TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App: 54 of 2008

BETWEEN

KESTER BENJAMIN Appellant

AND

THE STATE Respondent

PANEL:

P. WEEKES, J A

A. SOO HON, J A

R. NARINE, J A

Appearances: Mr. Scotland for the Appellant
Ms. D. Seetahal S.C. for the Respondent

DATE DELIVERED: 17th December 2009.

JUDGMENT

DELIVERED BY: RAJENDRA NARINE, J A

THE PROSECUTION'S CASE

On 11th December, 2008 the Appellant was convicted at the Port of Spain Assizes of rape, buggery and robbery with aggravation. He was sentenced to 30 years imprisonment for rape, 23 years for buggery and 13 years for robbery with aggravation to run concurrently.

The State's case was that the virtual complainant was at work on 21st March 2002, at a shop which sold high end bathroom fittings including vanities, faucets and tubs. It was the sole agent for a certain type of faucet.

Around 11.00 am the appellant entered the store and spoke to the virtual complainant. He walked around the shop, inquiring about certain items. The virtual complainant answered his questions. The shop was lit with several halogen lights on the display items.

The telephone rang and the virtual complainant went to her desk to answer it. The appellant came to her desk and inquired about the price of a faucet. The virtual complainant sat at her desk working out the price. She looked up and saw the appellant with a knife in his hand three feet away. He demanded money. He ordered her into an adjoining room where he taped her hands and eyes. He robbed her of a watch, a silver band and three rings. He pushed her unto a rattan seat, where he partially undressed her. He then had sex with her and buggered her. He was speaking with her continuously as he committed these acts.

After the appellant left, the virtual complainant, managed to free herself. A report was made to the police. She was medically examined. She gave a statement in which she described her assailant. Later that day, the virtual complainant's employer discovered that a FP faucet and a labelling machine were missing from the shop.

On 5th June 2002 Cpl. Emrol Bruce arrested the appellant at Frederick Street, Port of Spain. Upon being told of the report and being cautioned the appellant responded: *"Officer all you don't put me on an identification parade, just charge me."* On 6th June 2002, Cpl. Bruce executed a search at the home of the appellant at

Barataria. Cpl. Bruce found a FP faucet with the label C & R Furnishings and a Brothers PT labelling machine in an area near the kitchen . These items were later identified by the virtual complainant. The faucet was of a brand sold only by her shop.

On 6th June 2002 the appellant refused to go on an identification parade, upon being asked by Inspector Nero if he was willing to do so. A confrontation was arranged that day. The virtual complainant identified the appellant as the man who had raped and robbed her. The Respondent denied that he committed the offences.

THE DEFENCE CASE

In his defence the appellant denied that he committed the offences and alleged that it was a case of mistaken identity. He further alleged that the police had fabricated the case against him.

The appellant gave evidence at the trial and called four witnesses in his defence. He denied that he was arrested at Frederick Street, Port of Spain. He testified that he was driving his BMW 7 series car on Wrightson Road, when he was stopped by Cpl. Boxhill and other police officers around 7.00 pm. Cpl. Boxhill asked him if it was his car, and he replied sarcastically that he had stolen it. The police drew their guns and ordered him out of the car. He was pushed to the ground, searched, arrested and taken to St. Vincent Street, C.I.D. He was subsequently taken to his home where a search was carried out. Cpl. Boxhill seized his camcorder and his passport. No faucet or labelling machine was found. The police were fabricating evidence against him because he had threatened to sue them for wrongful arrest and assault.

REBUTTAL EVIDENCE

The State was permitted to call George Kurbanali, the former owner of the BMW car, and employees of the Licensing Office with respect to the transfer of ownership of the car. Mr. Kurbanali testified that he bought the car in 1997. It was in an accident on 24th July, 2003. He later sold it to the appellant as a wreck. He produced receipts dated 21st October 2003 and 1st November 203 to support his evidence of the time that he sold the car. The car was transferred to the appellant in October 2003.

There was conflicting evidence from the employees of the Licensing Office as to whether the purchaser had to be present at the Licensing Office in order to effect a transfer of ownership.

The Defence was allowed to reopen its case to call Prisons Officer Adolphus Jeremie who testified that the appellant was in prison from 28th October 2003 to the end of December 2003.

