JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 79/01

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (AG.)

R. V. CHRISTOPHER DOYLEY

Nelton Forsythe for the Applicant

David Fraser for the Crown.

October 27, 2003 & February 18, 2004

FORTE, P.

The applicant was tried and convicted on the 10th April 2001 in the High Court Division of the Gun Court on 6 counts of an Indictment containing four (4) counts of robbery with aggravation (Counts 3 – 6), one count of rape (Count 2) and one for illegal possession of firearm (Count 1). He was sentenced as follows:

Count 1	-	10 years imprisonment at hard labour
Count 2	-	21 years imprisonment at hard labour
Counts 3,4,5 & 6		18 years imprisonment on each count.

It was ordered that the sentences should run concurrently.

The Crown, at trial, alleged that the applicant and another man invaded the home of M while she was receiving visits from the other Crown witnesses, raped her, and robbed all her visitors. Both men were armed at one time or another with a gun, a machete and a knife, the possession of which they changed between them from time to time during the incident. In a relatively detailed summation, the learned trial judge expressly accepted the evidence of the Crown witnesses and rejected that of the applicant and his witness. At the hearing before us, the applicant through his counsel, Mr. Nelton Forsythe, argued one ground of appeal i.e. "that the verdict of the Court was unreasonable and cannot be supported, having regard to the tenuous nature of the identification of the applicant."

No complaint was made, and correctly so, of the treatment by the learned trial judge of the principles of law to be applied in assessing evidence of visual identification, which was the sole issue in the case.

The applicant was purportedly identified by three witnesses, M, Mr. P and Mr. R. Mr. D who was also present and was also robbed, did not attempt to identify his assailant. Three of those persons were present in M's apartment in Spanish Town, St. Catherine when two men entered therein at 10:30 p.m. on the 26th December 2000. The witness P who was not present when the men entered, later came in search of M and was immediately held at gun point by one of the assailants. When the men entered, one was armed with a gun and the other with a machete. Mr. R and Mr. D were ordered to lie down on the floor, and

M who was then sitting on the bed, was ordered to sit on the floor. Having obeyed, the occupants of the room were tied up, searched and their valuables taken from them. In the end, M was deprived of her wrist watch, a necklace and other items of jewellery. Mr. R was deprived of his wrist watch valued at $6,000 and $8,500 in cash; Mr. P was robbed of J$41,000.00 and US$21.00 which was subsequently taken from his apartment which adjoins that of M. During the course of the incident, which it was alleged lasted in excess of an hour, M was taken into another room, on different occasions by the two men, and raped. The identification of the men was obstructed by the fact that both wore masks which covered the bottom half of their faces. In those circumstances, what was the state of the identification evidence?

An assessment would naturally depend on the circumstances under which each witness purported to identify, their assailant. Consequently, each will be dealt with separately and a conclusion derived from those assessments.

Mr. P's evidence

Perhaps it would be best to dispose firstly of the evidence of Mr. P who purported to identify the applicant by his voice. This witness was not only tied up, but his head was covered with a sheet. Nevertheless, he spoke to having worked with the applicant on the 13th to 15th of December only a few days before the incident. They had worked together for hours and consequently he knew his voice. The applicant had actually come to his home during that period and borrowed a video tape from him. He therefore had ample opportunity to hear the

applicant speak prior to the incident, and would be qualified to make a voice identification. But what was his evidence in that regard?

(i) In his testimony, his identification was described thus:

> "I heard a voice which sound like the man I worked with a few days ago."

Such a statement falls far short of the required standard of proof required of the Crown. A voice that "sounds like" is not necessarily "the voice of", and leaves room for the possibility that the voice belonged to someone else.

(ii) Because he knew the applicant before, he also knew where he lived, and in fact took the police to the applicant's address, where he (the applicant) was apprehended. However, asked in cross-examination why he took the police to the applicant's home, he answered:

> "Because they say that he is the guy that robbed me."

Add those two statements to the fact that this witness did not tell the police on the night he made the report, that he "suspected that [he] knew one of the men who had committed the rape and robbery that night", we are left with a witness whose identification at trial, was not the quality that a jury should be asked to rely on, to convict the applicant.

In our view the purported identification by Mr. P could not be sufficient to uphold the conviction.

Mr. R

He was put to lie down, and though admitting that the men were masked, he professed to be able to identify the applicant by the fact that he (the applicant), "came and bend over me when him tie me up.". Although admitting that his assailant had a mask covering the bottom half of his face, he nevertheless insisted that he saw his whole face as "when him step over mi a look at him."

