JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 117/01

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

R. V. NEVILLE WILLIAMS

Dr. Randolph Williams & Andrea Benjamin for Appellant

Georgianna Fraser, Assistant Director of Public Prosecutions for Crown

17th, 18TH, 19TH November 2003 & 18th, March 2005

FORTE, P:

The appellant was convicted on the 28th May 2001 in the Home Circuit Court on both counts of an indictment which charged him with the offences of Rape (count 1) and Assault Occasioning Actual Bodily Harm (Count 11). He was sentenced to seven years and three years imprisonment respectively, the sentences to run concurrently.

At the hearing of the appeal, leave was granted to call fresh evidence. Having heard that evidence, we allowed the appeal, quashed the convictions, set aside the sentences, and entered verdicts of acquittal. We promised at that time to put our reasons in writing, but unhappily after a long delay, we now do so.

Having regard to our conclusion, it is unnecessary to set out the facts fully, and consequently a summary is set out hereunder.

On the night of the incident, the complainant was in the company of a male friend. It was between 11:00 p.m. and midnight. She was on her way home from the "Quest" night club in Maryland, St. Andrew. Her companion and herself were walking along the main road. They stopped at a shop to facilitate her getting a taxi to go home. The shop was closed at the time. They sat on a wall, waiting for a taxi to arrive. The complainant testified that while they sat on the wall, the appellant, came from behind and held her "in her throat" and put a "hard object to her side". He then ordered her male companion to leave "before mi kill you." The male companion ran off. The appellant, thereafter pulled her into the shop, and hit her head on the wall of the shop. He then pulled her unto the verandah of the shop and ordered her to take off her T-shirt. He stood behind her. He took off the shorts which she was wearing and then ordered her to take off her panties. She did not. He did so himself. Whilst he was doing so, she struggled to prevent him. He ordered her to open her legs. He pulled her hair and bent her over the railing and eventually "forced his way into her vagina with his penis". He did so, from behind. She had known the appellant for about five to six years before that night and had last seen him on the Sunday before. She had spoken to him more than once, and in fact, she used to see him every day.

She testified that on this night, he wore a mask, but she was able to see his face after he had sex with her, because at that time she was able to pull the mask from his face. She was able to see his face because the light from another shop shone sufficiently to allow her to do so. The other shop, however, was fifteen (15) meters away.

After she had pulled off the mask she said to her assailant, whom she maintained was the appellant and whom she knew as "Didley", "Didley wa dis fa?" He then said "Don't mi tell you seh mi a go rape you?" She then told the Court that the appellant had in fact, on an earlier occasion in October of the previous year, said the following words to her "Hey gal, Janine, you go on like you nuh want free up Maryland man. Anytime you a come from Quest one night me a go hold you and tek it."

At that stage, her male companion returned, and the appellant ran off. Her companion assisted her in putting on her clothes, during which time she saw the appellant again. She was able to do so by the same light. He was no longer wearing a mask. The appellant then threw stones at her, one of which hit her in her face causing it to become swollen. She ran off leaving her companion. She ran to a lady's house made a complaint and the lady accompanied her to her mother's home. She saw her mother, to whom she spoke. She was crying. She later went to the police station in the company of her brother and made a report.

At trial, the defence was one of alibi. At the time the offence was committed he was at home. He called two witnesses to support his evidence

that he was at home. When he was arrested and charged, he maintained his innocence by saying "a lie she a tell pon me, officer."

On this evidence, after accurate directions from the learned judge, the jury convicted the applicant of both offences. Before us an application to call fresh evidence was granted. The investigating officer had testified at trial that he had received vaginal smears and the complainant's blue panties, which she wore at the time of the incident. These items he handed to the government analyst. It appears, however that no evidence was led at the trial, as to the results of examination done on these items at the forensic laboratory. There was also no evidence as to the results of the forensic examination of a pair of multi-coloured underpants which had been taken from the applicant. Because of the nature of the evidence and the effect it could have on the verdict of guilt returned by the jury, we acceded to the application to tender the evidence of Ms. Sherron Brydson, The Government Analyst attached to the Forensic Laboratory who had examined the items of clothing as also the vaginal smears.

On examinations he found the following:

(1) There were semen stains on the crotch, back and outer aspect of the front of the blue panties.

(2) On the vaginal smear there were red blood cells, spermatozoa and many pus cells.

(3) On the multi-coloured print underpants, there were semen stains on the front and inner aspects of the back.

She submitted two samples of the semen stains from the panties, and two samples of the semen stains from the multi-coloured underpants taken from the appellant, to DNA analysis.

There was a mixture of DNA material on both samples derived from the panties, but not so in respect of the underpants.

She compared the eight (8) markers on the DNA profile derived from the two samples taken from the panties with the DNA profile derived from the two samples taken from the underpants, and concluded that the profiles were different and did not match. This evidence which we concluded to be credible evidence placed serious doubt on the evidence of visual identification offered by the prosecution. We therefore concluded that the conviction could not stand. For these reasons, we allowed the appeal, quashed the conviction and entered a verdict of acquittal.

Before leaving this matter however, we need to state that in cases such as this it is incumbent on the prosecution in whom knowledge would rest, as to the reference to the Forensic Laboratory for examination of specimens and garments, to ascertain the results of these examinations before the commencement of the trial. In the event that the results favour the case of the defence, it is the duty of the prosecution to pass over the results to the defence. In this case, it appears that neither prosecution nor defence knew of the results of the forensic examination, so that no accusation of deliberate concealment of evidence can be placed at the prosecution's door.