JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 135 & 136/03

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE MCCALLA, J.A.

R v NOEL CAMPBELL
ROBERT LEVY

Bert Samuels for applicants
Chester Crooks and **Miss Winsome Pennycooke** for Crown

February 12, 16, and April 27, 2007

McCALLA, JA:

1. The applicants, Noel Campbell and Robert Levy were convicted on June 19, 2003 in the High Court Division of the Gun Court on an indictment containing 3 counts which charged them jointly with the offences of illegal possession of firearm, rape and robbery with aggravation. Each was sentenced to 10 years imprisonment on count 1, 20 years on Count 2 and 10 years imprisonment on Count 3. The application for leave to appeal in each case was refused by a single judge , hence this renewed application before us.

2. The facts which gave rise to the convictions may be briefly stated and are as follows:

On September 8, 2002, at about 5:15 a.m. the complainant was walking along Waltham Park Road on her way to work. Both applicants walked towards her armed with guns pointed at her. Under threat of being shot they ordered her to go on a gully bank and jump in the gully. Both applicants then went into the gully where they took turns in sexually assaulting her. Each had sexual intercourse with her from behind with her leaning forward while the other stood in front of her at about 7 feet away pointing a gun at her. They then robbed her of $1000 in cash and ordered her out of the gully. The incident lasted for about 30 minutes. While she was on Waltham Park Road before she went in the gully she was able to see the faces of the applicants for about one minute with the assistance of a street light that was across the road from where she was with the men. She was also able to see them in the gully as whilst she was in the gully it was almost fully daylight and the gully was not dark. She testified that she was looking at the faces of the applicants as " I was trying to make certain that if I see them again I would be able to identify them and make certain that they were the persons."

3. The complainant testified that she had seen the applicant Campbell once before on Renford Road and the applicant Levy she had seen before at her workplace. On the 8th January, 2003 she saw and recognized the applicant Campbell at Half Way Tree, called the police and pointed him out. On 3rd March, 2003 she saw and recognized the

applicant Levy at Popeye's at Half Way Tree and pointed him out to the police.

4. Both applicants made unsworn statements in which they refuted the charges and relied on the defence of alibi.

5. Supplemental grounds of appeal were filed on behalf of both applicants. Ground 1A of the applicant Campbell's supplemental grounds was argued in respect of both applicants. It reads as follows:

> "1. The learned trial judge erred when he failed to adequately assess the Identification evidence in the trial and in particular the evidence of the complainant and the discrepancies therein regarding –
>
> a) The presence and or absence of scars on the two accused in her statement to the police and her testimony in Court. "

6. Ground 2 states that "the learned trial judge erred when he failed to uphold the submissions of no case to answer made on behalf of the Applicant." After exchanges between bench and bar Counsel was unable to advance arguments in support of this ground of appeal.

7. Ground 3 is couched as follows:

> " The learned trial judge recognized that he was required by law (sic) that it was dangerous in cases of rape to rely on the uncorroborated evidence of the complainant. The case

before him was one such example. He wrongly diminished the importance of this warning and thereby denied the Applicant of its benefit when he reasoned at page 102 of his summation as follows:

> '...if the issue of identification is one that satisfies me as to the identification of the two men, then that (the danger of convicting on the uncorroborated testimony of the complainant) becomes secondary'. (my emphasis)"

The Court directed counsel's attention to the case of ***R v Derrick Williams*** SCCA 12/98 an unreported decision of this Court delivered on April 6, 2001. At page 11 of the judgment Forte, P stated as follows:

> "For the purpose of emphasis we reiterate that where there is no challenge to the fact that the offence has been committed, and the only defence offered is one of mistaken identity, rather than a purposeful identification made because of some ulterior motive, then it will be sufficient if the traditional warning given in cases of sexual offences is omitted, but the warning on the ***Turnbull*** principle is given."

In light of that authority ground 3 was abandoned and with the leave of the Court, Counsel formulated a ground to this effect:

> "The learned trial judge ought not to have accepted the identification as satisfactory in this case and that being so the verdict for the offence of rape is unreasonable having regard to the evidence."

