THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
PORT OF SPAIN

CR No. T0032 of 2015

BETWEEN

THE STATE

AND

GUY RAMREKHA

Before the Honourable Mr. Justice Hayden A. St. Clair-Douglas

Appearances:

Mrs. Maria Lyons-Edwards and Mr. Ronnie Leon Bassant appeared for The State

Mr. Yves Nicholson appeared for Guy Ramrekha.

RULING ON SUBMISSION OF NO CASE TO ANSWER

1. Guy Ramreka is on trial at the criminal assizes on an indictment that alleges serious indecency, as count 1, and kidnapping, as count 2. This is a ruling in respect of a submission, made on behalf of the accused at the close of the case for the prosecution, that he has no case to answer.

2. This trial is being conducted before me without a jury. My responsibility relates to issues of law, but I am also the arbiter of the facts. Because this is a submission of no case to answer, the question to be decided is one of law only; it is

unnecessary and inappropriate for me to make any findings of fact. I must decide whether there is evidence that is not inherently incredible, which, if it were to be accepted as truthful and accurate, would establish the essential elements of the offences charged in the indictment. Although I am not required to make any findings of fact, I must, for the purposes of ruling on a submission of no case, take the prosecution's case at its highest.

3. Serious indecency is defined by the Sexual Offences Act as an act, other than sexual intercourse, involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.

4. The offence of kidnapping consists of the taking or carrying away of one person by another by force or fraud, without the consent of that person and without lawful excuse. On a charge of kidnapping, the prosecution do not have to prove that the kidnapper carried the victim to the place he intended; the prosecution only needs to prove a deprivation of liberty and carrying away from the place where the victim wished to be.

The prosecution's case.

5. The victim gave evidence that on Sunday, May 9, 2010, she was at her home at Top Road, Pembroke, Tobago. At around 1:30 p.m., the victim left her home, crossed the road, and went and sat down outside a wooden building that was across from her house. The victim was 10 years old in May 2010. There was a disused car seat on the ground at the side of the wooden building. The victim sat down on the car seat. A person known as "Tall Man", or "Parker", worked at the wooden building. He was in the building when the victim came and sat down on the car seat.

6. The victim testified that while she was sitting on the car seat she saw an Indian man walking toward her. She had not known that man before. That man came

and sat next to her on the car seat. He had a black plastic bag in his hand. She said that the man offered her 4 dollars which she refused; the man pushed the bills into her pocket. She testified that Tall Man pushed his head through a window of the wooden building while she and the Indian man were seated on the car seat. Tall Man told her to go home.

7. The victim went home but she did not remain there; she went back over to the wooden building. When she went back to the wooden building the Indian man was still there. The Indian man asked her to come with him and he grabbed her by the arm and dragged her into a cocoa field where he put her to lay down on some dried cocoa leaves. He asked the victim to take off her clothes and when she refused he attempted to take down her pants and underwear. The victim testified that the man then began poking (she said "chooking") her vagina with his finger. He then lifted her up and spread some newspaper on the ground. He put her to lie down on the newspaper.

8. The victim testified that Tall Man again pushed his head out of a window of the wooden building and loudly enquired what was happening. This caused the man to pick up the black plastic bag and run off. The victim said that she then pulled up her clothes and went home. Tall Man subsequently went to the victim's home and informed her father what had taken place. The victim's father took her to the police station where a report was made.

9. Kerry Job gave evidence in the case for the prosecution. Job testified that around 1:45 p.m. on May 9, 2010 he was by "Joshua" – who lived on Cardiff Road. He and Joshua were "making a cook". Joshua went to the pipe to wash some chicken. Job saw an Indian man coming along Cardiff Road with the victim. Job testified that the man's hand was around the victim's neck. He saw them walking along the road then he saw them turn off into the cocoa.

10. Job testified that he and Joshua then entered the cocoa. At first he did not see the man and the victim; this was because they were on the other side of an immortelle tree that had been obscuring his view. When he got to the other side of the immortelle tree he saw that the man had spread some newspapers on the ground. Job testified that the victim's pants was unbuttoned and her zip was down. He testified that he asked the victim what had happened and she made a complaint to him of sexual assault by the man.

