JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 43/99

BEFORE: **THE HON. MR. JUSTICE BINGHAM, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

Ian Wilkinson, Miss Cheryl-Lynn Branker-Taitt and
Miss Shawn Steadman for appellant

Ms. Paula Llewellyn & Janet Scotland for Crown

REGINA VS. KIRK MANNING

December 13, 14 , 1999 and March 20, 2000

HARRISON, J.A.

The appellant was convicted in the High Court Division of the Gun Court on 4th March, 1999 of the offences of illegal possession of firearm and rape committed on 20th June, 1997 and sentenced to eight years and twelve years imprisonment at hard labour respectively. The material facts are that on 20th June, 1997 at about 2:00 p.m. the complainant M. P. was walking on her way to her house and about to enter a track in a big yard in the Crescent Road area of St. Andrew at a point bordered by a house on one side and a wall and zinc fence on the other when she saw the appellant known to her as "Dudu" approaching her. She stopped, the passage way being too narrow for them to pass each other abreast. The appellant told

her not to move and said 'A long time you a diss me." The evidence then reads:

"A:	I ask him what him mean by 'A long time mi a diss him' and him repeat him statement that is long time mi a diss him. Him sey a long time him want mi an' mi nuh waan deh wid him. Mi seh to him now seh ...
HIS LORDSHIP:	That time you stop?
A:	Yes.
HIS LORDSHIP:	You talking to him face-to face now?
A.	Face to face, yes. And I said to him 'A tell you a'ready that there can never be a relationship with me, we caan deh, there is no way we can have a relationship' and him sey if mi nuh big woman?
HIS LORDSHIP:	And he said what?
A:	If mi nuh big woman?
HIS LORDSHIP:	If what?
A:	If I am not a big woman and I said yes, and then he asked me how old was my oldest child and I say three and him ask me seh how mi would'a feel if ...
HIS LORDSHIP:	Yes, he asked you how old is your oldest child and you told him three. Yes?
A:	No, my oldest child is not three.
HIS LORDSHIP:	But did you answer him?
A:	Yes, and I tell him the age of my oldest child is three.
HIS LORDSHIP:	Yes.

A: And him seh how would I feel if my child knew that I got raped, how would I feel?

HIS LORDSHIP: That is what he said to you?

A: Yes. I did not reply to that."

The appellant then took a firearm from his side pointed it at her, she heard a click, she saw the trigger, a short gun, and "a long mouth through where the shot come through". He told her to reverse and directed her through a gate into a neighbouring yard to the back room of a house. He, still with the gun, ordered her to take off her clothes, which she did and he then raped her and left. The complainant then went to her house in the big yard, and returned to her work place, at a clinic, crying. The police was called and she made a report.

The appellant had been known to the complainant as "Dudu" for a long time and she had seen him frequently over the period of three months before,"... almost every day" because he used to visit a friend of his in a cook shop in a yard next door to where she lived. The complainant was accustomed to see the appellant in the lane where she lived. He called her "Karen", and would say to her "... what happen you nah deh wid mi?" She said, in evidence in chief:

> "And him would seh 'Yuh soon know 'cause me a go kick off yuh door an' yuh wi see'. Mi never tek him serious so mi never report it to the Board of my workplace."

She admitted that she was afraid of him. Cross examined, she admitted that there had been gang warfare in the Crescent Road area, but not in the area where she lived and that the appellant lived on the same side as she did.

She denied that she was telling lies on the appellant because of the gang warfare, maintained that he kept telling her that he wanted to be intimate with her, and insisted that the appellant had said he was going to rape her and did rape her.

The defence projected was an alibi and malice on the complainant's part. In his evidence, the appellant maintained that at the time of the offence he was "into a yard building graters." He knew the complainant, knew where she lived and confirmed that he was accustomed to visit a friend next door to where she lived in order to buy cooked food, and food was cooked there every day except Wednesdays and Sundays. He denied that he had ever told her that he wanted to have sex with her nor did he point a firearm at her and have sex with her. He knew that she worked at the clinic.

Mr. Wilkinson for the appellant, having been granted leave to argue nine supplemental grounds, argued together grounds 3 and 8:

> "3. False statement given by witness.
> ...
> 8. The learned trial judge erred in finding as a fact that the virtual complainant was a credible witness and that she was '...speaking the truth, the whole truth and nothing but the truth'."

He submitted that the learned trial judge, in finding that the complainant was truthful, and that she was "...highly intelligent.. and .. overly impressive" failed to direct his mind to the flawed credibility of the complainant due to the numerous inconsistencies in her evidence.

