TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App: 37 of 2009

BETWEEN

JASON FARFAN	Appellant
AND	
THE STATE	Respondent

PANEL:

P. WEEKES, J A

N. BEREAUX, J A

R. NARINE, J A

Appearances: Mr. K. Hogan for the Appellant
Ms. J. Honore-Paul for the Respondent

DATE DELIVERED: 26th February 2010.

JUDGMENT

DELIVERED BY: RAJENDRA NARINE, J A

On 9th June 2008 the appellant was convicted of two counts of rape and three counts of robbery with aggravation. He was sentenced to 20 years with hard labour and 10 strokes of the birch on the counts of rape and 15 years with hard labour and 12 strokes on each count of robbery. The terms were to run concurrently.

THE PROSECUTION'S CASE

On 22nd August 2003 shortly after 8.45 pm, three men including the appellant, broke down the door of a wooden house at Valencia. Inside the house were 52 year old Ashmin Mohammed, her husband Sarran Gobin, her 17 year old daughter Asha and her daughter-in-law Usha, who was eight months pregnant. The appellant and one of the men had guns.

The house was not supplied with electricity. It was lit by a bulb in the drawing room which was powered by a car battery. The partitions of the house were low allowing the light to filter into the bedrooms. There was a lighted kerosene lamp in Ashmin's bedroom.

The appellant asked for money and jewellery. Ashmin gave him $100.00. Another man took up her handbag and took out her son's identification band, 2 gold chains and a gold ring.

The appellant and one of his confederates ransacked Asha's bedroom, taking money. They had bright torch lights which were turned on. The appellant threatened to burn down the house if he didn't get more money and jewellery. The three men ransacked Ashmin's bedroom. The appellant told them that he was going to count to ten, and if he did not get any money or jewellery, he would kill them. He placed a gun to Ashmin's mouth. Another man pointed a gun at Usha.

The appellant told Ashmin to remove her earrings. Usha helped Ashmin to remove them. The appellant then ordered Ashmin to remove her clothes. She complied. He then ordered one of his confederates to have sexual intercourse with her. The man had sexual intercourse with Ashmin on a couch and on the ground. The

appellant then ordered Ashmin to lie on a table. He then had sexual intercourse with her in a rough manner. Usha could see what was happening.

At around 11.00 pm, Ashmin's son, Shaheed returned home from work. The appellant and the two other men proceeded to rob him of $425.00. They took him upstairs and made him lie on the bed next to Usha. They covered his face with clothes.

The appellant raped Ashmin a second time on the table. Once more Usha was witness to the rape. The appellant later took Asha downstairs to the outhouse, where he put a gun to her head and ordered her to take off her clothes. He then proceeded to rape her. He also made her suck his penis. He raped her a second time while one of the other men was present.

When Asha returned upstairs she saw one of the men raping her mother. When he was finished, the appellant told the other man to have sexual intercourse with Asha. The other man took Asha outside in the yard and had sexual intercourse with her for approximately one hour.

After the men left, the family hid themselves for a while, then went to a neighbour's house. There they telephoned the police. They were taken to the Valencia Police Station and to the Sangre Grande Hospital where injures were found on Ashmin and Asha.

On 7th July 2004, some eleven months later, Usha and Asha pointed out the appellant at an identification parade at which the appellant's sister, Treasure Scott was present at his request.

THE APPELLANT'S CASE

The appellant gave evidence on his own behalf and called two witnesses. He denied that he committed the offences. He claimed that he was severely beaten by the police on 3rd July 2004, and taken to hospital where he received medical attention.

Glenda Alicock, the custodian of medical records at the Arima Health Facility, produced a medical report dated 3rd July 2004. The report indicated that the appellant had a periorbital oedema of the left eye, a bruise to the lower hip, injury to the left hand, and a contusion to the right thigh.

The appellant testified that he agreed to go on the identification parade on 7th July 2004. However, at the time of the parade his lip was swollen, and he could barely see. Further, the parade was unfair since it comprised persons much younger

than him. In addition, he claimed that he was picked out only by Usha Pakeera. He further complained that he had been *"set up"* by the complainant.