PREVIOUS TRIALS

It should be noted as well that there were two previous trials with respect to these offences. In March 2006 the trial judge upheld a no case submission with respect to the offences of rape, buggery and one count robbery. The jury were invited to consider a second count of robbery with an alternative verdict of receiving. They were undecided on the robbery. However, a majority verdict of not guilty was accepted on the alternative count of receiving.

At a second trial in April 2008, the trial judge indicated that the appellant should be indicted for the offence of larceny in addition to the counts of rape, buggery and robbery. However, the jury failed to agree on all counts.

During the third trial, the Judge heard submissions with respect to the count of larceny and ruled against its inclusion on the indictment.

GROUNDS OF APPEAL

The appellant put forward the following grounds:

1. The learned trial judge erred in law by allowing the circumstantial evidence relative to the stolen items alleged to have been found at the home of the appellant before the jury after ruling that the indictment for the larceny of same would be withdrawn.
2. The learned trial judge erred in law by not permitting the appellant to put before the jury his previous acquittals relative to the complainant even though they directly impacted the credibility of the complainant.
3. The learned trial judge erred in law by permitting the State to adduce evidence in rebuttal on collateral issues.
4. The learned trial judge erred in law in imposing a sentence that was too severe in the circumstances.

At the hearing the appellant was granted leave to file a further ground of appeal. It was formulated as follows:

5. The appellant was denied a fair trial due to the failure of the State to produce two exhibits, namely the black underwear belonging to the virtual complainant and the vaginal and anal swabs taken from the virtual complainant.

GROUND 1

This ground relates to the circumstantial evidence on which the State relied to support the identification evidence in the case. The evidence in question is the finding of a FP faucet with the label "C & R Furnishings" and a Brothers PT labelling machine at the home of the appellant on 6th June 2002.

The specific grounds of complaint raised by the appellant are:

1. The trial judge left the circumstantial evidence with the Jury in spite of his ruling that the count of larceny should be withdrawn. Accordingly, the State was not required to prove the larceny of the items beyond reasonable doubt.

2. It was not brought to the attention of the jury that the appellant had previously been acquitted of receiving the items from C & R Home Furnishings. This left the jury with "an incomplete and biased picture that unfairly bolstered the prosecution's case."

3. The items were not properly identified as the property of C & R Home Furnishings. Further there was no evidence that

- the appellant was seen removing the items;
- that the items were present at the time the perpetrator entered the store and
- the items were missing immediately following the departure of the perpetrator.

4. In the circumstances the admission of the evidence amounted to unfairness to the appellant.

THE LAW

In the case of **R vs. Z** (2000) 2 A.C. 483 the defendant was charged with rape. He alleged in his defence that the complainant had consented to the intercourse, or alternatively, that he believed that she had consented. In order to rebut the defence, the prosecution sought to lead evidence from four women who had made previous complaints of rape against the appellant. These complaints had been tried. The appellant had been acquitted of three of them. At a preparatory hearing the judge

ruled that all four complaints came within the principle of similar fact evidence. However, he excluded as inadmissible the three previous complaints on which the appellant had been acquitted on the basis that a verdict of acquittal was binding and conclusive in all subsequent proceedings between the parties. His decision was affirmed by the Court of Appeal but reversed by the House of Lords.

In his judgment (at page 500) Lord Hutton cited with approval a dictum of Chanell J in the case of **R vs. Ollis** (1900) 2 QB 758 at p. 782:

> *"the fact that a jury had acquitted would neither detract from the weight of the evidence nor in any way affect its admissibility, for the prisoner would not be tried again for the offence of which he had been acquitted, but for a different offence, in respect of which the evidence given in the former case, or some of it would be relevant."*

Lord Hutton went on to give his own conclusion (at page 504) that provided a defendant is not placed in double jeopardy, evidence which is relevant to a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was in fact guilty of an offence of which he had earlier been acquitted.

