[2022] JMCA Crim 71

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CRIMINAL APPEAL 76/2018

TAJAE CAMPBELL V R

Robert Fletcher and Russell Stewart for the appellant

Miss Channa Ormsby for the Crown

12, 13 and 16 December 2022

DUNBAR GREEN JA

[1] On 5 June 2013, nine-year-old AA ('the complainant') was savagely raped and buggered at school. On 18 December 2017, after a trial in the Home Circuit Court before a judge of the Supreme Court of Jamaica ('the learned judge') and a jury, the appellant, Tajae Campbell, was convicted of committing the acts of rape and buggery. He was sentenced to 15 years' imprisonment for rape with ineligibility for parole before serving 10 years; and four years' imprisonment for buggery. The sentences were ordered to run concurrently.

[2] On 4 September 2020, the appellant was granted leave to appeal his convictions and sentences by a single judge of this court.

[3] At the hearing of the appeal, on 12 December 2022, there being no objection from the Crown, the appellant was granted permission to abandon his original grounds of appeal, and argue, instead, supplementary grounds of appeal filed on 1 December 2022. These grounds are as follows:

> "Ground 1 – The learned trial judge erred by not herself recognizing that the weakness of the identification evidence taken as a whole was such that the accused ought not to have been called upon to answer the case against him. With this failure the accused was denied a real chance of acquittal.
>
> Ground 2 – The sentence is manifestly excessive."

[4] During the course of argument, and without any objection from the Crown, permission was also granted for counsel to argue a third ground of appeal, viz:

> "Ground 3 - That in the context of this case, the learned trial judge erred in not inviting the jury to consider whether to accept the virtual complainant's evidence without a corroboration warning or in the alternative, to consider what weight they should put on it in the circumstances; and the absence of that direction denied the appellant a balanced consideration of his case and would amount technically to a miscarriage of justice."

The trial

The prosecution's case

[5] The prosecution presented evidence that on 5 June 2013, the complainant attended an evening class at the Mico Care Centre, in the parish of Saint Andrew, where she had been enrolled for extra classes. She was a slow learner.

[6] About 3 o'clock, she went into a bathroom and a boy (later identified by her as the appellant) entered the said bathroom. Seemingly surprised by this occurrence, she enquired of him what he was doing in the girl's bathroom and he told her he was there to use it. The boy, from behind, tied a handkerchief around her mouth, pushed her into one of the cubicles that accommodated a toilet and locked the door. He pulled down her skirt and panties and inserted his penis in her anus then into her vagina, without her consent. He then pulled off the handkerchief, put a hand over her mouth and a hand over her eye. She bit him and he ran from the bathroom. The complainant proceeded to use the toilet and noticed blood coming from her anus. She went to class and then made her way home.

[7] While at home, she noticed that her vagina was bleeding. Out of fear that she would be beaten for the truth, she lied to her mother that a girl had kicked her in the vagina. She was eventually taken to the Bustamante Hospital for Children and admitted there. On that same day, she made a report of the incident to the police.

[8] On 12 June 2013, she returned to school and pointed out the appellant to her mother, the principal of the school, and later the police. The appellant was arrested and, in due course, charged with the offences of rape and buggery.

[9] Aside from the initial viewing of the boy's face, in the bathroom, which the complainant testified lasted for one minute, there was no evidence that the complainant saw his face again during the incident.

[10] The complainant's grandmother, with whom the complainant resided, as well as the two police officers who investigated the case, gave evidence for the prosecution. However, they were discrepant in their evidence as to the circumstances of the identification of the appellant, at the school.

The defence's case

[11] The appellant gave an unsworn statement in which he denied having anything to do with the incident. It was also alleged that the complainant was mistaken in her identification of him as the perpetrator. The principal of Mico Care Centre gave evidence for the defence. She expressed surprise and disbelief at the allegations against the appellant.

The submissions

Ground 1

[12] Mr Fletcher, appearing for the appellant, submitted that a trial judge has the overarching discretion, if not a duty, to withdraw a case from the jury if it falls below the threshold for the jury's consideration. He pointed to para. [26] in **Jermaine Plunkett v R** [2021] JMCA Crim 43 ('**Plunkett v R**'), where V Harris JA (Ag) (as she then was) made

reference to guidance from this court in **R v Vincent Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 187/2004, judgment delivered 7 April 2006 – that "[i]n a case of disputed identity, the reliability of the evidence is essentially within the province of the jury while it's [sic] adequacy is primarily the function of the trial judge". It was counsel's contention that the identification evidence, which had emerged by the end of the prosecution case, did not meet the Turnbull threshold (**R v Turnbull** [1976] 3 ALL ER 549) concerning adequacy of the evidence, and, therefore, the learned trial judge ought to have withdrawn the case from the jury.

