JAMAICA

IN THE COURT OF APPEAL

***SUPREME COURT CRIMINAL APPEAL NO.* 26/96**

BEFORE: ***THE HON. MR. JUSTICE FORTE, J.A.***
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

REGINA vs. TREVOR CLARKE

***Delano Harrison* for the appellant**

Miss Paula Llewellyn* and *Miss Carol Edwards
for the Crown

***May 5 andJune* 2, 1997**

***BINGHAM,* J.A.:**

At a hearing in the Westmoreland Circuit Court (Gun Court Division) held at Savanna-la-mar before Reid, J. on the 8th and 9th February, 1996, the appellant was convicted on an indictment for:

Count I	Illegal possession of a firearm
Count II	Robbery with aggravation
Count III	Rape
Count IV	Rape.

He was sentenced to concurrent terms of imprisonment at hard labour of six years (count 1), ten years (count II), and fifteen years (counts III & IV).

This matter came before us as an appeal, leave having been granted by the single judge. After hearing arguments by counsel, we dismissed the appeal and affirmed the convictions and sentences imposed. We ordered that the sentences commence as from 23rd March, 1996. We promised then to give our reasons for our decision. This is a fulfilment of that promise.

The facts may be briefly summarised at this stage: On 31st May, 1995, in the night, Lloyd Woolcoot was at his home at Mango Hall District, Little London, Westmoreland, seated in his parked car talking with his common-law wife, Elsaida Subaxon. Miss Subaxon's daughter, C.B., an high school student then aged 16 years, was in bed in her room engaged in studying for her exams. Her younger sister was in another room asleep.

Three men, armed with a gun, a machete and a knife, pounced on and held up the couple by the car. They demanded money from them and proceeded to rob Mr. Woolcoot of $2,000 in cash. They then marched the couple into the house. After menacing and threatening Mr. Woolcoot, they proceeded to tie him up face down on the bed in the couple's bedroom. The appellant, who was later identified as the knifeman, then proceeded into the bedroom where the elder daughter was studying. She was held up and escorted back to the bedroom in which the couple were, along with the other two intruders.

There was a search made by the intruders of the house and Miss Subaxon's jewellery was taken. There was also a demand made for more money. Following this, the men demanded sexual intercourse from the elder

daughter. Miss Subaxon offered herself to undergo this ordeal in her place. The appellant (knifeman) then ushered the daughter back to her bedroom where her clothing was forcibly removed and, despite her struggles, her resistance was overcome and she was sexually assaulted by both the appellant and the gunman.

In the interim, the machete man, not to be outdone, having threatened Miss Subaxon with bodily harm, removed her clothing and sexually assaulted her. The intruders then bound Miss Subaxon and her elder daughter and gagged Mr. Woolcoot before leaving the premises. The victims managed to free themselves and on the following morning a report was made to the police at the Little London Police Station and a description was given of the men.

On 28th June, 1995, the appellant was identified by Mr. Woolcoot and the elder daughter at an identification parade held at the Negril Police Station. Following the parade, the appellant was arrested by Detective Corporal Hurditt, the investigating officer. He was charged for illegal possession of a firearm, robbery with aggravation and two counts of rape. Upon caution, following his arrest, he said "Bwoy officer, mi nuh know wey mi a go do."

The appellant gave an unsworn statement in his defence which amounted to a denial of any knowledge of the incident. He told of being accosted by the police in Kingston and of being taken by the police to premises where he stayed on Maxfield Avenue. A search was made there by the police for jewellery and a big tape, without any success. He was detained at Central

Police Station and while there he was accused by the police in this manner, "A yuh rape the people dem, you see how you nose big."

Before us learned counsel for the appellant, Mr. Harrison, sought and was granted leave to argue the supplemental grounds of appeal filed. For the purposes of this judgment, however, it is necessary to advert only to ground 1. This is so as we found that the arguments relating to the other two grounds were devoid of any merit. Ground 1 reads:

> That the learned trial judge failed to assess and/or analyse properly evidence which tending to show that the I.D. Parade for the appellant was unfairly conducted vitiated the purported identification of the appellant."

Learned counsel for the appellant, in advancing this complaint, submitted that the learned trial judge, in approaching this crucial question, dealt with it without highlighting the unsatisfactory features of the parade. Our attention was drawn in particular to:

1. The evidence of scars on the appellant.

2. The discrepancies between the witnesses at the parade.

3. The manner of the identification at the parade.

The evidence adduced at the hearing pointed to the existence of three scars on the appellant, one large one and two smaller ones. There was a marked disparity in the accounts, as given by the parade officer Sergeant Burrell, the investigating officer, and the identifying witnesses. Learned counsel contended that in a case where the suspect had some features that make his

appearance outstanding, such as where he is marked by misfortune by scars on the face, an identification parade should be so arranged as to ensure fairness to him and to any witness or witnesses called on the parade. This fairness is an absolute requirement in matters of identification, especially where the investigating authorities acted in apprehending the suspect solely on the description given them of a stranger. This unfairness at a parade has the effect of rendering the evidential value of the identification nugatory.