The principle of admissibility, where the evidence is relevant to a subsequent offence, is not confined to cases of similar fact evidence. The case of **R vs. Z** (supra.) was applied in **R vs. Terry** (2005)2 Cr. App. R. 7, in which the appellant sought to put forward his acquittals as conclusive proof that he was not in a motor vehicle at the time of the commission of related offences. The prosecution succeeded in putting into evidence the testimony of an expert with respect to tape recordings which had been ruled inadmissible at an earlier trial in which he had been acquitted. These recordings were put in to establish his presence in the car at the material time. He was convicted on five counts. On appeal it was held that although an acquittal meant that the appellant was not guilty in law of the alleged offence to which it related, it was not conclusive evidence of innocence, nor did it mean that all relevant issues had been resolved in the appellant's favour. The initial questions were whether the evidence in question was admissible as relevant to an issue in the case and whether it was fair to admit it.

In the instant case the evidence with respect to the items being found at the appellant's home was clearly relevant to the issues before the jury. If the jury accepted the evidence of Inspector Boxill that he found the items at the home of the

appellant and they were sure that the items were taken from C & R Home Furnishings at the time that the offences were committed, it was open to them to find that this evidence supported the visual identification of the appellant by the virtual complainant.

As the cases cited above establish, the previous acquittal by a jury for the offence of receiving does not render the evidence inadmissible for the purpose of proving other offences allegedly committed at the same time. Following the same reasoning, the fact that the trial judge in this case ruled that the count of larceny should not be pursued by the State, did not preclude the State from relying on the same evidence for the purpose of proving other offences, once the evidence was relevant. The fact that the State was not required to prove the ingredients of larceny is of no moment whatsoever, and does not amount to unfairness to the appellant.

In relation to his submission that the previous acquittal for receiving should have been put before the jury, Mr. Scotland referred us to the learning in ***Archbold*** (2006) at paras. 4-331 and 4-332, which are set out below:

Para 4-331: *"In the absence of some exceptional feature, such as the effect of an acquittal on the credibility of a confession or the evidence of a prosecution witness, evidence of the outcome of an earlier trial arising out of the same events is irrelevant, and therefore inadmissible since it amounts to no more than evidence of the opinion of the jury in the earlier trial:* **Hui Chi-Ming v. R** *(1992) 1 AC 34 PC."*

Para 4-332 *"The principle to be derived from* **Cooke,** *ante, seems to be that where there is a clear inference from a verdict that the jury has rejected a witness's testimony on the basis that they do not believe him (as opposed to thinking that he might have been mistaken), and that witness's credibility is directly in issue in a subsequent trial, evidence of the first trial is relevant. For further refinement of this principle, see* **R v. Edwards** *(1991) 1 WLR 207.*

Mr. Scotland submits that the credibility of Inspector Boxhill was in issue in the previous trial in which the appellant had been acquitted of receiving. In his submission, the jury did not reject his evidence on the ground that he was mistaken. His credibility in the later trial thus became "an exceptional feature" within the

principle derived from **Hui Chi-Ming v. R** cited in para 4-331 of Archbold (2006) ante.

For the State, Ms. Seetahal submitted that there was no exceptional feature in this case. In addition, the test was whether there was an acquittal by virtue of which the witness' evidence was demonstrated to have been disbelieved: **R v. Edwards** (1991) 1 WLR 207, **R v. Y** (1992) Crim. LR 436.

The principle enunciated in **R v. Edwards** (ante) has been applied in this jurisdiction in cases involving the admissibility of confessions, where reasoned rulings of trial judges are available, and where the issues in the voir dire directly involve the credibility of police witnesses. In such cases it is often possible to conclude that the evidence of a witness had been demonstrated to have been disbelieved. In a jury trial involving a number of issues of facts and law, it is often impossible to discern on what basis a verdict of not guilty has been reached. In this case, there is no basis on which one can conclude that the verdict of not guilty arose from the jury's disbelief of the evidence of Inspector Boxhill.

Having regard to the facts of this case, and the cases cited above, we are of the view that evidence of the previous acquittal for receiving the items was not relevant to the issues that the jury had to decide in this case and would have served to unnecessarily confuse the jury and deflect their attention from the issues they had to decide.

Mr. Scotland's further submission related to the identification of the items, as the property of C & R Furnishings. It was the evidence of Debra Ramatally that she discovered the faucet missing either on the day of the incident or the day after. A customer come to collect the faucet. It was supposed to be in the small room where ordered items were kept. She noticed as well that the labelling machine was not in the drawer where it was usually kept.