In our view, the general rule is that inconsistencies in the evidence of a

witness, a specie of discrepancies, must be considered by a tribunal of fact in the context of whether they are material, going to the root of the issue or, immaterial, in which event, they may be ignored. If material, and there is no explanation or ... satisfactory explanation, the said tribunal must consider whether to accept the evidence of the particular witness on that point or at all: (**R. v Baker etal** (1972) 12JLR 902). Of the matters complained of by counsel, only two may properly be classified as inconsistencies, namely, the complainant's reply to the appellant that her oldest child was three (3) years old, although it was not so, and her assertion that she called her "baby father", contrasted with her admission in cross-examination that it was her co-workers who did so. The complainant's evidence of:

> (1) the house on one side and the zinc and wall bordering the track, although the appellant said there was no track there;
>
> (2) her statement that she was afraid of the appellant and also that she did not take him seriously; and
>
> (3) that there was no gang warfare where she lived and also that there was gang warfare from her side "and the other side", which was supported by the evidence of Detective Sergeant Hamilton that the gang warfare was not where the complainant lived,

were not inconsistencies, necessitating any specific consideration by the learned trial Judge. The said two inconsistencies may properly have been viewed as immaterial not affecting the credit of the complainant and similarly not requiring any specific attention by the learned trial judge. His general directions on the method of dealing with discrepancies were adequate.

We found no merit in these grounds.

Grounds 1 and 9 argued together were:

> "1. Insufficient evidence
>
> ...
>
> 9. The learned trial judge erred in law in not visiting the **locus in quo** in discharge of his function to safeguard the interests of the Appellant and, consequently, did not afford the Appellant a fair trial."

In support of these grounds, counsel submitted that because of the ambiguities and inconsistencies on the prosecution case, particularly as to the respective location of the residences of the appellant and the complainant, the evidence was not clear. Accordingly, the learned trial judge, erred in not visiting the locus in quo, and he could have done so even on his own motion.

Counsel projected his submission on the basis that the evidence suggested that because of the warfare existing in the area, the appellant, who lived on one side of the area hostile to the other side where the complainant lived, was unlikely to have gone over to the complainant's side of the area and commit the offence. On the contrary, the complainant stated in evidence, that the appellant lived on the same side of the area as she did. The evidence read, on page 15 of the transcript:

> "His Lordship: Did you know where this accused man lived?
>
> A: No, mi know where him hang out, me don't know where him live.
>
> His Lordship: All right.
>
> Miss Bogle: And he was on the other side, not the same side as you?

A: No, he was on my side".

Detective Hamilton also stated that the complainant and the appellant both lived "... in the same area". The appellant's evidence that he visited his friend at the cook shop beside where the complainant lived, several days in each week, confirms that the complainant was accustomed to encounter him frequently and also, that there was no restriction on his frequent visits to the area where the complainant lived. In our view, the exact location of the respective residences was not an issue in the case.

Furthermore, a visit by a court to the locus in quo depends on the circumstances of the particular case, and is only undertaken in circumstances where in the opinion of the learned trial judge it would serve to clarify the evidence given, for the benefit of the tribunal of fact. It is therefore a pre-condition to such a decision to visit that there is evidence that the locality is unchanged, since the commission of the alleged offence: (**R. v. Warwar** (1969) 15 WIR 298). In the absence of such evidence, a judge should not exercise his discretion to undertake such a visit to the locus, nor should he do so, on his own motion; any variation or alteration to the geographical or structural nature of the locality would be more likely to confuse than clarify the issues of fact.

The submission on these grounds is misconceived and without merit.

Ground 10, argued next, reads:

> "10. The learned trial Judge misdirected himself in finding (or stating) that:-
>
> (a) 'It was a narrow pathway which would permit just two persons to pass" (page 36 of the Transcript) and,

(b) the appellant "... had threatened her that he was going to rape her."

On our examination of the transcript of the evidence, the complainant, said, on page 13:

"Is a narrow lane, two persons can't pass."

and on page 17, the evidence reads:

"Q Suggesting that he never said that he would rape you..."

and further on page 18:

"A: Him seh him a go rape mi, him seh him a go rape me."

The learned trial judge had sufficient evidence to make the finding he made and which is complained of. There is no basis for such a complaint. This ground also fails.

Grounds 2, 4 and 5 argued together read:

"2 Insufficient evidence.
...

4 Regarding the first count, the verdict is unreasonable and cannot be supported by the evidence.

5 Concerning the second count, the Learned Trial Judge erred in law in failing to rule that there was no case to answer."

In support of this ground, counsel submitted that no firearm was recovered and coupled with the deficiencies complained of, the learned trial judge should not have accepted the evidence of the complainant as credible. He relied on **R v Jarrett** (1975) 14 JLR 35 and **R. v. Purrier** (1976) 14 JLR 97.

The evidence led reveals that the complainant said she saw the appellant with,

> " ...a short gun ... it has a trigger.. black ... and have a long mouth with the something where the shot come through..."