11. Job testified that he told Joshua to go and get a piece of wood; when he did so he was trying to hold the man – who was trying to escape. The man eventually got away and ran out of Cardiff Road. Job testified that he eventually went to the victim's home and told her father what had happened. Job eventually gave a statement to the police.

12. The evidence disclosed that the victim and Kerry Job attended identification parades where each of them pointed out the accused. The issue that is at the heart of this submission of no case has to do with the conduct of those identification parades.

The submission.

13. The victim described the man who came up to her as a tall, brown-skinned, Indian man who had a beard. Kerry Job did not give a description of the man; he testified that he had known the man before May 9, 2010. Under cross-examination, both the victim and Job confirmed that they had pointed out the man with the beard at the identification parade. Both the victim and Job confirmed that the accused was the only man on the lineup of the identification parade who had a beard.

14. The Identification Parade had been conducted by Hugh Jack, who, in May 2010, was an acting Inspector of Police. Under cross-examination, Mr. Jack

was asked whether the person who had been pointed out by the witnesses was the only person who had a beard. He stated that all the persons on the parade had beards.

15. Counsel for the accused has submitted that because the accused was the only person who had a beard among the persons who formed the parade, he would have stood out. Counsel contends that the evidence in the prosecution's case is manifestly unreliable – because of the fact that the accused stood out at the identification parade. Counsel submitted that the identification evidence is poor because of the manner in which the identification parade was conducted.

16. The Judges' Rules for Identification Parades provide that the members of the parade should as far as possible resemble the suspect in terms of race, colour, age, height and general appearance. [1] The objective of this requirement is to test the witness's ability to discern, and then point out the suspect from among other persons, all of whom resemble in terms of physical characteristics.

17. The contention that has been made in the submission on behalf of the accused is that he stood out on the parade, especially for the victim, who had described her assailant by reference to his beard. The question whether the accused stood out is connected with, and follows from, the factual finding of the physical features of the participants of the identification parade. The question whether the accused stood out is, equally, a question of fact. These factual issues will not be determined at this stage of a submission of no case to answer.

[1] Judges' Rules – Identification Parades, Trinidad and Tobago Gazette Vol 33 No 190, 16th September, 1994, rule 9.

18. The state of the evidence is that two witnesses who attended the parade testified that the accused was the only member of the parade who had a beard; however, the police officer who was responsible for the composition of the parade testified that all the members had beards. If the accused was the only participant who had a beard, he would undoubtedly have stood out.

19. Because this is a submission of no case to answer, I must determine whether evidence has been presented in the case for the prosecution which, if accepted, is capable of establishing the elements of the offences charged. To the extent that there is a factual divergence on the evidence that has been presented, I am not required to resolve that issue at this time. I must proceed on the assumption that inferences most favourable to the prosecution, which are reasonably open, will be drawn. Although there are two sets of witnesses, both of whom testified to the same identification parade, whose testimonies differ as to an aspect of the physical characteristics of the participants, it is not for me, at this stage to decide whom I believe.

20. If it were eventually to be determined, upon an examination of the totality of the evidence, that the accused did not stand out among the participants of the parade by virtue of his beard, there would be no issue to be discussed. For purposes of ruling on the submission that has been made on behalf of the accused, I will proceed to examine the law on the assumption that it has been found as a fact that the accused was the only participant on the parade who had a beard, and that the parade was, for that reason, unfairly conducted. Does this unfair parade mean that this trial ought not to proceed? Does this unfair parade mean that a submission of no case, founded on the proposition that the prosecution's evidence is of a tenuous character and is manifestly unreliable, should succeed?

The law: submission of no case to answer and identification evidence.