His sister, Treasure Scott, testified that there were teenagers on the parade. The appellant's face was *"buffy"* and swollen and there was clotted blood in his left eye. His lips were swollen and he had a scar on his left eye. She further testified that only one of the three witnesses called at the parade, identified him

GROUNDS OF APPEAL:

On 22nd May 2009, the appellant filed the following grounds of Appeal:

Ground 1:

The learned trial Judge erred in that he misdirected the Jury on the use that could be made of the fact that in generalizing (sic) the ability of country folk to see in light of lesser quality than city dwellers.

Ground 2:

The learned trial Judge erred when he misdirected the Jury that the identification witness, being from the countryside, had acclimatized to seeing in poor light with no evidence for so doing.

Ground 3:

The learned trial Judge erred in that he misdirected the Jury by inviting them to speculate as to the ability to the identification witness to see in poor lighting.

Ground 4:

The learned trial Judge erred in law when he failed to fairly present a weakness in the identification as required by Turnbull guidelines, whereas, he presented it as a strength namely the ability of country folk to see in poor light (sic).

Ground 5:

The learned trial Judge failed to properly analyse the effect of the identification witness, having only given a first description after the identification parade and how that diminishes the reliability of her identification (sic).

On 29th June 2009 the appellant filed additional grounds of appeal. These were:

Ground 1:

The learned trial Judge failed to analyze, as required by Turnbull, the length of time between the event and the identification of the accused. The Turnbull guidelines required the learned trial Judge to indicate the potential weaknesses in the identification of the accused. One such weakness would be the length of time between the witnesses first seeing the accused at the scene and his subsequent identification at the parade.

Ground 2:

The learned trial Judge either failed to exercise the discretion or exercised his discretion wrongfully in allowing the association with Ishmael to enter into evidence as its prejudice may have outweighed any potential probative value.

Ground 3:

Having failed to exclude the facts concerning Ishmael the learned trial Judge filed to analyze how it was possible for an association with Ishmael and the accused could have led to a double mistaken identification of the accused, especially where the identifying witnesses are in communication with each other.

Ground 4:

The learned trial Judge failed to properly and fairly put the case for the defence in that:

1. The learned trial Judge did not indicate the Turnbull weakness on a crucial and pivotal area, such as poor lightening, ability to see and the length of time after the initial attack and the subsequent identification.
2. The tone and manner of presenting the possibility of a witness or series of witnesses to be mistaken (page 22 lines 8-15) without pointing out not only does the law say it is possible for more than one witness to be mistaken but that it has in fact happened that there have been wrongful convictions on mistaken identifications. This would have forced the jury to look at the evidence with greater scrutiny if it was pointed out that there had been wrongful convictions, that it was not just a theoretical possibility (sic).
3. The learned trial Judge either failed to exercise the discretion or exercised his discretion wrongfully in allowing the association with Ishmael to enter into evidence as it's prejudice may have outweighed any potential probative value.
4. Having failed to exclude the facts concerning Ishmael the learned trial Judge failed to analyze how it was possible for an association with Ishmael and the

accused could have led to a double mistaken identification of the accused, especially where the identifying witnesses are in communication with each other.

5. The learned trial Judge failed to properly analyze the no first description issue.

The learned trial Judge failed to analyze that the accused may have wanted to distance himself from a proper identification and his being identified thereon for reasons other than guilt.

There was much overlap and repetition in the grounds of appeal.
At the hearing, the Court sought, with the assistance of defence counsel to identify the major areas of complaint as reflected in the grounds of appeal.
These areas are essentially:

- the Judge's summation on the Turnbull guidelines.
- the fairness of the identification parade.
- the evidence in relation to one Ishmael, and its possible impact on the defence.
- severity of sentence.

THE TURNBULL ISSUES:

The appellant complains that the trial Judge did not indicate the weaknesses in the identification evidence with respect to:

1. The lighting conditions.
2. The length of time between the incident and the identification parade.
3. The first description of the appellant being given only after the identification parade.

Further he complains that the trial Judge failed to indicate to the jury that there have been wrongful convictions in the past based on mistaken identification.