[13] Counsel's first complaint was that the evidence of identification did not establish that the complainant had sufficient time or opportunity in which to make a correct identification of the assailant. He said this was evident at pages 22-23 of the notes of evidence ('the notes') where the complainant gave the following summary of what she said had happened:

> "When I was going to the bathroom this boy come into the bathroom and I asked him…what is he doing in the girl bathroom and he tell me that he is going to use the bathroom…And then when I was going into the bathroom he tie a black and green kerchief around my mouth and then locked the bathroom door. And pulled down my skirt and my panty and push his penis into my bottom. And then he didn't keep it in there for too long he pushed it into my vagina and him pull off the kerchief from 'round my mouth and put his hand over my mouth and his hand over my eye. And I bite him on his hand and he run out of the bathroom and when I go to use the bathroom I see pure blood and I was frightened."

[14] Mr Fletcher also pointed to the complainant's evidence that during the incident itself she had seen the appellant's face for one minute, and the likely inaccuracy of that estimation given her further evidence that she had only seen his face during the brief conversation between herself and the assailant, which consisted of a mere two sentences. Counsel further contended that apart from the fact that the complainant's evidence concerning lighting, time and opportunity for observation, identification of the appellant and distance was variable and weak, she made the identification in difficult circumstances overall.

[15] Still on the quality of the identification, Mr Fletcher pointed to evidence that the complainant had been attending the Mico Care Centre for only two weeks prior to the incident and had supposedly seen the appellant twice during the course of that period, for a maximum time of one hour or one minute (both time periods used interchangeably by the complainant) from a "very far" distance, which was estimated to be between 35 and 40 feet. He also drew our attention to the complainant's further evidence that she had seen the appellant every day that she attended classes (Mondays and Wednesdays), from a distance, and that she had never spoken to him. This evidence, which counsel contended was the sum total of the sightings for recognition purposes, was wholly unacceptable and insufficient to ground recognition in law.

[16] To support his position, counsel referred us to **Kevin Williams v R** [2014] JMCA Crim 22, in which this court was asked to say whether evidence of four prior sightings of the appellant, by the police, was sufficiently strong to obviate the need for an identification parade. The first three sightings were not particularised and the fourth was a single conversation more than six months before the appellant was accused of the incident. In those circumstances, the court found that the "sightings could not be classified as amounting to [the appellant] being well known to [the police]".

[17] Counsel also highlighted an aspect of the evidence where the complainant agreed that she had described the appellant to the police as being black, tall, slim with low hair. This, he said, contrasted with the actual appearance of the appellant, and the obvious differences supported the argument that visual identification was not of a quality to go to the jury.

[18] Mr Fletcher turned next to what he called, "a curious episode of post-incident identification by confrontation". He said the identification was highly irregular because it involved circumstances in which the complainant purportedly identified the appellant by pointing him out to her relative at the school. We were referred to pages 44-46 of the notes, where the complainant states:

> "She [meaning her mother] stand up there and ask me to show her the boy and I walk and I show her where he was sitting down. And in the walkway where we eat lunch she go around there look at him and she go up to the principal…And then the principal asked me…She asked me if I can show her the boy…I show the principal the boy…In the principal office…Because she call him up there…She asked me what he was in and I tell her he is in full blue and there were two other boys sitting beside of him in a blue. So she call the two of them and then she call him up her office and she asked me to point him out."