The virtual complainant testified that as a consequence of a telephone call from Ms. Ramatally on the same night of the incident, she became aware that the computerized labelling machine usually kept in the bottom desk drawer in the store, and a gold and chrome FP faucet that was in a box in the same room where the man had had sexual intercourse with her, were missing. The box was kept on the left side of the room on the ground. The virtual complainant reported the loss of these items to the police on 22nd March 2002, the day after the incident.

On 5th June 2002, at about 4.00 pm, a search was carried out at the appellant's home at Third Avenue Barataria. Inspector Boxhill testified that during the search, he found one FP faucet in a box bearing the logo "C & R Trading Company" and one Brothers PT labelling machine on the floor in a passageway between the kitchen and the bathroom. He took possession of these items, placed his markings on them in the presence of the Appellant and handed them over to W.P.C. Horsford later that day. The virtual complainant identified the items to W.P.C. Horsford the same day.

Further, it was the evidence of Ms. Ramatally that C & R Furnishings were the sole agents and distributors of the FP brand at the time. It was a "high end" product imported from Venezuela that they had started to sell in the store a few months before the incident. It was also Ms. Ramatally's evidence that the labelling machine had been bought abroad, and she had not seen another one like it.

With respect to the finding of the items the trial judge directed the jury:

> "*Now the State is effectively saying that what gives this bit of circumstantial evidence, as to the findings of the items, force, is that C & R Home Furnishings, according to the evidence of Debra Ramatally, were the sole agents for the sale of these items on the days in question; and the state's case, by inference, is that the accused took these items from C & R on the day in question. There is no direct evidence of that from Cathy Sookoo, but the State is saying that when you look at the totality of the evidence, it is an inference which you may possibly arrive at. The State's case, from the evidence of Cathy Sookoo and on the totality of the evidence, is that the accused is the perpetrator of the robbery, rape and buggery on Cathy Sookoo, at the C& R Store. The State is saying on the totality of the evidence, the evidence of Cathy Sookoo the confrontation, that is their case. And the State is saying that on their case, if you accept it, two and a half months later, two items from C & R Home Furnishings, one bearing a sticker from the store, were found in the apartment of the accused, and the State says that this is a very significant and telling bit of*

circumstantial evidence which tends to support that Cathy Sookoo is correct in her visual identification evidence."

The trial judge directed the jury as well:

"If you are sure that the items were found in the circumstances as described by Inspector Boxhill, in his evidence on the State's case, and you are sure that he is a truthful, credible, reliable witness, that his account is truthful and that he is unbiased and has no axe to grind against the accused, it is open to you to find that this evidence, if you accept it, of the finding of the two items, is circumstantial evidence independent of Cathy Sookoo's evidence, which tends to support the correctness of her visual identification evidence."

As Ms. Seetahal submits, the trial judge made it clear to the jury.

- they must be sure of the truthfulness of the evidence of Inspector Boxhill as to the finding of the items at the home of the appellant.
- there is no direct evidence that the items were removed from the store on the day of the incident;
- the identification of the items was based on a sticker on the box containing the faucet, and the evidence of Ms. Ramatally that they were the sole agents and distributors of the F P brand at the time.
- on the totality of the evidence, it was open to the jury to draw the inference that the items were taken from the store by the appellant at the time of the incident.

It is clear form the summation that the trial judge was careful to direct the Jury's attention to all of the relevant evidence in relation to the items. It was then for the jury to consider all of the evidence and to draw reasonable conclusions. In this regard, the dictum of Lord Morris of Borth-y-Gest in **McGreevy v. DPP** (1973) 1WLR 276 at 281 H, is worth repeating:

"It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to

point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence, they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt."

For these reasons, we hold that there is no merit in this ground.

GROUND 2

The learned trial judge erred in law by not permitting the appellant to put before the jury his previous acquittals relative to the complainant even though they directly impacted the credibility of the complainant.

First of all, the ground appears to be erroneously framed. There was only one acquittal by the jury, for receiving. The directed acquittals at the first trial were all reversed by the Court of Appeal in **The State v. Kester Benjamin** Cr. App. No 11 of 2006.

