JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 55/95

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE DOWNER, J. A
THE HON. MR. JUSTICE GORDON, J.A.

R. V. DAVID FENNEL

Everton Bird for Appellant

Vivene Hall & Dwight Reece for Crown

17th January & 7th October, 1996

GORDON, J.A.

In the Saint Catherine Circuit Court on 10th April, 1995 before Clarke J., the appellant was convicted for the offence of rape committed on 31st December, 1993. On the hearing, his appeal was dismissed, the conviction and sentence affirmed and we ordered that his sentence should commence on the 20th May, 1995.

The facts may be shortly stated:

The complainant was standing at her gate in a well lit street talking to a male friend. The appellant, known, to her for sometime, rode up on a bicycle and stopped. He pulled a knife and ordered her companion to take flight. He obliged. He then at knife point took the complainant to the back of the premises and raped her. He proceeded at knife point to the gate, placed the complainant on his bicycle and rode with her along the well lit street to premises several chains from her home. He led her to an unlit house and therein she was turned over to a number of men who in darkness

raped her seriatim. She averred the appellant raped her again in these circumstances but she was, because it was dark, unable to identify any of her assailants.

Each of 2 counts in the indictment charged the appellant with rape. The defence was a denial of the charges and the issue one of identity. The learned trial judge correctly directed the jury that each count should be given separate consideration. The jury convicted on count 1 for the incident at her home and acquitted the appellant for the incident in the house. It was submitted on appeal that the verdict was inconsistent and ought to be quashed.

The evidence led by the Crown pointed clearly to the appellant acting in concert with the men in the house. The Crown apparently did not rely on common design in count 2 and in his presentation Crown Counsel did not refer to it. The learned trial judge in his summing-up did not mention common design.

A trial judge has a duty to direct the jury on all issues that arise on the evidence. Where there is evidence supportive of a defence, even if the defence is not urged by the counsel for the defence, the judge must leave it to the jury. If he fails so to do the conviction may be quashed and the appropriate verdict substituted.

On an indictment for murder the jury may be directed to return a verdict on manslaughter and on one for motor manslaughter directions on alternative verdict of causing death by dangerous driving or dangerous driving may be given. Where the offence charged is wounding with intent, a verdict of wounding, simpliciter, may be returned on proper directions.

The trial of cases must be fair to the defence as well as to the prosecution. Unfairness to the defence is visited with a reversal of the conviction on appeal. Unfairness to the Crown cannot be a ground of appeal hence it redounds to the benefit of the defence.

The prosecutor determines the conduct of the prosecution case, it is the trial judge who determines the content of his directions to the jury and these are conditioned by the issues raised on the evidence and the relevant law. It is considered desirable that the judge should indicate to counsel issues raised and not addressed by them that he proposes to deal with. (See **Rupert Crosdale vs. Regina** P.C. Appeal (unreported) delivered 6th April, 1995)

The trial judge should have directed the jury on common design in count 2. Had he so done, in all probability the jury would have convicted the appellant on this count. What then could the appellant do. He could not complain of inconsistent verdict, he could not complain that the evidence led by the Crown did not raise common design.

The jury acting on the clear directions given by the learned trial judge entertained doubts as to the identification evidence given by the complainant linking the appellant with the charge in the second count. She could not identify any of her assailants. In that state of the evidence they could, and did, doubt her evidence on that count but being satisfied on her evidence that the appellant was guilty on count 1, they so found. The verdicts are not inconsistent but were appropriate on the directions given. For these reasons we dismissed the appeal.