[19] Counsel contended that the identification sequence was unsatisfactory and fatally weakened the adequacy of the identification evidence. He pointed to discrepancies in the evidence of the complainant, her grandmother, Mrs Pauline Gray, and Inspector Hepburn. The evidence from Mrs Gray was highlighted as being clearly inadmissible hearsay for reason that she had recounted what had been said to her by the complainant's mother who was not called as a witness. Additionally, counsel submitted, if the evidence given by the complainant's grandmother as to the pointing out were true, it would have only exacerbated the confrontation as she said that the police had held the appellant and taken him upstairs. The impugned part of the grandmother's evidence is recorded at pages 106-107 of the notes, as follows:

> "When Janice came to me, she said to me, mummy, Amoy just point out the guy to me…Same time I dial the number at the guidance counsellor [sic] room and call the police…The police came…the police hold him and take him upstairs…After they took him upstairs the police tell him to come back down and take him away…"

[20] Mr Fletcher submitted that the post-incident identification described by the police was unacceptable. He contended that, by participating in the identification as she did, Inspector Hepburn facilitated the confrontation. Inspector Hepburn's account is recorded, at pages 139-140 of the notes, as follows:

> "Q. So Inspector, you had told us earlier that you went to the administrative office and spoke with the administrator. Did you leave that office and then see Amoy and her mother?

A. If I can recall, Amoy and her mom were there because they were called by the administrator. So it was in close proximity to the office.

Q. Can you tell us what happened after you saw and spoke with Amoy and her mother?

A. Amoy told me something in relation to the young man.

Q. And what happened after Amoy told you something in relation to a young man?

A. I made enquiries of the administrator and I was subsequently introduced to a young man and his mom. He gave his name as Tajae Campbell…He was 16 years old…

Q. Can you tell us what happened after you were subsequently introduced to Tajae Campbell, where were you?

A: In an office

…

Q. So you were continuing to tell us that Amoy and her mother were close by?

A. Yes

…

A. Amoy would have told me something…that the young man who raped her was there.

…

A. As a result of what she told me I spoke with the administrator. Amoy pointed out Tajae Campbell as the person who raped her in the bathroom on the 5th of June 2013, on the compound of Mico Care Centre…"

[21] Mr Fletcher submitted that no matter how the various strands of the post-incident identification were pieced together, the evidence was flawed, and that the learned trial

judge should have withdrawn the case from the jury. **Tesha Miller v R** [2013] JMCA Crim 34 was referenced for a discussion on identification by confrontation.

[22] Counsel's concluding argument was that the weakness in the identification circumstances could not have been cured by an exhaustive summation. Heavy reliance was placed on **Wilbert Daley v R** [1993] 4 ALL ER 86 where the Privy Council considered **R v Galbraith** [1982] 2 ALL ER 1060 in the context of **R v Turnbull**.

[23] Miss Ormsby, appearing for the Crown, also relied on **R v Turnbull**, at paras. 551-552, as supportive of her submission that this ground lacked merit. She contended that the identification evidence was a matter within the province of the jury; the issue of visual identification turned on the credibility of the complainant; and the learned trial judge was duty-bound to leave the case to the jury. Moreover, the case for the Crown was one of identification by recognition and not a fleeting glance or identification made in difficult circumstances.

[24] Counsel highlighted strengths in the identification evidence, viz: (a) the accused admitted to attending Mico Care Centre on Mondays and Wednesdays as did the complainant; (b) the complainant last saw the appellant about two days before the incident; (c) the complainant would see him every time she attended classes; (d) on the last occasion, the complainant saw him at a distance of 20 feet; and (e) the appellant was at a distance of about 3 to 4 feet from the complainant when he faced her in the girl's bathroom. Additionally, there were three light bulbs in the bathroom which assisted the complainant in seeing the appellant.

[25] It was counsel's contention that the school environment being a small space would have provided opportunities for the complainant to see the appellant in the walkway, thus not making recognition farfetched; and that although the complainant had an "imperfect concept" of time, she would have had sufficient opportunity, in the bathroom, to recognise someone she knew. It was also the Crown's position that no issue was taken when the complainant eventually said, in evidence, that the assailant was always in full

blue. The evidence was, therefore, not of a slender base and was sufficient to go to the jury.

[26] Counsel disagreed with Mr Fletcher's characterisation of the post-incident identification. She said that the sequence of events leading up to the pointing out of the appellant was solely at the instance of the complainant, when she and her mother visited the Mico Care Centre, and that the complainant was entirely unaided on each occasion when she pointed him out. Counsel contended that an identification parade would have had no value because when the police arrived at the school the complainant had already pointed out the appellant to her mother and the principal.

[27] Consequently, it was the Crown's position that neither on the credibility/reliability limb (**R v Galbraith**) nor the sufficiency/adequacy of evidence basis (**R v Turnbull**) was it necessary for the learned judge to have withdrawn the case from the jury.