Clearly, this was evidence sufficient to fit the description, at least, of an imitation firearm which was used in the commission of an offence. Accordingly, the provisions of section 25 of the Firearms Act would be sufficiently complied with for a court to find that it was a firearm. In the instant case the learned trial judge so found. We find that the learned trial judge had evidence sufficient to find as he did in respect of the facts. These grounds also fail.

In respect of grounds 6 and 7, they also fail for the reasons we gave regarding grounds 2, 4 & 5 .

The final grounds argued were grounds 11 and 12. They read:

> "11 The learned trial judge erred in law in stating '.... now in the way in which this case was conducted the usual caution which is imperative in cases of identification is not demanded on both sides.'
>
> 12. The learned Trial Judge failed to direct himself (the jury) adequately, or at all, in respect of the issue of visual identification evidence."

In cases where the prosecution relies on visual identification by a witness, the law requires that the jury be given a general warning, or a judge sitting without a jury is required to remind himself, of the danger involved in relying on such evidence to support a conviction and the reasons for such caution: (**R v. Turnbull** [1976] 63 Cr. App R. 132). This warning is usually required even in "recognition" cases, namely, where the accused was

known to the witness before. In **Beckford et al. v. Reginam** (1993) 97 Cr. App. R 409, a case relied on by counsel for the appellant, the Judicial Committee of the Privy Council, reiterated the requirement even in recognition cases, of the **Turnbull** warning. The headnote reads:

> "A general warning on **Turnbull** lines is required in all identification cases whether the witness identifies a person he recognises or a stranger. Even if the sole or main issue raised by the defence is the credibility of the identifying witness, that is, whether his evidence is true or false as distinct from accurate or mistaken, a general warning is nonetheless required."

Although the requisite warning is expressed in apparent obsolute terms, the requirement for it to be administered will depend on the nature and circumstances of the particular case. In the instant case, which may be classified as a recognition case, the appellant was known to the complainant. She knew him as "Dudu", a fact which was not challenged nor denied. The warrant for the arrest was issued in that name. She was accustomed to see him pass and he called her by the name of Karen, and invited her to be intimate and made further threats to rape her. This conduct occupied a frequency over a period of three months. The incident complained of lasted for approximately twenty minutes, and occurred at 2.00 p.m. near her home, a route and place he frequented during several days of each week. He admitted to these latter frequent visits.

The learned trial judge was mindful of the issue of identification, and did direct his mind to it, albeit not in classic **Turnbull** terms. He said, on page 38 :

> "Now in the way in which this case was conducted

> the usual caution which is imperative in cases of identification is not demanded on both sides. The accused man when he gave evidence said he knew her and he would see her when he went next door to buy food. She said he came next door to visit one of his confederates, to use her words, so she had seen him regularly over a period of time; she knew his name as Dudu, which she has not denied. So they were face-to-face in that walled pathway, broad daylight , 2:00 o'clock in the day, long conversation and sexual intercourse. So in respect of opportunity to see and to discern somebody who you knew before there is no difficulty at all."

Furthermore he adverted his mind to the accuracy of her evidence, mindful no doubt of the caution as to mistakes. He, continuing said:

> "In my assessment of this case I found this witness to be highly intelligent, to be particularly articulate, and her precision in describing what happened was overly impressive. I have no doubt in my mind, none at all, that this witness was a witness of truth and despite the absence of corroboration I am convinced that she is speaking the truth the whole truth and nothing but the truth."

He finally directed his mind to the defence of alibi in the context of the issue of identification. He said:

> "The accused man gave evidence in which he said that at about that time of the day he was making graters which is what he does for a living so he was no where near there. So his evidence is an alibi and I am quite aware that there is no duty on him to prove anything to the court. It is for the Crown to disprove and the Crown must do so to satisfy me so that I am sure about the correctness of the identification and also that in law there was rape, and I am so satisfied."

The Board in **Beckford et al v. Reginam** (supra) recognized that there may be rare cases involving recognition where the **Turnbull** caution may not be required. It said (per Lord Lowry) at page 415:

> "The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification. Namely, is he right or could he be mistaken?
>
> Of course no rule is absolutely universal. If, for example, the witness's identification evidence is that the accused was his workmate whom he has known for 20 years and that he was conversing with him for half an hour face-to- face in the same room and the witness is sane and sober, then, if credibility is the issue, it will be the only issue. But cases like that will constitute a very rare exception to a strong general rule."

The instant case does not fall squarely within that type of " rare" category. However, because the issue of credibility was elevated above that of mistake or recognition, the approach of the learned trial judge cannot be faulted. We are of the view that he dealt with the issue of identification with the "usual caution" in mind.

We agree with counsel for the Crown that the approach of the learned trial judge did not derogate from the conviction.

For the above reasons the appeal is dismissed and the conviction and sentence are affirmed. Sentence shall commence from 4th June 1999.