With respect to the lighting conditions the specific directions which were targeted by the appellant are:

> *"Those of you who have grown up or spent time in the countryside without electricity, may use your experience of that to understand and to interpret the evidence of these country people in deciding whether when they say that the lighting was good to enable them to see who came into their house."*

> *"So you have a scenario now where people who are from the countryside, and this is a matter you are entitled to factor in, these are country folks. These are not city folks. These are not folks who are accustomed to street lights outside their gap on the road. They are in Sans Quarry in Valencia, no electricity, do they go around in their house at night bumping into each other …… Why are they able to do that? Because they are aided by kerosene lamp, flambeaux and in some cases, you may want to consider, battery from car."*

The appellant complains that this was a misdirection. The Judge invited the jury to make a generalization about the ability of country folk to see in light of lesser quality, without any evidential basis for so doing. The appellant further complains that the Judge in fact converted a weakness in the identification evidence into a strength.

The complaints do not bear scrutiny. The trial Judge invited the jury to use their collective experience in analyzing the evidence. It was open to the jury to decide from their own experience whether rural folk who do not have electricity in their homes are able to see adequately by kerosene lamp, flambeaux and bulbs powered by car batteries.

The trial Judge did not invite the jury to speculate on this issue. He drew the jury's attention to the evidence of Ashmin Mohammed, Asha Gobin and Usha Pakeera with respect to their ability to see in the light that was available to them.

It was the evidence of Ashmin Mohammed that there was a lamp in her bedroom, which was lighting. There was a light attached to the battery in the drawing room, which was *"all bright."*

Asha Gobin's evidence was that the battery light remained on. There were reflections from the light bulb and the kerosene lamp. She could see *"well enough."* There was *"sufficient light."* There was the reflection of light from the living room and from the lamp in her mother's bedroom coming from the top of the partition. The assailants' torch lights were on.

Contrary to the submissions of the appellant, at no time did the trial Judge refer to the ability of country folk to see in light of lesser quality as a strength. In fact, the Judge compared the lighting in a closed environment inside the house, with the moonlight outside the latrine and commented that *"there are weaknesses in the*

strength of the prosecution's case for identification outside." While the Judge may have misspoken, it was clearly conveyed to the jury that there were weaknesses with respect to the lighting outside. The Judge further invited the jury to consider the lighting in the context of weaknesses in the identification evidence.

Accordingly there is no merit in the appellant's grounds with respect to the Judge's directions on the lighting conditions.

The appellant further contends that the Judge failed to analyze the length of time that elapsed between the incident and the identification parade. Among the matters which the trial Judge invited the jury to consider were:

- the length of the observation
- the distance
- the lighting
- whether or not the witness had seen the person before
- any difference between the description given to the police and the appearance of the appellant and,
- the time that had elapsed between the original observation and the identification to the police.

It is true that the Judge did not go on to explain that the longer the time that elapsed, the less reliable the subsequent identification might be, and perhaps it may be desirable for a trial Judge to do so. However, the jury would have considered, as a matter of common sense, the effect of the lapse of time on the reliability of the identification. Accordingly, there is no merit in this ground.

The third issue had to do with the fact that the first description of the appellant by Usha Gobin was given to the police after the identification parade. It is the usual practice that a description of the assailant is recorded in the first report or statement given to the police. This was not done in this case. The trial Judge characterized it as *"sheer slackness on the part of the police."* In the summation, the issue was dealt with in the context of an inconsistency by omission, the suggestion of the defence being that she had not given such a description at the first opportunity she had to do so. The Judge invited the jury to consider her failure to give a description at the first opportunity in relation to the reliability of her evidence.

The classic Turnbull direction requires the trial Judge to point out as a weakness any significant difference between the first description given by a witness

with the appearance of the Accused. If there is such a difference, it impacts on the reliability of the identification.

In this case no description was given to the police at the time of the incident. The first description was given by Usha Gobin after the identification parade. This matter might have been of greater importance had Usha been the only identifying witness, or the only person present. The evidence raises this issue only in relation to Usha. Asha was also present and identified the appellant. However, it is difficult to see how the failure to give a first description before the identification is a weakness which the trial Judge is required to bring to the attention of the jury. The requirement of such a direction becomes necessary if there is a material difference between the first or any description and the appearance of the Accused. There being no (first) description, no such difference arises that ought to have been brought to the attention of the jury.