Learned counsel for the Crown, Miss Llewellyn, in her response, referred to the fact that the identification parade was conducted using the one-way mirror. This would have resulted in the distance between the suspect (appellant) and the other volunteers in the line-up being at a reasonable distance apart from the identifying witnesses. It is of some significance that it was the unchallenged evidence of the identifying witness, Miss C.B., that there were other men in the line-up with scars apart from the appellant. Counsel also argued that the established dicta from this court relating to the Identification Parade Rules, 1939, made under The Jamaica Constabulary Force Act, as amended by The Jamaica Constabulary Force (Amendment) Rules, 1977, and which governs the conduct of parades using the one-way mirror, are procedural and not mandatory. She further submitted that the ultimate question is as to whether the evidence of the scars assisted the witnesses in identifying the suspect. In the absence of any such evidence, it may be concluded that it was the general appearance of the suspect that assisted the witnesses in identifying him.

Learned counsel cited in support S.C.C.A. 158 & 159/81 ***R. v. Bradley Graham & Randy Lewis*** (unreported) delivered on June 26, 1986 where Rowe, P., in dealing with a similar complaint, said:

> "Notwithstanding the imperative nature of the language used in Regulation 554A that an attorney-at-law ... 'shall be present' we decline to interpret this provision to mean that his absence will, in all circumstances, except those provided for in 554(iii), invalidate the parade and render an identification made thereat a nullity. We think that the Regulations are procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such a parade."
> [Emphasis supplied]

We are of the view that there is merit in the submissions advanced by Miss Llewellyn. What is called for in the conduct of identification parades is such care on the part of the officer having charge of the proceedings capable of ensuring substantial compliance with the Parade Rules, thereby ensuring a marked degree of fairness to the suspect. In this regard, the use of the one-way mirror has gone a far way to achieving this objective.

To this end, as the evidence indicated, the parade officer, someone of advancing years, observed no scars on the suspect, whereas the young victim, Miss C.B., was able to discern scars not only on the suspect but on the other men in the line-up. The one-way mirror, in placing the identifying witnesses at a reasonable distance from the suspect and the men in the line-up, would equally have resulted in an identification of the suspect based upon a true test of the powers of recollection of the witnesses called to the parade.

The learned trial judge, in his self-imposed directions, exercised great care in dealing with the conduct of the identification parade as to the question of its fairness. This came in for special treatment and was fully dealt with in his summation where he said (p. 26):

> "So then, whatever is described as to identification parade is taken to be the parade that the prosecution spoke to by the mouth of the witnesses. Well, I won't go through a ritual of all that, any more than I have done, so far as what I must address, but I said I would indicate my view of this question of the scars and whether or not it affects the validity of the parade. I must be extremely careful and a man expects a fair trial both sides, both the prosecution and the accused, and if a case is good on the face of it and falters because of any imprgpriety or less than fairness in the holding of the identification parade, a Judge is obliged to say so, but carefully, before saying so, examine every facit of it, and that I have done with as great a care, or with more greater care than my words convey." [Emphasis supplied]

Following this direction, the learned judge directed his mind to the disparity in the ability of the witnesses as to their powers of observation in making out any distinguishing marks on the suspect and the reasons which may have resulted in this being so. He adverted to his own experience at the hearing which led him to summon the appellant to within a close proximity to where he sat before being able to identify two scars on his face.

Having weighed and assessed the evidence, he concluded that these scars were not a factor, which when considered as a whole, would have served to undermine the efficacy of the parade. Having regard to the manner in which he set about his task, we cannot say that his approach can be faulted.

Conclusion

The evidence before the learned judge revealed a state of affairs in which three armed and unknown intruders pounced suddenly and without any prior warning on their victims at night. The male victim was robbed and threatened and the two female victims were sexually violated in their home. The unchallenged evidence pointed to an incident which lasted for about one hour during which the lights in the house remained on throughout. The intruders wore no disguises.

The appellant was subsequently identified at an identification parade held within one month following the incident. On a careful examination of the evidence relating to the circumstances of the identification of the appellant, as well as the summing-up, there is nothing arising therefrom which could lead us to interfere with the convictions.