

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICIATURE

CRIMINAL APPEAL No. 40 of 2000

BETWEEN:

HAZRAT ALI,

APPELLANT

-and-

THE STATE

RESPONDENT



BEFORE:

- The Hon. Madam D.P. Bernard - Chancellor
- The Hon. Madam C.M.C. Singh - Justice of Appeal
- The Hon. Mr. N. Kissoon - Justice of Appeal

2001: June 18, 27, 29

Mr. Bernard De Santos, S.C. for the Appellant

Ms. Roxane George for the Respondent

J U D G M E N T

BERNARD, C.

On 18th December, 1999 Bethlyn Thakur and her two children were asleep in her house at Unity, Lancaster, East Coast Demerara, when at about 7.00 p.m. she felt a chop on her hand and on opening her eyes she saw the Appellant, Hazrat Ali, called "Rat", stooping

over her with a cutlass in his hand. She had known him casually before, and recognised him by means of a bottle lamp in her bedroom. He lashed her several times with the cutlass causing her to scream out to a neighbour who lived a few yards away. She alleged that the Appellant tore off her clothes and raped her against her will. He was later charged and indicted with the offences of rape and wounding with intent to cause grievous bodily harm.

At a trial at the criminal assizes on 6th November, 2000 the Appellant was convicted of the offence of rape for which he was sentenced to fifteen (15) years' imprisonment and of the offence of wounding with intent for which he was sentenced to four (4) years' imprisonment. It is from these convictions that the Appellant has appealed to this Court.

At the hearing of the appeal Counsel for the Appellant sought and was granted leave to argue Grounds 2, 4(d) and 6 of the Amended Grounds of Appeal. However, of these Grounds 6(a) & (b) were vital as, if upheld, there would be no need to consider the other grounds. The gravamen of Ground 6 is to this effect:

"The learned trial judge was guilty of serious non-directions amounting to misdirections to the jury:

(a) when she failed to deal with the defence of consent in her summing-up;

(b) when she failed to direct them that if they disbelieved the Appellant's alibi and found that he entered the complainant's house and had intercourse with her, it was still open to them to find that that intercourse was consensual and in keeping with what the accused allegedly told Cpl. Kingston. The said statement was effectually and wrongfully withdrawn from the jury's consideration;

(c) when she failed to direct the jury adequately or at all in relation to evidence of intent on the second count having regard to all the proven circumstances;

- (d) when she failed to give the jury assistance in the resolution of issues of fact but left them to roam unaided over the terrain of disputed evidence."

In relation to Grounds (a) & (b) Counsel submitted that the learned trial judge did not put before the jury for consideration the oral statement made to Cpl. Kingston in the lock-ups of the Police Station. The circumstances under which this oral statement was made were these:

On 18th December, 1999 the Appellant was arrested and taken to the Mahaica Police Station where he was placed in custody in the lock-ups.

On 20th December, 1999 at about 15.40 hrs. Cpl. Michael Kingston was on duty in the C.I.D. Office at the Station when the Appellant summoned him to the lock-ups. As a result he went and inquired from the Appellant why he wanted to see him. The Appellant said that he would like to tell him something pertaining to the matter for which he was in custody. Cpl. Kingston cautioned him, and the Appellant replied, "Man, boss man, me aint rape nobody. That girl tek me money and give me sex." After telling him that he could write the statement, the Appellant declined to do so saying that he had already given a written statement.

Indeed on 19th December, 1999 the Appellant did give a written statement to Det. Const. 15947 Vincent Blair at the Station after being cautioned. The statement was exculpatory and was admitted in evidence without objection. It is to this effect:

"Last night a went drinking with me Captain. We drink about 12 o'clock and a come out the shop and he carry me halfway in the street, and tell me pack me bag fo morning 8 o'clock. Me go home and me sleep. When me wake up me see two officers. They tell me say

me rape this gal. Me na rape she; they
bring me a station."

There is a dramatic difference between the oral statement given to Cpl. Kingston On 20th December, 1999 and the written one given to Const. Blair on 19th December, 1999. The written statement raises the defence of alibi whereas the oral statement refuses any alibi but raises the defence of consent. This indeed presented a dilemma for the trial judge which required skilful directions to the jury on how to deal with conflicting defences raised by the accused.

An examination of the summing-up indicates that the main thrust of it in relation to the defence was on the defence of alibi. The learned judge repeatedly pointed this out to the jury. To compound the dilemma the accused (Appellant) in his statement from the dock indicated that he and the complainant had had a relationship and on the day in question she had asked him for money, and threatened to fabricate a story that he had raped her if he did not give her money.

This is his statement from the dock:

"With all due respect to this Court, my name is Hazrat Ali. I know Begnie [the complainant] about four years. One year and a half, me and she was having a relation-ship. In 1999 November me and she break up. The 4th December, I gone pon sea. I came in on the 16th December. When I came in one of my friends tell me that she husband gun chop me. I told her that no man, me and the girl done. On 18th December, 1999, I was home packing my bag to go to sea and she big son run come and tell me mummy calling me. I told him tell you mother I gon come next five minutes. About five minutes pass, she send she daughter. I left what I was doing and I go by she about 8.00 p.m. I had on a clarks and a short pants, a arm-