21. The discussion of the issues thrown up by counsel's submission must begin with consideration of *R v Galbraith*[2] which established that if there is no evidence that the crime alleged has been committed by the defendant, or if there is some tenuous evidence that is inherently weak or vague or inconsistent, then the case should be stopped by the trial judge. In addition, where the judge concludes that the prosecution evidence, taken at its highest, is such that a properly directed jury could not properly convict on it, the judge should stop the case. But where the strength or weakness of the prosecution's case depends on the view to be taken of a witness's reliability, or of other matters which are within the province of the jury – so that it would be possible for a properly directed jury to convict, then the judge should allow the case to be decided by the jury. That this is unquestionably the test to be applied on a submission of no case in Trinidad and Tobago has been confirmed by the Court of Appeal in *The State v Kerlan George*.[3]

22. In circumstances where proof that an offence was committed by the person on trial depends on the correctness of evidence of identification, the guidance set out in *R v Turnbull*[4] continues to be the starting point.

23. The English Court of Appeal has said in *R v Turnbull*[5] that where the quality of the identification is poor, the case should be withdrawn from the jury unless there is other evidence capable of supporting the identification. This court entertains no doubt that *R v Turnbull,*[6] and the guidance of the English Court of Appeal are well known even to those not steeped in the criminal law. As reported in the *Law Reports*, the headnote of *Turnbull* is as follows:[7]

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[2] *R v Galbraith* (1981) 73 Cr. App. R. 124
[3] *The State v Kerlan George* Crim App No P 002 of 2011.
[4] *R v Turnbull* [1977] Q.B. 224
[5] *R v Turnbull* [1977] Q.B. 224
[6] *R v Turnbull* [1977] Q.B. 224
[7] [1977] Q.B. 224

> Whenever a case against a defendant depends wholly or substantially on the correctness of one or more identifications of the defendant, which the defence alleges to be mistaken, the direction to the jury should include a warning of the special need for caution before convicting the defendant and the reasons for that caution.
>
> Further, the quality of the identification should be considered and the jury should be directed to examine closely the circumstances in which the identification was made. Where the quality of the identification is good, the jury can safely be left to assess the value of the evidence, but, where the quality is poor, the case should be withdrawn from the jury unless there is other evidence capable of supporting the identification. The judge should direct the jury on the evidence that is capable of supporting the identification.

24. On reading the headnote, one might be forgiven for forming the impression that the circumstance where the case should be withdrawn from the jury is that where the quality of the *identification* (that is to say, the *pointing out* of the suspect) is poor. However, the judgment delivered by Lord Widgery CJ reveals that the Court sought to ensure that careful consideration would be given to the quality of the evidence at trial of *the circumstances under which the purported identification of the suspect came to be made*. Lord Widgery discussed the type of situation where the reliability of identification evidence might come to be considered:[8]

> All these matters go to *the quality of the identification evidence*. If the quality is good and remains good at the close of the accused's case the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.
>
> In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess *the value of the identifying evidence* even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. …

[8] [1977] Q.B. 224

> When, in the judgment of the trial judge, *the quality of the identifying evidence* is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.[9]

It is therefore the quality of the evidence of identification, rather than the circumstances of the "pointing out" of the suspect that the decision in *Turnbull* directs attention to.

25. *R v Turnbull*[10] provided guidance on the treatment by the court of evidence that relates to the identification (or recognition) of the perpetrator by the witness/victim as the offending unfolded; it does not deal with the issue of identification (pointing out) of the suspect after the alleged offence – during the course of the police investigation. In the United Kingdom, the Police and Criminal Evidence Act 1984 contains codes of practice that govern, inter alia, the identification of suspects by witnesses to police officers. The House of Lords has ruled, in *R v Forbes*,[11] that Code D, which dealt with eyewitness identification procedure, placed a mandatory obligation on the police to conduct an identification parade whenever the suspect disputed an identification. This obligation remained even where there had previously been a "full and complete" or "unequivocal" identification of the suspect by the witness. From the discussion of the issues in the appeal in *Forbes*, it is clear that the issue of the identification (the pointing out) of the suspect during the course of the police investigation is distinct from that of the identification (or recognition) of the suspect by the witness as the offence unfolded. This distinction is discussed further below.