Submissions made under this ground clearly overlap with those made under Ground 1. The emphasis, however, appears to be different. Mr. Scotland has submitted in essence that the trial judge should have allowed evidence of the previous acquittal as a matter of law, since, in Mr. Scotland's submission it impacted on the credibility of Inspector Boxhill, who was a key witness for the State with respect to the finding of the items at the appellant's home.

We reject this submission for the reasons given above. The evidence of the previous acquittal was irrelevant, since it amounted to no more than the evidence of the opinion of a jury at an earlier trial: **Hui Chi-Ming v. R** (ante). Further there is no reasonable basis to conclude that the acquittal by the jury in the earlier trial was based on disbelief of the testimony of Inspector Boxhill.

Moreover, the trial judge made it clear that the jury must be sure that Inspector Boxhill was a "truthful, credible, reliable witness," and that his account was truthful and that he was unbiased and had no axe to grind against the appellant.

For these reasons we find that the trial judge did not err by not permitting the appellant to put his previous acquittal before the jury. Accordingly Ground 2 has no merit.

GROUND 3

The learned trial judge erred in law by permitting the State to adduce evidence in rebuttal on collateral issues.

It was the evidence of Cpl. Emrol Bruce that on 5th June 2002 around 4.00 pm, he went to Frederick Street, Port of Spain in the vicinity of St. Mary's College accompanied by two other police officers, all dressed in plain clothes. He saw the appellant, identified himself to him, informed him of the report that he was investigating, and that he was a suspect. He cautioned the appellant, and told him of his rights and privileges, and the appellant replied *"Officer, all yuh don't put me on an identification parade just charge me."* He was then taken to the Belmont Police Station.

The appellant gave a totally different account of the circumstances of his arrest. According to his account, he was driving his BMW 7 series motor car on Wrightson Road, in the vicinity of the Licensing Office on 5th June 2002 around 7.00 pm. His witness Rodell Mc Fee was in the car. He was pulled over by some police officers, one of whom was Inspector Boxhill, whom he knew before. One of the officers asked the appellant if the car belonged to him. The appellant replied sarcastically *"No, it is not my car, I thief it."* The officers then started to shout, pointed their guns at him and ordered him to get out of "*the f...ing car."* The appellant came out of the car and asked the officers if that was how they were trained to speak to people. The officer searched the appellant and ordered him and Mc Fee, to lie on the ground. The appellant refused and he was forcibly pushed to the ground. The appellant was handcuffed and taken to St. Vincent Street, C.I.D. He shouted his wife's telephone number to Mc Fee, who subsequently telephoned the appellant's wife.

The State applied to the trial judge to call evidence in rebuttal with respect to the ownership and possession of the BMW motor vehicle at the time of arrest. The application was granted by the trial judge.

The State called one Gregory Kurbanali and employees of the Licensing Office. Mr. Kurbanali testified that he bought the car in 1997. In July 2003 the car was damaged in an accident. In October 2003 he sold the car to the appellant. He produced receipts dated 21st October 2003 and 1st November 2003 to establish the time of the sale. The car was transferred to the appellant in October 2003. The appellant was permitted to reopen his case to call Prisons Officer Adolphus Jeremie

who testified that the appellant was in prison from 27th October, 2003 to the end of December 2003.

Mr. Scotland contends, inter alia, that the issue of the ownership and possession of the BMW car was clearly a collateral issue which was not relevant to any matter that the jury had to decide, but merely impacted on the credibility of the appellant.

In his oral ruling at the trial delivered on 26th November, 2008 the trial judge reviewed the leading authorities on rebuttal evidence, and exercised his discretion in favour of the State.

The State sought to have the evidence admitted under the ex improviso principle, which is encapsulated in the diction of Tindal C J in **R v. Frost** (1839) 9 C & P 129 at p. 159 quoted in Archbold (2006) para 4-340: *"if any matter arises ex improviso, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradicting evidence, they may give evidence in reply."*

R v Blick 50 Cr. App. R. 280 provides an illustration of the principle. During his trial for robbery, Blick asserted that he was present at the place where he was arrested due to a visit to a public lavatory. A juror who knew the area passed a note to the judge informing him that the lavatory was closed at the material time. The prosecution were granted leave to call evidence in rebuttal to that effect. It was held that the evidence was properly admitted.

