JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 206 of 1973

BEFORE: The Hon. Mr. Justice Edun, J.A.(Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Hercules, J.A.

R. v. RAYMOND FAILEY

Mr. Roy Taylor for appellant.

Mrs. Ruby Walcott for the Crown.

16th, 17th January, 1975
31st January, 1975

HERCULES, J.A.:

On January 17, we allowed the appeal herein and ordered a new trial. We promised to put our reasons in writing and this we now do.

The appellant was tried before Parnell, J. in the Home Circuit Court on an indictment containing two counts. The first count alleged that he had broken and entered the dwelling house of Dorothy Carson (hereinafter referred to as 'the complainant') with intent to commit the felony of rape. The second count charged that he had sexual intercourse with the complainant without her consent. He was, on the advice of the learned trial judge, acquitted on the first count. He was, however, found guilty on the second count.

For the purpose of this judgment it is unnecessary to give more than a very brief account of the case advanced by the prosecution. Ida Brown, the mother of the complainant, was awakened at about 3 a.m. on April 4, 1973 by the sound of "someone kicking and licking" at the door of the room in which she was sleeping with the complainant. She went to this door "and started to brace it" so as to prevent anyone from entering the room. It appears that this door was made entirely of wood. It appears, too, that the appellant was one of five men who participated in the events of that morning. They each wore a mask. While Brown was "bracing" this door the appellant was "wrestling" it. He then had 'a gun in his right hand and a flashlight in his left". It is not shown the appellant "wrestled" the door while he was holding a gun and a

flashlight, nor is it shown how Brown was able to see the appellant while he was "wrestling" the door. She did not, and quite obviously could not, say that the appellant was the only one of his co-adventurers who had "wrestled" the door. Nor did she say how she was able to see that it was indeed the appellant who was "wrestling" the door. She said, however, that the appellant's mask fell off, and "as soon as (it) fell off, he put it on back". Again, it does not appear how this was done by the appellant while still holding the gun and the flashlight. What is clear is that Brown advanced no reason why the appellant's mask fell off. It was when the appellant's mask was momentarily off his face that Brown was able to recognise him as someone she had known before. As a result of the "kicking and licking" of the door it eventually fell off its hinges. Brown did not say that the appellant's mask fell off at any time after the door came off its hinges. After the door fell the appellant held the complainant and took her from the room. The five men took her to a Church yard some distance away where each of them in turn had sexual intercourse with her without her consent. On the way to this yard they had to go over a wall. They put her over the wall first. They followed, the appellant being the last to scale the wall. "As he climbed to come over, (the complainant) saw a cap drop and a towel drop from his face", and she was able to recognise him as someone she had known for some seven or eight years. It is, perhaps, not unimportant to note here that in her evidence at the trial the complainant gave the address of the Church as Greenwich Street whereas at the preliminary enquiry she had given the address as Water Street. This inconsistency in the complainant's evidence was dismissed by the trial judge as trivial and in language calculated to invite the jury to disregard it. But was it trivial? The complainant swore that she was able to see the appellant's face when the towel fell from his face by the aid of "a street light which was right under the wall" over which the men had put her. There was no evidence as to the presence or otherwise of any kind of lighting at, "under" or near the wall on the Water Street side of the Church. In our view this was no trivial contradiction. It called for an explanation. None was forthcoming. There were other contradictions in the evidence led by the prosecution but these need not

be noted.

At the end of his summing-up the learned judge invited the jury to retire to consider their verdict. They did so at 2.36 p.m. They returned after some 46 minutes and announced, through their foreman, that they were divided "six for, one against". The foreman did not disclose whether the majority were in favour of conviction or acquittal. Thereafter the following took place:

"HIS LORDSHIP: In other words, you are not unanimous. Mr. Foreman and members of the jury, I cannot take a divided verdict until at least an hour of the deliberations have taken place. In other words, you want at least another thirteen minutes, so I would have to ask you to go back. If seven of you agree before that time, then it is all well and good. If you still hold out, with the hint that you have just given, you will have to stay there for at least another thirteen, fifteen minutes, but before I send you out is there any particular part in the case, any point that you want help on? I don't want to know anything else. Is there any difficulty as to the law or as to facts that you want some help on?

