 pm, she would have recorded it, thus giving rise to an inference that the applicant had not left the hospital and was not in the town of Montego Bay at the material time. The cases of **Ruperto Hart-Smith** and **Donaldson** did not assist the applicant's arguments as there was no sworn evidence exonerating him (see **Ruperto Hart-Smith)** and no favourable inferences to be drawn from the evidence of his witnesses as they were not able to speak to his whereabouts at the material time. The learned trial judge clearly "grappled" with the evidence in its entirety (see **Donaldson**) and demonstrated a balanced and fair approach for which he cannot be faulted. Consequently, ground (b) also fails.

[46] In ground (b) of his original grounds of appeal (which was not abandoned, but, as stated in paragraph 4 above, was said to be subsumed under the supplementary grounds), the applicant challenged the sentence imposed by the learned trial judge, complaining, in effect, that the sentence was out of line with the evidence which was adduced in the trial. Although no arguments were advanced in that regard, we are inclined to the view that there was a valid cause for complaint such that the court could address the matter even in the absence of supporting arguments.

[47] These were indeed very serious offences and there is no doubt that they are deserving of harsh punishment but since the offences arose out of one transaction, the sentences imposed are, in our opinion, cumulatively, manifestly excessive. It seems to us that there can be no valid complaint that a sentence of eight years imprisonment for the offence of illegal possession of a firearm is excessive as that is well within the range of sentence imposed in this jurisdiction for such offences and the same may be said of the sentences of three and 10 years, respectively, for the offences of indecent assault and robbery with aggravation. Additionally, in circumstances where a firearm was used to intimidate the complainant and where she was subjected to an act of sexual degradation, a sentence of 20 years is not inappropriate for this offence of rape. However, the consecutive component of the learned trial judge's order brought the total period of imprisonment to 38 years and that, in our opinion, made the sentence manifestly excessive. The appropriate order ought to have been for all sentences to be concurrent.

[48] In the final analysis, the applicant's application for leave to appeal against his convictions is refused and his convictions are affirmed. However, his application for leave to appeal against sentence is granted in part and the application is treated as the appeal with the result that the individual sentences are affirmed but the learned trial judge's order as to

how the sentences should run is set aside. Our order is that all sentences are to run concurrently, which means that the total period of imprisonment to be served by the applicant/appellant is 20 years and they are to commence on 26 September 2007.