

BYNOE v. R.

[COURT OF APPEAL - CRIMINAL APPEAL NO. 34 of 1992

(Williams, P., Husbands and Moe, JJ.A.) January 12, 1994]

(1994) 30 Barb. L.R. 1

Evidence - Identification - Masked intruder entered house during night time - Description of intruder given - No identification parade held - Dock identification - Whether evidence of identification satisfactory.

Facts: The evidence disclosed that a masked intruder broke and entered the victim's house in the night of April 18, 1990, and raped her. The victim testified that the intruder masked his face with her undergarment, that she saw his face twice in the dark, once in the bedroom when he tried to kiss her, once when he was on his way out and looked back, and also once in the bedroom when he switched on the light. She gave the police a description of the intruder and indicated that she would be able to identify him if she saw him again. No identification parade was held. The appellant gave a confession statement. The victim identified the appellant in the dark during the preliminary enquiry. The appellant was convicted of burglary and rape and sentenced to imprisonment of ten and eighteen years respectively to run concurrently with sentences then being served. On appeal

Held: There were marked differences between the victim's evidence and the confession statement which could be rationalised so as to support as well as weaken the case against the appellant. The evidence of identification was unsatisfactory. In the circumstances the convictions were unsafe and would be quashed and the sentence set aside.

No cases or statutes referred to.

Dr. Harold Eastmond in association with Miss Rosalind Griffith for the appellant.

Mr. Olton Springer for the respondent.

JUDGMENT OF THE COURT.: The appellant Vincent Bynoe was on July 22, 1992 convicted before a judge and jury of burglary and rape and on the following day sentenced to ten years and eighteen years respectively, to run concurrently with sentences then being served.

The incident that gave rise to the charges occurred in the night of April 18, 1990 when a masked intruder broke and entered the house of the complainant and raped her.

The case for the Crown was that the appellant was the intruder and it was [1] supported by identification evidence given by the complainant and a confession statement which police officers testified was voluntarily given by the appellant.

The defence was that the appellant was not the intruder and the confession statement was a fabrication by the police which he was forced to sign.

The jury found the appellant guilty at 2.10 p.m. by a majority verdict of 7 to 2 after having retired at 11:01 am. They were recalled at 1.17 p.m. for further direction and returned again at 1.24 p.m.

The complainant testified that the intruder had masked his face with a white undergarment of hers which she had left in the bathroom before she went to bed. She saw his face twice in the dark, once in the bedroom when he tried to kiss her and once when he was on his way out and looked back and again in the light in the bedroom when he switched on the light. At that time the mask covered his mouth and part of his nose. She described the intruder to the police as tall and of medium build, with an old scar on his left eyebrow and a low hair cut. She told the police that she would be able to recognize the man if she saw him again.

No identification parade was held. The complainant saw the appellant in the dock at the Magistrate's Court during the preliminary investigation and identified him there and in the dock at his trial. The explanation which was given for not holding an identification parade was that the police went back to the complainant's residence at various times between 26 and 29 April but did not find her.

There are marked differences between the complainant's evidence and the confession statement. The complainant was sure the article which the intruder used as a mask was her undergarment which she had left in the bathroom when she went to bed. According to the statement the appellant had a piece of whitish cloth tied around his mouth when he entered the house. Both could not be true. Further, the complainant was positive that entry to the house was gained through a window that had been functioning well but was found sprained after the incident. According to the statement, the appellant got a flat piece of thing and opened the door. No flat implement was found on the scene. Both could not be true. Moreover, the complainant told of the intruder leaving behind the undergarment which he used to cover part of his face and of the police taking it up the same morning. According to the statement, the appellant left the house with the cloth and threw it in a bin.

These differences between the complainant's story and the confession statement can be rationalized so as to support as well as weaken the case against the appellant but were not dealt with specifically by the trial judge and they form part of a picture which leaves the court with a feeling of uneasiness about the convictions. The evidence of identification is unsatisfactory and the majority verdict was returned after the jury was recalled to court at the expiration of the period prescribed by the statute for deliberations.

The court is of the view that the convictions are unsafe and they are accordingly quashed and the sentences set aside.[2]