FOREMAN: Yes.

HIS LORDSHIP: What is the point?

FOREMAN: Why it is only that man's mask did drop off. That is what is causing the trouble.

HIS LORDSHIP: Let me see if there is anything in the case to help you on it. Please sit. Now, when jurors are trying a case you have to use combined commonsense. You use your commonsense and then now, you have to draw reasonable inferences. We gather from the evidence that the mask that he is supposed to be wearing would be something like a rag and he is supposed to have had a hat - but let us start off with the mother's evidence now. Her evidence is that the accused was, to use her language, 'rastling' with the door so that the mask that is on his face no doubt would have dropped off during that time. The evidence that we have is that another man was there, but she did not tell

HIS LORDSHIP: us about the other man 'rastling' with the door that would cause the mask to drop off. Then you have people wearing the mask differently, some have it under their hat ..... tied on, others may tie it behind. We don't know the condition as to how it was put. ..... evidence, that is the explanation. As far as the girl's evidence is concerned she told us the reason, the man jumping from there to there. We don't know how it was, whether tied around or loose or what. You have to use your commonsense.

I am afraid there is nothing else I can point out in the case. Take for instance, the other men who were in the front, if their masks were there, there would be nothing that would cause them to - for it to come off, but the mother is just telling us of this man at the door, wrestling with the door and the girl is saying, he is jumping over, he was the last one to jump. It is just his bad luck his mask dropped off - we don't know.

I am going to ask you now to go back unless of course before that time all seven of you can agree, otherwise, you will have to spend a few moments."

The jury retired again, this time for 18 minutes, from 3.29 to 3.47 p.m. and, as observed earlier, returned a majority verdict adverse to the appellant on the count charging rape.

The appellant challenged his conviction on a number of grounds. We allowed his appeal, however, on a point which was taken by the Court. Indeed this was the only point argued, namely, whether the jury should have been directed to remain out for an hour from 3.29 when they retired the second time in the event of their failure to reach unanimity within that time. In our view they should have been so directed. It will be observed that when they retired the second time they did so with the distinct impression that they could return in 13 minutes even if they were still divided. The crucial question, however, is: "When was the case finally and definitely left to the jury?" See R. v. McDonald and Haye, 14 W.I.R. 11. We are of the firm view that it was finally left to them on the occasion of the second retirement.

The problem in respect of which the jury were having some difficulty was, quite obviously, the credibility of the complainant and her mother Brown, certainly in relation to the question as to the appellant's identity and, perhaps, generally. We say 'perhaps generally' in view of the summing-up taken as a whole. Why was it, they asked, it was only the appellant whose mask had fallen off? If the trial judge, at that point, had told them that that was essentially a question of fact which they had to resolve on the basis of the view they took of the evidence of the two ladies we apprehend that his earlier direction that they should go back for another thirteen minutes would have been quite unobjectionable. He went on, however, to deal with the evidence of Brown and the complainant. But this time, no doubt in an attempt to assist the jury, he told them, inter alia, the cause of the appellant's mask falling off. Neither Brown nor the complainant had given any evidence as to the reason why the appellant's mask fell from his face. The trial judge now filled this vital gap, albeit unwittingly as it appears to us. By advancing his own 'explanation' he introduced a new yardstick by which the credibility of Brown was to be assessed. The same observation is to be made in respect of the complainant's evidence. She gave no reason, contrary to what the trial judge said, for the appellant's mask falling off. She had said that the towel fell from his face "as he climbed", not when he "jumped from there to there". When the jury retired the second time it would clearly have been necessary for them to reconsider the evidence of Brown and the complainant in the light of the further directions they had received, and which directions clearly introduced new aspects of the matter. In those circumstances the jury should have remained out for one hour from 3.29 p.m. in compliance with the mandatory provisions of s. 44(3) of the Jury Law Cap. 186 which enacts:

> "(3) On trials on indictment before the Circuit Court for offences other than murder or treason, the verdict of the jury may be unanimous, or a verdict of a majority of not less than five to two may,

after the lapse of one hour from the retirement of the jury, be received by the Court as the verdict of the jury."