Discussion

[28] The considerations which bear on this appeal were articulated by Lord Widgery at pages 552-553 in **R v Turnbull**:

> "If the quality [of the evidence] 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…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…
>
> 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 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."

[29] A helpful elaboration of the law was also provided, by V Harris JA, in **R v Plunkett**. At para. [21], reference is made to the following extract from the judgment of Lord Mustill in **R v Wilbert Daley** which reconciled the law, as stated in **R v Galbraith** and **R v Turnbull**:

> "…in the kind of identification case dealt with by *R v Turnbull* **the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction**: and indeed, as *R v Turnbull* emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. **When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice.** Reading the two cases in this way, their Lordships see no conflict between them." (Italics as in the original) (Emphasis added)

[30] At para. [27] of **R v Plunkett**, V Harris JA affirmed the observation, in **R v Vincent Jones**, that "[i]n assessing the adequacy of evidence, especially in visual identification cases… it is incumbent on a trial judge 'to address and scrupulously examine the weaknesses'". Referencing **R v Ivan Fergus** (1994) 98 Cr App R 313, she pointed out that it was also necessary for the trial judge to consider the cumulative effect of the weaknesses on the quality of the identification evidence.

[31] We have also considered **Dwayne Knight v R** [2017] JMCA Crim 3, para. [30], where McDonald-Bishop JA (Ag) (as she then was) made the point that at the close of the prosecution's case, the judge has a duty to assess the cumulative effect of weaknesses in the identification evidence and "ensure…there was a substantial evidential basis upon which the identification could be found to have been correct." That duty, she stated, is "non-delegable".

[32] Our examination of the identification evidence reveals several deficits which cumulatively make that evidence wholly unacceptable and inadequate for the jury's consideration.

[33] Firstly, there was inconsistency in the complainant's evidence regarding the number of sightings of the appellant prior to the incident. The details of the purported sightings and their duration also lacked cogency. It was also not explored by the Crown, at trial, why the appellant would have been distinctly noticed in the purported pre-incident sightings. The extent of the complainant's evidence about her viewing the appellant in "passing on way to classes" was about when, where, and the duration of the viewing but not sufficiently, about the circumstances and particulars. It is noticeable, for instance, that no attempt was made to establish what portion of the one minute or one hour that the complainant had supposedly viewed the appellant, on the way to classes, that she would have actually seen his face. This was particularly important given her evidence that other children were around, other boys wore blue (clothing) or full blue and those sightings were from afar.

[34] Early in the evidence, at pages 28-29 of the notes, the complainant stated that the appellant had been seen for the first time once in the "walking area" where "they" ate lunch. He was sitting. She saw all of his body, including his face and clothes (full blue). This sighting lasted for "like one hour", and was from "very far" and "way out" (estimated at 35-40 feet). She said other children would have been in the walkway. She also said that after the first sighting she never saw the appellant again until the incident in the bathroom. She was then asked for how long before the incident she had seen the appellant in the walking area. The answer was that she could not remember but when pressed, she said, "I know that it was two time [sic] I ever seen him in the eating area and when the incident happen to me".

[35] In the first account, the complainant supposedly saw the appellant once in the walkway prior to the bathroom incident. Later, she said she had seen him on at least two occasions prior to the bathroom incident. It is noted that apart from the sightings in the

walkway, the complainant said she would see the appellant on her way to classes, "like we would be passing – one minute", but when asked by the learned judge to speak louder, she adjusted the time to - "like one hour or one minute". She also told counsel for the Crown that, on those occasions, she saw him from "far".

[36] Clearly, there was not only the issue of whether, at such distances, the complainant could have made an accurate identification of the appellant but also there was an absence of evidence as to why the appellant would have been noticed or was particularly noticeable at those distances in circumstances where other children were around.

[37] On another point, the complainant was asked in examination in chief, "Do you remember when you started going to Mico Care Centre?" to which she replied, "No". In cross-examination when asked a similar question, she replied, "two weeks". She also told counsel that she attended classes "Monday and Wednesday". This evidence would likely raise questions about the period over which the complainant would have had any opportunity to observe the appellant at school, such that she would have been able to recognise him as someone she knew prior to the one short "question and answer" exchange which preceded the ghastly and brutal acts in the bathroom.