The appellant also complained that the Judge failed to indicate to the jury that more than one witness can be mistaken as to identification, and that persons have been wrongly convicted in the past on the basis of evidence of mistaken identification.

In his summing up, the trial Judge asked the jury to consider the possibility of both identifying witnesses being mistaken. He then went on to direct the jury that *"the law says that more than one mistake could be made on an identification, two people could be mistaken."* Earlier in his summing up, he had directed the jury as follows:

> *"To avoid the risk of any injustice in this case such as has happened in some cases in the past, I must therefore warn you of the special need for caution before convicting the accused in reliance on the evidence identification. A witness who is convinced in her own mind may, as a result, be a convincing witness but may nevertheless be mistaken. And the same may apply to a number of witnesses, as indeed in this case where you have the two women who alleged that they were raped, pointing their fingers at the accused and saying he is the rapist."*

Clearly the Judge emphasized to the jury that two witnesses may be mistaken. He also pointed to the risk of injustice in this case, *"such as has happened in the past"* and went on to warn the jury of the special need for caution before convicting

on evidence of identification. By *"risk of injustice"* the trial Judge was obviously alerting the jury to the risk of a wrongful conviction in this case, such as has happened in the past.

The Judge's directions on this aspect of the matter, and his application of the Turnbull guidelines were unobjectionable. Accordingly, there is no merit in the grounds raised in relation to the Turnbull issues.

THE FAIRNESS OF THE IDENTIFICATION PARADE:

The specific ground of appeal on this issue was:

4. *"The learned trial Judge failed to properly and fairly put the case for the defence in that ………the learned trial Judge failed to analyze that the accused may have wanted to distance himself from a proper identification and his being identified thereon for reasons other than guilt."*

The Court had some difficulty in understanding the meaning of this ground and called upon Mr. Hogan to explain it. Mr. Hogan confessed that as he did not draft the grounds, he had a similar difficulty. In the end Mr. Hogan submitted in essence that the identification parade was unfair because the appellant stood out by reason of the following:

1. The Accused had injuries to his face.
2. He was wearing a red jersey which was given to him by his sister Treasure Scott who was his representative on the parade.

In his summation, the trial Judge directed the jury on the requirements of an identification parade. He pointed out that the men on the parade *"must fit the general description of the suspect, who must not stand out like a sore thumb."* The Judge went on to give examples of the suspect standing out on the parade by reason of being dressed differently from the other men, and indicated that that would be unfair.

The trial Judge referred to the evidence of the Inspector who conducted the parade, who testified that the appellant's face was not swollen, nor did he have a scar or cut under his left eye. He did not have clotted blood by his eyes, nor was his lip swollen.

The trial Judge went on to direct the Jury:

> *"Because understand this, if what the accused is saying is true, that he stood out because of his face, he stood out*

> *because of what his sister had said, alleged, that he was set up on the parade……if you find that there is any such smoke, not even the fire, smoke, then that parade, in so far as that identification is concerned, would be no good……"*
> *"So once it is you are satisfied that the State has proven and that there is no doubt about it in your minds that the parade was fairly conducted, then you may act on the evidence."*

From the Judge's summation, it is clear that he brought the factual issues clearly into focus for the jury's consideration. It is a question of fact for the jury to find whether or not the appellant stood out on the parade. The Judge was at pains to impress on the Jury the importance of the fairness of the parade and made it clear to them that they must have no doubt in their minds on this issue, before they can act on the evidence.

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

THE "ISHMAEL" ISSUE

The appellant was jointly charged for these offences with one Ishmael Blackwell, who did not appear at the trial. Asha Gobin testified that on the night of the incident she saw one Elijah, a man she had known some seven years before. She believed that his name is Ishmael. The appellant admitted in his evidence that he is charged together with Ishmael Backwell. In her evidence Treasure Scott, the appellant's sister, testified that Ishmael Blackwell is her cousin.

The appellant complains that the trial Judge should not have admitted the evidence with respect to Ishmael, since its prejudicial value outweighed any probative value that it had. Further, the association of Ishmael with the appellant could have led to *"a double mistaken identification."*

It is interesting to note that no connection was made between the appellant and Ishmael on the State's case. It came out in the cross- examination of the appellant that he was charged together with Ishmael Blackwell, whom he knew. It emerged from the evidence of Treasure Scott that Ishmael is her uncle Ephraim's son.