[9] Emphasis added
[10] *R v Turnbull* [1977] Q.B. 224
[11] *R v Forbes* [2001] 1 A.C. 473, [2001] 1 All E.R. 686, [2001] 1 Cr. App. R. 31

26. The relationship between the judge's duty, pursuant to *Galbraith*, to withdraw the case from the jury's consideration where the prosecution's evidence lacks an element of the definition of the offence, or where the evidence is tenuous or inherently weak, and the judge's duty, pursuant to *Turnbull*, to withdraw the case where the quality of the identification evidence is poor, was clarified by the Privy Council in *Daley v R.*[12] In *Daley*, the Board explained that *Galbraith* was intended to deal with the situation where a judge forms the view that the prosecution's witnesses are not believable. Since it was not his duty to decide the facts of the case (including whether a witness was or was not speaking the truth), it was wrong for him to stop the case because he disbelieved witnesses. The judge's duty in identification cases, however, is different. The guidelines laid down by the court in *Turnbull* require the judge to carry out a qualitative assessment of the identification evidence – assessing, not the honesty or credibility of the witnesses, but the reliability of the identification evidence – that is the evidence of the circumstances under which the victim/witness identified (or recognised) the perpetrator as the offence unfolded. Under *Turnbull*, the case would be withdrawn from the jury if the examination of the quality of the identification evidence reveals that it is inherently unreliable – and therefore not sufficient to found a conviction.

27. The Privy Council made it clear in *Daley*, that a judge should uphold a no case submission in an identification case not because he is of the view that a witness is lying, but because the identification evidence – even if it is coming from an honest or credible witness, is founded on a base that is so slender that it is unreliable and therefore not sufficient to found or base a conviction.[13] The qualitative assessment that the judge is required to carry out in *Turnbull* is intended to

[12] *Daley v R* [1994] 1 A.C. 117
[13] *Daley v R* [1994] 1 A.C. 117, 129.

remove from the jury's consideration evidence that has been demonstrated over time to be a possible source of injustice.

28. But the decisions in *Turnbull* and *Daley* relate to what I have described as evidence that has to do with the unfolding of the offence, and the opportunity that the victim/witness had to perceive the features of the perpetrator – with the result that the victim/witness claims eventually to identify (or recognise) the perpetrator. These decisions do not relate to the (separate) issue of the obligation on the part of the police to build certain safeguards into their investigation – in the context of the *testing* of the ability of the victim/witness to correctly point out a suspect who has been taken into custody.

29. It has been noted that the purpose of an identification parade is to test the ability of the witness to (correctly) point out the suspect from among persons of similar appearance and physical characteristics. It has been noted that the guidelines state that the members of the parade should as far as possible look like the suspect in terms of race, colour, age, height and general appearance.[14] What is the effect of an identification parade where this desired blending-in between the suspect and the members of the parade was absent?

30. In *The State v Barrow*[15] the appellant had been convicted of robbery. In making his report to the police, the victim had described the robber as a short, dark, negro man with a scar on the left side of his face. When the identification parade was carried out after the arrest of the appellant, he was the only member of the parade who had a scar on the left side of his face. The Court of Appeal of Guyana held that the identification parade had been a farce; it had been no test of the witness's ability to point out the assailant since he could have picked out no one other than the lone man with a scar on the left side of his face. The court stated that the

[14] n 1 [16] above.
[15] *The State v Barrow* (1976) 22 WIR 267

parade had not been fairly conducted because the appellant was the only person on the parade with facial scarring.

31. Having determined that the identification parade had not been fair, the court made it clear that it had been the responsibility of the trial judge to explain the basis of the unfairness to the jury; he should have directed the jury to look at the unfairness and decide whether it affected the weight of the identification evidence at the trial.[16] The trial judge had failed to do so.

32. In *The State v Mayers*[17] the 11-year-old victim was accosted and assaulted by a man whom she described to the police as a negro man with an afro hairstyle and wearing a little beard. Having been convicted, the appellant complained that he had been the only person on the parade with an afro hairstyle. The Court of Appeal of Guyana found that the identification parade had been unfair, and that the appellant had not received a fair trial because the trial judge had not dealt with the unfairness of the parade in his directions to the jury.