In **R v. Milliken** 53 Cr. App. R. 330, in the course of his evidence the defendant alleged that he was falsely charged by a police officer as part of a conspiracy with two other police officers. The prosecution was granted leave to call rebuttal evidence to contradict the allegations of conspiracy made against the police officers. The exercise of the discretion to permit rebuttal evidence was upheld by the Court of Appeal. At p. 333 of the report Winn LJ stated:

> *"Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the defendant and where it is reasonably foreseeable by the prosecution that some gap in the proof of guilt needs to be filled by evidence called by the prosecution, then, generally speaking, the Court is likely to rule against the closing of any such gap by rebuttal evidence; but it is to be noted that the evidence*

here was not evidence in any sense probative of the guilt of the defendant, since it really consisted of no more than denials of the accusations of conspiracy and concoction of the charge made by the defendant in his own evidence.

If it has to be analyzed, the evidence called by way of rebuttal was evidence to disprove the truth of the defence, which itself consisted of an affirmative attack upon the credibility and honesty of the police officers."

In **Noel Williams v. The Queen** Privy Council Appeal No. 11 of 1996, the defence raised serious allegations of misconduct against police officers. Rebuttal evidence was permitted to meet allegations of a police conspiracy against the defendant. It was held that the discretion was properly exercised.

Having reviewed the authorities the trial judge had this to say at p. 27 of the transcript of the trial dated 26th November 2008.

"The proposed evidence, in my view, goes to rebut the defence of a police activated conspiracy generated by Inspector Boxhill to avoid being charged consequent upon the threats of the accused to him.

"If the state has evidential material which suggests or goes to establish that vehicle X was not owned or possessed by the accused on the material date, then this is relevant to a rebuttal of that particular line of defence."

The trial judge went on to grant leave to the State to call rebuttal evidence on the issue. We find no fault with the exercise of his discretion in the circumstances of this case.

Accordingly this ground fails as well.

It is convenient to deal with Ground 5 before Ground 4, for reasons that will become clear in due course.

GROUND 5

The appellant was denied a fair trial due to the failure of the State to produce two (2) exhibits, namely, the black underwear belonging to the virtual complainant and the vaginal and anal swabs taken from the virtual complainant.

After the incident on 21st March 2002, the virtual complainant was taken for a medical examination at which vaginal and anal swabs were taken. The swabs, together with the underwear she was wearing at the time, were taken by W.P.C. Horsford to the Forensic Science Centre for testing, on 22nd March, 2002. On 14th November, 2002 W.P.C. Horsford returned to the Forensic Science Centre. She was handed the underwear and a Certificate of Analysis which confirmed that human spermatozoa were found on the swabs and on the underwear. W.P.C. Horsford lodged the underwear for safekeeping with the property keeper at Central Police Station on the same day.

On 9th April 2008 while giving evidence at an earlier trial, W.P.C. Horsford indicated that when she subsequently returned to Central Police Station to collect the exhibit, it could not be found.

On 9th April 2008 for the first time the appellant stated his willingness to provide DNA, if samples exist. We have not been referred to any evidence with respect to the availability of the vaginal and anal swabs.

On these facts Mr. Scotland contends that the appellant is seriously prejudiced since he has been denied the opportunity to have DNA testing done with a view to "unequivocally" confirming his innocence.

In support of his submission Mr. Scotland referred to the case of ***R v. Beckford*** (1995) Crim. LR 712, in which the exhibit (a car driven by the appellant in a fatal accident) had been destroyed before its potential use in the preparation of the defence.

The Court considered the issue as to whether in the circumstances it was possible for the appellant to receive a fair trial. The Court noted the necessity of ensuring the fairness of the process while ensuring that those who are properly before the Court are tried according to law.

On the facts before it the Court concluded that the appellant was not denied a fair trial because of the destruction of the exhibits before he was charged.

It is to be noted that in **Beckford**, at the very outset the defence had requested that the car be tested for a defect in its steering mechanism, which was relevant to the defence.