In his summation the trial Judge was at pains to point out that the jury were not required to decide whether Asha Gobin correctly identified Elijah as one of the men. It was not an issue in the case. Further, the trial Judge made it clear to the jury

that Asha could have been equally mistaken when she alleged that she made out Elijah that night. He further directed the jury that they should not assume that because she made out Elijah, that she was *"necessarily correct"* in her identification of the appellant.

The Jury went on:

> *"Now remember, you cannot make that connection. It is wrong for you to make any assumptions because you are not called upon to decide whether she made out Elijah in this case. Your task is simply to decide whether, given the circumstances there that night, she correctly made out the accused……"*

Having regard to the Judge's clear and cogent directions on this issue, we hold that there is no merit in this ground.

SEVERITY OF SENTENCE:

The appellant complains that the sentences imposed were too severe. At the hearing of this appeal the Court noted that no written submissions were presented on this ground and invited Mr. Hogan to put his submissions in writing. Upon inquiry by the Court, however, Mr. Hogan indicated that the ground was still being pursued by the appellant, but conceded that having regard to the particular facts of this case he would expect the sentence to be *"on the extreme side of the fence."*

The Court further drew Mr. Hogan's attention to the aggravating factors in the case namely:

- multiple assailants
- the use of weapons
- repeated acts of violations
- multiple victims and
- the commission of the offences over an extended period of time.

The Court requested Mr. Hogan to address these issues and to consider whether there was any reason why the Court should not increase the sentences imposed. Mr. Hogan was given until 15th October, 2009, with extensions, to file his submissions. None have been forthcoming.

The sentences of this court have varied depending on the presence or absence of aggravating circumstances. At the higher end of the scale a sentence 30 years has

been imposed for rape: *Richard Elliot v The State* Cr. App. No. 56 of 1999 and *Dominique London v The State* Cr. App. No. 10 of 2003.

On the lower end of the scale sentences of 12-15 years hard labour have been imposed: *Marlon Roberts v The State* Cr. App. 19 of 2007, *Lennox Millette was The State* Cr. App. No. 22 of 2001, *Prakash Manraj v The State* Cr. App. No. 109 of 1998, *Ramchand Rampersad v The State* Cr. App. 97 of 1999, *Steve Williams v The State* Cr. App. No. 42 of 2000, *Gregory Donnor v The State* Cr. App. No. 25 of 2005.

The trial Judge in this case was moved to say that in his many years on the Bench, he had *"never come across a criminal course of conduct as heinous as this one."* Indeed, we find it difficult to imagine criminal conduct more reprehensible.

The aggravating factors that came to mind are:

- the forcible entry into the victim's home after shooting the door.
- the use of guns which were pointed at their victims with threats to kill them if they did not hand over their money and jewellery.
- the commission of the offences by multiple assailants on multiple victims.
- the repeated rape of the mother in the presence of her daughter-in-law and daughter.
- the repeated rape of the daughter who was just 17 years old.
- the fact that one of the victims was 8 months pregnant at the time.
- the commission of the offences over an extended period lasting more than two hours, during which the victims were repeatedly raped, robbed and terrorised.

Having regard to the extreme aggravating circumstances of this case we are of the view that the sentences for rape must be increased to the higher end of the scale. We see no reason to interfere with the term of imprisonment imposed for the three counts of robbery with aggravation.

However, the Judge erred in imposing a combined number of more than 20 strokes. Section 4 of the Corporal Punishment (Offenders over Eighteen) Act Ch. 13:04 prescribes that the total number of strokes imposed must not exceed 20.

Accordingly we dismiss the appeal against conviction and vary the sentences as follows:

1. On each of the two counts of rape the appellant will serve a sentence of 30 years hard labour, and receive 10 strokes of the birch.
2. On each of the 3 counts of robbery with aggravation the appellant will serve a sentence of 15 years hard labour.

3. The sentences will run concurrently and will begin from the date of conviction.

P. Weekes J A

N. Bereaux J A

R. Narine J A