33. I have discussed above[18] that the House of Lords, in *R v Forbes*,[19] ruled that Code D of the Police and Criminal Evidence Act 1984 placed a mandatory obligation on the police to conduct an identification parade whenever the suspect disputed an identification. This obligation remained even where there had previously been a "full and complete" or "unequivocal" identification of the suspect by the witness. The victim/witness in *Forbes* had just withdrawn cash from an ATM when he was confronted by a man who attempted to rob him. He was able to escape the would-be robber and retreat to the safety of a waiting car. As he drove off he saw the assailant – they made eye contact, and the assailant spat at the car as it passed.

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[16] *The State v Barrow* (1976) 22 WIR 267, 276 – 277: "If the trial judge had given adequate directions a court might not have interfered even though the identification parade was not a fair and reliable test. But the jury were left free to approach the issue of identity as if it was." (1976) 22 WIR 267, 277 per Haynes C.
[17] *The State v Mayers* (1981) 30 WIR 189
[18] [25] above.
[19] *R v Forbes* [2001] 1 A.C. 473, [2001] 1 All E.R. 686, [2001] 1 Cr. App. R. 31

The police were immediately contacted; the victim/witness was placed in the police vehicle and they drove him around the streets in search of the assailant. The victim/witness eventually pointed out the appellant. When the appellant was taken into custody he repeatedly asked for an identification parade. No parade was held. The circumstances of the attempted robbery, the eye contact and the reaction of the alleged robber of spitting at the passing car, and the almost immediate apprehension of the alleged robber – with the victim, in effect, presenting the suspect to the police - were discussed in *Forbes* as being a "full and complete" or "unequivocal" identification of the suspect. Despite the circumstances in which the alleged robber came to be identified, the House of Lords ruled that the relevant Code under the Police and Criminal Evidence Act 1984 imposed a mandatory obligation on the police to carry out an identification parade. There had been a breach of the Code – because that mandatory obligation had not been carried out.

34. But the discussion did not end there. That the issue of the circumstances under which the victim/witness came to identify (or recognise) the perpetrator is different from the question of whether the police conducted proper identification procedures as part of their investigation into the offence is borne out by the approach of the House of Lords in *Forbes*. After an examination of the Code in its original and amended forms, and after examination of the authorities, the House of Lords arrived at the conclusion referred to immediately above. Having concluded that there had been a breach of the Code because it imposed a mandatory obligation to hold an identification parade, the House of Lords went on to consider the effect of the breach. In addressing its mind to the effect of the breach of the Code, Lord Bingham made the following observation:

> It was readily and rightly accepted for the appellant that even if the failure to hold an identification parade was (as we have concluded) a breach of Code D, paragraph 2.3, *it does not necessarily follow that the evidence of Mr Tabassum's identification should have been excluded*. That would

> depend on an exercise of judgment under section 78 of PACE, taking account of all the circumstances of the case.[20]

35. When they came to evaluate the evidence of the victim/witness, the House of Lords agreed with the assessment of the Court of Appeal that that evidence was strong and reliable; Lord Bingham quoted from the judgment of the Court of Appeal:

> 'The evidence was compelling and untainted, and was supported by the evidence (which it was open to the jury to accept) of what the appellant had said at the scene. It did not suffer from such problems or weaknesses as sometimes attend evidence of this kind: as, for example, where the suspect is already visibly in the hands of the police at the moment he is identified to them by the complainant.'[21]

The House of Lords discussed the approach that should have been taken by the trial judge's summing up in the face of the breach of Code D. The judge should have explained the purpose and objective of an identification parade to the jury, making it clear that there had been a breach of the Code, as a result of which the suspect had lost the benefit of the safeguard that an identification parade would normally have provided. The judge should then have invited the jury to consider the possible effect of the breach, directing them to take account of the fact that the suspect had lost the benefit of the safeguard provided by the identification parade, and further directing them that they should take account of that fact in their assessment of the entire case and give it such weight as they considered appropriate.[22]

[20] [2001] 1 A.C. 473 [23] (Lord Bingham of Cornhill) (emphasis added).
[21] [2001] 1 A.C. 473 [26] (Lord Bingham of Cornhill).
[22] [2001] 1 A.C. 473 [27] (Lord Bingham of Cornhill).