In the instant case the appellant indicated his willingness to provide DNA for the purpose of comparison, on 9th April 2008, more than six years after the incident and after W.P.C. Horsford had indicated in her testimony that the underwear could

not be found. Had the appellant made a request for DNA testing to be carried out at the time that he was charged or at an early stage of the prosecution, his assertion of a denial of a fair trial might have carried more weight. However, having regard to the timing of his indication that he was willing to provide DNA samples, the appellant's assertion smacks of opportunism.

The issue that has been raised is whether or not in the circumstances the appellant was denied a fair trial. On an examination of the evidence the answer must be in the negative.

The trial Judge made it clear to the jury that the State's case rested on three limbs:

- the evidence of identification of the virtual complainant;
- the finding of the items by Inspector Boxhill, and
- the alleged oral statement of the appellant.

At the end of the day the Judge made it quite clear that the case rested principally on the evidence of the virtual complainant. In this case, the identification evidence was quite strong and could have supported a conviction, independently of the other two limbs. Clearly, by their verdict the jury accepted and were sure of the evidence of the virtual complainant.

To consider at this stage, whether DNA testing would or would not have exculpated the appellant is to engage in speculation.

Accordingly, this ground fails as well.

GROUND 4

The learned Judge erred in law in imposing a sentence that was too severe in the circumstances.

In this case the trial Judge imposed a sentence of 30 years hard labour for rape, 23 years for buggery and 13 years for robbery with aggravation.

In imposing sentence the trial judge considered the following aggravating factors:

- the use of an offensive weapon, namely a six inch knife;
- the rape was accompanied by buggery;
- threats to kill the virtual complainant because she had seen his face;
- an element of planning and premeditation;

- the appellant had four previous convictions – three for indecent exposure and one for being found on premises for an unlawful purpose;
- the prevalence and seriousness of the offences, and
- the lack of remorse shown by the appellant.

In his submissions, Mr. Scotland has referred us to a number of local cases on the issue of sentencing in cases of rape.

On the higher end of the scale is the case of **Dominique London v The State** (unrep.) Cr. App. No. 10 of 2003. In this case the victim was a 15 year old girl, who was raped by the appellant over an extended period on three separate occasions. She was choked to the point of unconsciousness on two occasions. She was hospitalized for six days after the incident. The offence was committed while the appellant was out on bail. A sentence of 30 years hard labour was imposed.

In ***Steve Williams v. The State*** (unrep.) Cr. App. No. 23 of 2001 the appellant was convicted of rape, buggery serious indecency and robbery with aggravation. The offences took place over a period of 1½ hours. He was sentenced to life imprisonment for the rape, not to be released before 20 years.

In **Richard Elliot v. The State**, (unrep.) Cr. App. No. 56 of 1999 the appellant was convicted of rape, buggery, serious indecency and indecent assault on a 19 years old girl. A knife was used in carrying out the offence, although no actual injury was inflicted with it. On the count of rape the trial judge imposed a life sentence not to be released before 30 years. The Court of appeal reduced the sentence to 15 years and 10 strokes.

In delivering judgment de la Bastide CJ stated as follows:

> *"It is however, necessary, to keep a sense of proportion when sentencing in circumstances of this kind…Also, it is necessary to bear in mind, though it may be difficult to imagine, there are other cases of the same kind in which the aggravating circumstances are even worse than in this case. One such feature I might mention would be the participation of more than one person in the outrage, in what is known sometimes as 'gang rape.' Also, it may be that the acts of sexual degradation are accompanied by physical violence of a greater or lesser degree."*

We bear in mind the principle outlined by the former Chief Justice in **Richard Elliot** (supra). While we note the careful approach of the trial judge in outlining the aggravating factors in this case, we consider that this case does not fall into the category of cases at the highest end of the scale.

Having regard to the circumstances of this case, and the sentences imposed in the cases cited to us, we consider the following sentences will do justice in this case:

On the count of rape - 20 years with hard labour.
On the court of buggery - 20 years with hard labour.
On the count of robbery with aggravation - 12 years with hard labour.

Accordingly, the convictions are affirmed and the sentences are varied accordingly.

P. Weekes
Justice of Appeal.

A. Soo Hon
Justice of Appeal.

R. Narine
Justice of Appeal.