JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 158/96

COR: THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J. A.

JASPER GABRIEL v REGINA

Glenford Watson, instructed by A. A. Hines for the Applicant
Bryan Sykes and Deneve Barnett for the Crown

8th June, and 14th July 1998

GORDON, J.A.

On the 11th December, 1996, the applicant Jasper Gabriel was convicted in the Circuit Court at May Pen, Clarendon, on an indictment charging two counts, the first being rape and the second being robbery with aggravation. He was sentenced to nine (9) years imprisonment at hard labour on the first count and seven (7) years imprisonment at hard labour on the second count, sentences to run concurrently.

On 8th June, 1998, we heard his application for leave to appeal against sentence, and we refused the application. We now give our reasons for our decision.

The case for the prosecution was that the complainant occupied one of the three houses on premises at Sevens Road, May Pen, Clarendon, while her landlord Miss Amy Johnson occupied another, and the remaining house was unoccupied. On the 26th January, 1995, at about 7:20 p.m., the complainant was at home with her daughter, aged 2 years and nine months, when she saw a man standing by a door near to her bedroom. The man had a knife in his hand. He stepped forward into the

bedroom and grabbed the complainant by her T-shirt. He demanded money and took her handbag. He took the complainant outside into the yard at the back of the house, where he had sexual intercourse with her at knife point. He then took money from her handbag and questioned her for sometime. He asked for water and she indicated a pipe near an ackee tree whereupon he said "Yes, is si you want to si mi face". He then took her back inside the house where she gave him water from a bottle in the refrigerator. He drank and then told her to go into the bedroom and close the door.

The complainant remained in the bedroom with her daughter for about an hour and a half. She then went out and made a complaint to her landlord. The next day, the complainant made a report to the police, who took her to the May Pen Hospital where a doctor examined her.

On 1st February, 1995, the complainant was walking in the vicinity of Oliver Drive in the May Pen area when she passed a shop. She saw the applicant in the shop and he appeared surprised to see her. She saw him at the same location the next day. The complainant made a report to the police and took them to a certain location. The applicant was subsequently picked up by the police.

On the 5th February, 1995, the complainant went back to the May Pen police station, where she saw the applicant. She told the police "see the man who came a me house and rape me"; whereupon the applicant said "see me? me no know you, a the first time me a see you".

The complainant gave evidence that before the incident, she had last seen the applicant some ten (10) years earlier. She had seen him regularly at her church on Sundays over a period of three years. This was contradicted by evidence of the complainant's landlord Amy Johnson, who said that when the complainant made a

complaint to her after the incident she asked the complainant if she knew who her assailant was and the complainant replied that "she don't pick up who it was".

The applicant made an unsworn statement from the dock. His defence was an alibi. Miss Lawrence, his god-mother as well as the person with whom he resided, gave evidence that the applicant was at her shop at Oliver Drive from 6:00 p.m. until 11:00 p.m. on the 26th January. The applicant also led evidence of his good character from a Justice of the Peace and from a Minister of Religion.

Counsel for the applicant urged two grounds of appeal. Ground 1 reads:

GROUND OF APPEAL

1. "That the learned trial judge erred in his summation to the jury in that he did not deal adequately with identification evidence in circumstances, where no identification parade was held and in which the Investigating Officer indicated that she would have held a parade if the complainant had not 'confronted' the accused at the station because the complainant in her evidence stated that at one point during the incident the accused said:

    a) There was light at a pipe and he would not go there because she wanted to see his face in the light.

    b) The virtual complainant immediately after the incident had told her landlady (witness) that she had not known her assailant before".

In his summing up to the jury on the issue of identification, the trial judge stated:

> "In this case there is no evidence of corroboration at all. So, I would warn you that for two reasons, for the reason, because it is a sexual offence, a charge that is easy to make and is hard for somebody to relate it and say, 'oh, I didn't do so and so', for that reason corroboration is looked for. Corroboration is looked for - you look for evidence of corroboration too because it is the testimony before you that you rely on, what you call visual evidence of identification. The evidence connecting this accused depends on the lady saying so and so and connects him also because she says she identifies the

person in the circumstances, a person she had not seen for a very long time.

In cases where corroboration is required, I must tell you that it is dangerous to act upon the uncorroborated word of a person, such as Miss S in this case; because you see, for the reason, where it's a sexual offence and because it's her evidence of her seeing something, but you have to address yourself to the danger of so acting, you are convinced that you can safely act upon it and you feel sure of it then it is open to you to accept her evidence. You consider the dangers of her evidence standing alone.