36. Having recognised that there had been a breach of the Code, and having noted that the recorder had failed to direct the jury on the breach and had failed to direct them to take the breach into consideration in their assessment of the case as a whole, the House of Lords then went on to consider whether the recorder's failure to direct the jury on the breach had the result that his trial had been unfair. The House of Lords concluded that the trial had not been unfair.[23]

37. The point that I take away from *The State v Barrow,*[24] *The State v Mayers,*[25] and *R v Forbes*[26] is that the fairness of the conduct of the identification parade is a separate, distinct issue from the fairness of the trial. The question of the admissibility or inadmissibility of evidence related to the identification parade is separate from the question of the admissibility of evidence related to the circumstances under which the identification (or recognition) came to be made. The *identification parade* in *Barrow* had been conducted where the suspect was the only person with a prominent scar on the left side of his face; the identification parade was unfair because the suspect stood out prominently from the other members of the parade. He stood out by means of the distinguishing feature by which the witness claimed to be able to identify him. The *trial* in *Barrow* was unfair because the trial judge failed to specifically identify for the jury the feature of the identification parade that made it unfair; he failed to explain the constituents of a proper identification parade; he failed to direct the jury that they had to determine the extent to which the unfair parade affected the weight they would attach to the identification evidence at the trial.[27]

38. The other point from *Barrow* and *Mayers* is that evidence that flows from an identification parade that was carried out in an unfair manner may be regarded as

[23] [2001] 1 A.C. 473 [28].
[24] (1976) 22 WIR 267
[25] (1981) 30 WIR 189
[26] [2001] 1 A.C. 473
[27] *The State v Barrow* (1976) 22 WIR 267, 276 – 277

nugatory, but the fact of that unfair identification parade, and that nugatory evidence do not mean *per se*, and without more, that a submission of no case must succeed. It is the responsibility of the trial judge, where the identification parade has been found to have been unfair, to direct the jury on the unfairness of the parade – ensuring that they understand why the parade had been unfair, and that they are required to take into consideration the improper procedure adopted at the parade when they come to consider the weight of the identification evidence that comes from the witness.

39. I am sitting in this trial as judge of the law as well as of the facts. I have noted above that it is not appropriate, at the stage of a submission of no case to answer, to make factual findings or determinations on the evidence; I must determine the issue taking the evidence in the case for the prosecution at its highest.[28] If my examination of the evidence at the end of the trial leads me to the conclusion that the accused stood out at the identification parade and that the parade had not been fairly conducted, I must then direct myself on (and give careful consideration to) the circumstances of the identification parade and the fact that it did not constitute an effective test of the ability of the witnesses to point out the suspect. I must also take the unfairness of the identification parade into consideration when I come to assess the evidence of the relevant witnesses.

40. But the question to be determined on the application that is under consideration at present is whether there is evidence before me that the offences alleged against the accused have been committed. In determining that issue, and in examining the evidence that has been presented thus far in the case for the prosecution, I must take that evidence at its highest. Because the prosecution's case is based on evidence of visual identification, and because the accused disputes that evidence, I must carefully examine the evidence of the

[28] [18 – 19] above.

circumstances of the identification. In examining this evidence of identification, my task at this stage is not to determine whether I believe or accept the evidence of the witnesses who claim to identify the accused as the perpetrator of the offences; my task is to determine whether the evidence of the circumstances of the identification of the accused has a base that is so slender that it is unreliable and therefore would be insufficient to support a conviction. The submission of no case to answer has directed my attention to the identification parade that was carried out by the police. Even if the identification parade had been unfairly conducted, that consideration is separate from the issue of the quality of the evidence relating to the circumstances under which the identification of the accused as the suspect came to be made. The fact of an unfair identification parade does not *per se* mean that an accused has no case to answer.

41. On my examination of the evidence that has been led in the case for the prosecution I am of the view that there is material in that evidence that is capable of allowing a properly directed factfinder to find, without irrationality, that the elements of the offences alleged against the accused have been established to the criminal standard. There is evidence which is capable of allowing a properly directed factfinder to arrive at a finding of guilt. In the circumstances, the submission of no case to answer fails.

22nd day of April, 2024

Hayden A. St.Clair-Douglas

Judge