[38] Secondly, we are satisfied that the identification of the assailant in the bathroom was only for the time it took the complainant to exchange one sentence with him. Although the complainant said this occurred over a period of one minute, her account of the conversation suggests that she would have viewed his face in a much shorter time. We have also considered that the presence of the assailant in the girl's bathroom, was unusual, at least from the complainant's perspective, and evoked some consternation. This circumstance, coupled with the shortness of time in their exchange should have raised questions for the learned judge as to whether this was an identification in difficult circumstances. The complainant did say, in cross-examination, that when the assailant was retreating she had seen his face, but this was not explored, and it is, at best, curious how that might have happened at that point.

[39] The instant case can be distinguished from **Separue Lee v R** [2014] JMCA Crim 12 where the eyewitness had demonstrated that she knew the appellant and, although she said the viewing time was two seconds, it was found to be more than a fleeting glance and sufficient for identification purposes, based on all the circumstances, including the eyewitness' demonstration of what was happening at different points. It was found that there was enough to entitle the judge to conclude that the matter ought to have been left to the jury (see para. [21]). By contrast, in the instant case, the complainant did not demonstrate that she knew the appellant well enough and had enough time, during the incident, to make a reliable identification.

[40] Thirdly, under cross-examination, the complainant accepted that she had described the perpetrator to the police as "black, tall … [and] slim…". At trial, the appellant's height relative to the description seemed to have been a point of contention. Curiously, not his complexion. At the end of counsel's cross-examination of the complainant, he asked the appellant to stand (presumably for the jury to examine his features). Counsel, however, did not make a no-case submission. We are of the view that, regardless, it was incumbent on the learned judge to examine those characteristics of the assailant as described to the police, against the appearance of the appellant and make an assessment as to whether this aspect of the identification evidence was of a sufficiently good quality to go before the jury. Our own observation of the appellant's features underscores the imperative of that duty being discharged by the learned judge.

[41] At para. [20] of **Michael Burnett v R** [2017] JMCA Crim 11, McDonald-Bishop JA affirmed the rule that "evidence of identification by confrontation, is admissible and that its probative value must perforce depend on the circumstances under which the identification was made, including whether or not it was voluntary and spontaneous". Having examined the post-incident identification in the instant case, we cannot agree with Mr Fletcher that the pointing out of the appellant to the police officer was facilitated by the police officer. The relevant evidence was that the complainant told Inspector Hepburn something; she made enquiries of the administrator; she was subsequently

introduced to a young man and his mom; and then the complainant pointed out the appellant as the assailant. There was no evidence of collusion or that the police officer had prompted the complainant as to who the assailant was. In those circumstances, the identification was unaided. The evidence also revealed that the pointing out of the appellant to the complainant's mother and the principal was also unaided.

[42] We disagree with Mr Fletcher that an identification parade would have been appropriate at that point. The object of an identification parade is to "make sure the ability of the witness to recognise the suspect has been fairly and adequately tested" (see para. [27] of **Michael Burnett v R**). Given all that had transpired before the police arrived (including the pointing out of the appellant to the mother and principal), an identification parade would have served no useful purpose.

[43] These are the principal weaknesses in the identification evidence that the learned judge ought to have analysed carefully, at the end of the prosecution's case: the short time period over which the assailant was said to be identified at the incident; the difficult circumstances of the identification in the bathroom; the questionable previous sightings of the assailant and over what period, and for what duration any such sighting would have occurred; the distance of the complainant from the assailant when he was supposedly previously identified; the absence of any reason for the purported previous observations of the assailant; and the stark differences between the description of the assailant given to the police, by the complainant, and the features of the appellant. It was also necessary for the learned judge to have considered their cumulative effect on the quality of the identification evidence overall. Had the learned judge done so, she would not have been faulted for withdrawing the case from the jury. For these reasons ground 1 succeeds.

Grounds 2 and 3

[44] In the light of the conclusion on ground 1, there is no need for a detailed consideration of grounds 2 and 3. As regards ground 3, it is sufficient to say that we agree with Mr Fletcher that, although section 26(2) of the Sexual Offences Act gives the

learned judge a discretion whether to give a corroboration warning, it would have been justifiable in this case where the child was of a very tender age and it was proved that she had lied to her mother about how she had sustained the injuries to her vagina.

Conclusion

[45] The appellant having succeeded on grounds 1 and 3, the appeal is allowed. Accordingly, the order of the court is as follows:

(1) The appeal against convictions and sentences is allowed.

(2) The convictions are quashed, sentences set aside and a judgment and verdict of acquittal entered.