You see, I mentioned to you the danger because it's a case of rape, and a person can make up stories, or because something happened they might get hysterical or so frightened and bewildered that they seize on the wrong person. But there is another reason for it. A witness may make a mistake as to the person she identifies and the witness may be mistaken, even if you knew somebody before, and you see somebody on a particular occasion you can make a mistake as to the identify of the person...

A person who you consider a truthful person you may consider a convincing witness but yet the witness is making a mistake not because the witness is wilful but because of the fact of human assessment based at looking at somebody and recognizing. So it is true then it is a number, even if a number of persons tell you the same thing that they saw a particular person a number of persons can make a mistake and it is all the more so when it is a single person who is telling you, speaking of the identity of the person and there are reasons why the person may well be making a mistake".

After reviewing the evidence, the learned trial judge continued:

"... the question still remains of the correctness or otherwise of identification made by the witness Miss S; the testimony that is not supported by any other evidence. No corroboration and I have gone on to the dangers of uncorroborated evidence but nevertheless you are reminded that if you, having considered those dangers on acting on uncorroborated evidence if you are convinced that in all the circumstances she was not mistaken as to the identification and you feel sure about this, it is open to you to convict the accused on this indictment".

Counsel for the applicant argued that the learned trial judge's summing up on the issue of identification ought to have gone further: the trial judge ought to have pointed out the possibility of wrongful conviction based on mistaken identification and emphasized the particular vulnerability of identification evidence to human error. Counsel cited the cases of ***Reid (Junior) v R*** and ***Palmer (Thomas) v R*** in support of his argument.

The effect of these cases on the duty of a trial judge in summing up to a jury on the issue of identification is usefully summarised in the following passage from the judgment of the Law Lords of the Judicial Committee of the Privy Council in the case of ***Freemantle (Michael) v R.*** Privy Council Appeal No. 1 of 1993, delivered on 27th June, 1994:

> "The learned judge was therefore under the judicial duty prescribed by the Court of Appeal in ***R v Turnbull*** [1977] 1 Q.B.224 as explained in the recent decisions of their Lordships' Board in ***Scott v The Queen*** [1989] A.C.1242; ***Reid (Junior) v The Queen*** [1990 1 A.C 363; ***Palmer v R*** [1990] 40 W.I.R. 282 and ***Beckford and others v Regina*** [1993] 97 Cr.App R. 409. According to these decisions whenever the case against an accused person depends wholly or substantially on the disputed correctness of one or more visual identifications of the accused person, the judge should warn the jury of the danger of convicting the accused in reliance on the correctness of the identification or identifications. The judge should also explain to the jury the reason for the danger and the special need for caution. The reason required to be explained is that experience has shown that visual identification (even by way of recognition) is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eye witnesses may be

as to the correctness of visual identifications and no matter how impressive and convincing they may be as witnesses, there is always the possibility that they all might nevertheless be mistaken in their identifications".

R v Turnbull expressly states that no set formula of words need be used. Therefore the trial judge need not in so many words inform the jury that persons have been wrongfully convicted in the past because of mistaken identification. What is to be emphasized is the particular vulnerability to error of visual identification, no matter how honest or convincing the witness may be as to the correctness of his visual identification. This is apparent from the case of ***R v Dickson*** [1983] 1 V.R 277 a decision from the Supreme Court of Victoria and referred to by their Lordships' Board in ***Reid (Junior) v R.*** In Dickson the trial judge had told the jury that they had to exercise extreme care in determining whether they were satisfied with the evidence as to identification and that in the past juries had made mistakes by acting on false identification. Yet the Court was not satisfied that what the judge said had effectively alerted the jury to the danger that the witnesses, whom they might regard as honest and convincing, might nevertheless be mistaken.

In the instant appeal, the summing up of the learned trial judge sufficiently brought to the attention of the jury the dangers of acting on uncorroborated identification evidence, and he explained the reason for the danger. He specifically referred to the danger of the witness' uncorroborated identification evidence being relied upon because "... it's her evidence of seeing something" and because " a person who you consider a truthful person you may consider a convincing witness but yet the witness is making a mistake not because the witness is wilful but because of the fact of human assessment based on looking at somebody and recognizing".