This ground may be conveniently considered with ground 1(a) which concerns the identification of the applicants.

8. Defence Counsel also attempted to advance arguments in respect of Ground 1 of the applicant Levy's application which is to the effect that:

> "That the Learned Trial Judge failed to deal adequately or at all with the matter of the confrontation and the reason for the confrontation of the two applicants at the Hunts Bay Police Station after the complainant had pointed out both men to the Police on a previous occasion and the Police had in fact taken the men in custody."

9. The evidence revealed that there was conflict between the evidence of the investigating officer and the complainant as to whether he had called the complainant to attend the Hunts Bay Police station in order to identify the applicants who were in custody. In light of the fact that the learned trial judge accepted the evidence of the complainant that she had pointed out the applicant Levy to the police subsequent to the incident, and his finding that the discrepancy was not material, Counsel had to concede that there was no merit in this ground of appeal.

10. The main issue for determination in this appeal is the complaint in ground 1(a) that the learned trial judge failed to adequately address the discrepancies between the complainant's written statement to the police and her testimony in court regarding the presence or absence of scars on the applicants.

11. Under cross-examination, at page 49 of the transcript, Counsel for the applicant Levy posed the following question;

> "What you told the police that sticks in your mind concerning your description."?

The complainant responded that in respect of the applicant Campbell she told the police that he was 5ft 1 inch tall and he was of black complexion and medium built; Levy was brown and about 5ft 6 inches tall. A portion of the cross-examination that appears on page 51 -52 of the transcript reads:

> **"Q:** Did you tell the police about any unusual features of any of these two men?
>
> **A:** I can't recall.
>
> ...
>
> **Q:** Do you recall seeing a scar on any of them?
>
> **A:** Yes Sir.
>
> **Q:** Which of the men, the short black one, the 5 feet 1 or the 5 feet 6 brown one?
>
> **A:** The black one.
>
> You told the police that you saw a scar on the black one?
>
> **A:** I can't recall if I said that to the police.
>
> **Q:** You now recall that you saw a scar?
>
> **A:** Yes, sir.
>
> **Q:** Do you recall if you saw a scar on the brown one?

A: No, sir.

...

Q: On the occasion when you were assaulted, do you recall if you saw a scar on the brown one?

A: No, sir."

12. The witness could not recall whether or not she had seen a scar on the applicant Levy when she pointed him out.

On being shown her written statement, the complainant agreed that she had told the police that "one of them was brown about 5ft 7 inches, he had a scar over the left eye." At the request of the prosecutor the complainant left the witness box in order to have a closer look at the applicants in the dock. She then pointed to a scar under the right eye of the applicant Campbell. There is no evidence of the size or appearance of that scar.

13. Defence Counsel submitted that in light of the evidence elicited in cross-examination the credibility and reliability of the complainant was affected and the learned judge did not adequately address her evidence with that in mind as in his summation not a single reference was made to the word "scar."

14. In his summation at pages 103-4 of the transcript the learned judge said:

> "It is not a question that the police went and found and come and say these are the two men. It was at the intervention of the complainant that both accused were held and pointed out at the scene where they were held. So, I take the identification description into account, likewise, in relation to the description given to the police by the complainant."(emphasis supplied).

At pages 106-7 he continued:

> " In relation to the identification, I find that she has been an impressive witness, despite the fact of the description which I find is not material to the identification ..."

15. It is abundantly clear from the above passages that the learned trial judge was making reference to the evidence which had been elicited in cross-examination concerning the discrepancy between the complainant's written statement and her evidence in court. The evidence referred to in cross-examination of the complainant demonstrates that the presence of a scar was not a distinguishing feature on which she relied to identify her assailants. In our view the learned trial judge correctly found that it was not material to her identification of them.

16. He rejected the defence of alibi in each case and having done so we conclude that he warned himself appropriately in respect of evidence of identification and his finding that the complainant was not mistaken was justified on the evidence presented.

We find no merit in this ground of appeal. Accordingly, we refuse the application for leave to appeal. The sentences are to commence as of September 19, 2003.