Then he explained in more detail:

> "A get a good look at him. I was looking at him all through the proceedings because I was tied up and lay on my back and every time him go into Miss M house and took out things, him carry it and throw it out right below my foot, so I get a good look at him."

In our view this identification cannot be accepted as meeting the criteria for an identification, which is accurate and credible. The obstruction of the mask, per se would result in an identification which on the careful assessment required, must leave the tribunal of fact in a state of mind which is unsure that a mistake has not been made. For these reasons we would conclude that the identification by this witness, R would be so weak that no jury should be asked to determine its accuracy.

As no attempt at identification was made by Mr. D we are left with that of M.

M's evidence

M was taken on two occasions from the company of the others into another room in which she was raped.

Her testimony, in relation to the applicant, is that during the course of the rape, his mask which was in the form of a scarf tied around the bottom half of his face, fell off and for 30 seconds before he restored it, she could see all of his face. There was electric light in the room, and as he was then having sexual intercourse with her, he was facing her at close range.

A few days after the incident, M saw the applicant coming from Mr. P's apartment, (where he had gone to return a video tape), and recognized him immediately.

In her words:

> "As I saw him I knew it was him. ...
>
> I didn't stop, as I saw him I just turned back and went around the house because I know his face, anywhere I see him I know him. ...
>
> Yes, as he saw my eyes catch him he pulled the cap down his face."

On seeing the applicant, M immediately called the police, and when the police failed to arrive after an half of an hour she went directly to the police and made the report. She had of course spoken to Mr. P after the applicant had left. He also called the police, and when they eventually came, took them to the home of the applicant.

The evidence of identification by M was sufficient for the consideration of the jury. The learned trial judge, sitting alone, was seized of the power to adjudge the facts of the case. In doing so, he expressly demonstrated that he was aware of the cautious approach necessary in cases of visual identification, when the case for the Crown relies solely on such evidence. In the end he

accepted the evidence of identification by M and we see no reason to interfere with that conclusion. Although he seemed also to rely on the evidence of Mr. R and Mr. P we are of the view that the evidence of M was so strong, that a verdict of guilty was inevitable.

In the circumstances, the application for leave to appeal is refused.

Before leaving this appeal, there is one matter that we feel compelled to address. It concerns the following words used by the learned trial judge in giving his judgment on pages 176 - 177. He stated:

> "My understanding from a recent judgment of a Court of Appeal is that notwithstanding the fact that I sit as a Judge and that in rape cases I must warn myself, or I must declare that I warned myself of the dangers of convicting when the evidence of the complainant in a case of sexual abuse is not corroborated and this is one of those cases in which the complainant's evidence is that she was sexually assaulted and in fact raped, is without corroboration. I expect that the Court of Appeal wants me to say that corroboration in a case of sexual offence is desirable and that corroboration in a sexual offence is evidence from source or sources other than the complainant in every material particular, is corroborative of the complainant's evidence that is, that a man had sexual intercourse with her without her consent and that man is the accused. Then I expect the Court of Appeal wants me to say that notwithstanding the fact that there is no corroboration if the court is satisfied or the Tribunal of fact is satisfied that the witness or witnesses are true then the Tribunal of fact may convict. Very well."

These words disclose in an extremely sarcastic manner the disagreement that the learned trial judge apparently has with the principles of law adumbrated by this Court in this regard. We have said on various occasions that though it may be assumed that judges know the law, it cannot be assumed that they have

correctly applied the law to the facts with which they are dealing. Consequently, judges sitting alone must expressly state that they are aware of those principles, or demonstrate, in language which can be easily construed that they have indeed applied those principles. The learned trial judge is obviously unaware of the reminder given by this Court in the case of ***R. v. Everton Williams*** SCCA 112/88 delivered 6th October 1988 (unreported) per Carey, J.A. He said at page 6:

> "Since we operate in a hierarchical system of Courts, it is expected that the decisions of this Court will be followed by judges of a lower Court unless of course, the decision can be distinguished."

We expect therefore that the principles laid down in this Court will be followed and without language which seeks to "mock" the dicta of the Court. The learned trial judge in the instant case was "out of line" and demonstrated an attitude not in keeping with our judicial system. It is hoped that he will soon realize that whereas he is at liberty to disagree with the decisions of this Court, he will nevertheless, under our system, be obliged to follow them and to do so without the use of language which could have the effect of undermining the competence and efficiency of this Court.

As already stated above, the application for leave to appeal is refused. We order, however that the sentences commence on the 10th July 2001.