The trial judge also dealt fully with the opportunity which the complainant had for identification. She was in the house with her assailant for about three to five minutes before going outside, during which she was able to see his face clearly from the light of the 40 watt bulb in her bedroom, and his face was not obscured in any way. When she was giving him the bottle of water she was able to see his face for about two minutes with the aid of light from her bedroom, and a light shining into the kitchen area from the street. Outside there was a light on the outside of the house and the moon was out.

In terms of the assailant's comment while outside that the complainant wished to see his face when she directed him to a pipe under a tree, the trial judge properly directed the jury to consider whether this remark was made because the opportunity of the complainant for seeing the accused was not so good or whether it was merely the perception of the assailant that he was fairly well hidden and not identified up to that stage, and not that the complainant was less able to see. Ultimately he directed the jury to "consider any extent to which the correctness of identification is rendered by a circumstance of lighting not as well as she makes out to be considering the remark made by the assailant".

The learned trial judge also properly dealt with the discrepancy where the complainant told her landlord that she did not "pick up" who it was when asked if she knew her assailant, but subsequently gave evidence that she had known the applicant some ten years earlier. The trial judge left it to the jury to decide whether the words used by the complainant (that she did not "pick up" who it was) admitted the possibility that she did not recall who it was at the time of the incident or when she made the complaint to the landlord, but that later the recollection came to her of having seen the applicant before. The trial judge also properly directed the jury to consider whether this discrepancy affected the correctness of her identification.

The second ground of appeal argued was:

GROUND OF APPEAL

2. "That the learned trial judge did not deal correctly and or adequately with the purpose and function of character evidence (which was given on behalf of the accused) re: the circumstances of the case.

Counsel for the applicant cited ***R v Vye*** [1993] 3 All E.R. 241, a case from the Criminal Division of the English Court of Appeal, in which the Court referred to directions to a jury on the matter of good character evidence as having two limbs. The first limb has to do with the relevance of evidence of good character going to the credibility of the defendant. The second limb has to do with the relevance of good character as to whether the defendant was likely to behave as alleged by the Crown.

The Court concluded that when the defendant has not given evidence at trial but relies on exculpatory statements to the police or others, the judge should direct the jury to have regard to the defendant's good character when considering the credibility of those statements. But if a defendant of good character does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a first limb direction is not required.

With regard to the second limb, the judge should give a direction as to the relevance of the defendant's good character as to his credibility or likelihood of his having committed the offence charged, whether or not he has testified or made pre-trial answers to statements at trial which he relies on. It is for the trial judge in each case to decide how directions as to character are to be tailored to the particular circumstances. Provided the trial judge indicates the two respects in which good character might be relevant, i.e going to credibility and to propensity to commit an offence, the Court will be slow to criticise any qualifying remarks based on the facts of the case.

The learned trial judge dealt with the question of good character thus:

> "... but when it comes about the good character let me say this, because quite a lot of evidence was adduced both from a Justice of the Peace and Mr. Anthony Thompson, who is the Minister of Religion in the Salvation Army, also Mr. Wycliffe Matthews, a J.P. ; a lot of evidence about his being of good character. It has a relevance in that it may, or you may consider it and ask yourself as regards what effect it has on the facts in dispute. You may well believe that a man who is of good character is somebody who is unlikely to have committed the offence charged.
>
> But, I must also tell you this, that notwithstanding all this evidence brought as to his good character , if you find that on the evidence that is tendered the charge is made out it is open to you, notwithstanding the testimony of good character and having listened to it and considered if for what it is worth, nevertheless, to find against the accused if you find that the evidence points to it, notwithstanding the evidence of good character".

The learned trial judge therefore did direct the jury to address their minds to the effect of the character evidence on:

1. the facts in dispute; and

2. whether a person of such good character is somebody who is unlikely to have committed the offence charged.

Although in the complainant's evidence it did emerge that when confronted by her at the Police Station the applicant did say "see me? me no know you, a the first time me a see you", the applicant did not rely on this statement. In fact, to the contrary on his own case he knew the complainant since in his defence he asserted that she often visited the premises on which he the applicant lived because her boyfriend lived there. The applicant having not given evidence or relied on pre-trial answers or statements, no first limb direction (as to credibility) was required.

With regard to the second limb, the trial judge properly pointed out that the jury should consider the likelihood of the applicant committing the offence, and did properly exercise his discretion in tailoring his direction to the circumstances. For these reasons the application for leave to appeal was refused.