[2013] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 54/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

PAUL MAITLAND v R

Robert Fletcher for the appellant

Miss Claudette Thompson and Greg Walcolm for the Crown

24 and 25 January 2013

ORAL JUDGMENT

BROOKS JA

[1] On 15 April 2010, the appellant Mr Paul Maitland was convicted of the offences of rape and indecent assault. This was in the Circuit Court for the parish of Saint James. He was sentenced to serve concurrent terms of imprisonment at hard labour for the offences. For the offence of indecent assault, the term imposed was three years, while a term of 30 years was imposed for the offence of rape.

[2] Aggrieved by his conviction and sentence, Mr Maitland filed an application for permission to appeal against them and to have them overturned. The two original grounds of appeal that he filed alleged that there was an "[u]nfair trial" and that there was "[i]nsufficient evidence to warrant a conviction". A single judge of this court considered his application and was of the opinion that there were matters that warranted the consideration of the court. Permission to appeal was therefore granted.

[3] Mr Fletcher, acting on Mr Maitland's behalf, filed two supplemental grounds, namely, that:

> "1. The summation of the learned trial judge was deficient in certain critical areas and these deficiencies denied the appellant a fair trial.
>
> 2. The sentence is manifestly excessive."

[4] Before considering these grounds, it would be of assistance to set out the respective cases of the prosecution and the defence.

The prosecution's case

[5] The evidence for the prosecution was that on 4 October 2008 at about 9:15 pm, the complainant, referred to hereafter as C, was walking along a major thoroughfare in the city of Montego Bay when she was accosted by two men. She had, only 15 seconds before, seen them walking toward her from the direction of a place called "City Centre". She was heading toward City Centre and had seen their faces as they approached. Having passed her, the men turned back and held her, one at either side of her, and

put ratchet knives at her sides. One threatened to stab her with his knife if she did not obey his commands.

[6] The men ordered her to walk with them and not to look at them. She complied out of fear. They forced her to walk some distance with them. The journey took them through the grounds of a church and those of Mount Alvernia High School, unto a path that led to another road that led past Cornwall College, and along that road to an open lot on the side opposite to Cornwall College. It was a 15 minute trek.

[7] At a spot in the open lot, one of them "tie a 'kerchief around his face covering his nose". He touched her on her breasts and on her vagina. He then left the other man at that spot and took her a further distance into the open lot, where he forced her, at knife-point, to perform oral sex on him. He, thereafter, ordered her to remove her panties and, upon her doing so, had sexual intercourse with her, from behind her and without her consent.

[8] When he was through, he took her back to the spot where the other man was waiting. That man then took her to the place from whence she had just come, and he also sexually assaulted her.

[9] After threatening her not to move for a certain period, they left her in the open lot. She telephoned her boyfriend, told him of her ordeal and then made her way to City Centre. Her boyfriend joined her there and together they waited for the arrival of the police, who had, by then, been contacted. While waiting, she saw the two men

again. This was about 10 minutes after they had left her in the open lot. They looked in her direction and laughed.

[10] The police vehicle came and took her to the police station. While she was waiting to be interviewed, the police brought in a man. It was the appellant. C identified him as the man who had first had sex with her that evening. She said that he was also wearing the same clothing that he had on at the time of the assault on her.

[11] The police officer who had apprehended the appellant said that, in response to the complaint that he had received, he went, at about 10:00 o'clock that night, to an area not far from City Centre. He saw two men and accosted them. They ran. He chased and held the appellant and took a ratchet knife from his person. He then took him to the police station where C identified him.

[12] Forensic evidence provided the profile of a female's DNA on the appellant's underpants. The profile matched C's DNA, as ascertained from her blood samples and buccal swabs. The probability that it was C's DNA on the underpants, was 3.3/100,000,000,000,000,000. The expert who gave that evidence also told the jury that the world's population is almost 7,000,000,000 and Jamaica's population is approximately 2,800,000. The conclusion was that "the chance of finding somebody with that profile is that rare".

The case for the defence

[13] Mr Maitland gave an unsworn statement from the dock. He said that he was coming from a church on the night in question when he saw the police car approach. He said that a man who was walking behind him ran away. He, however, kept on walking and the police approached him. He said that his clothes were wet from a ritual which had taken place at the church. The police took him to the police station and he was made to sit with some other men.

[14] While there, he said, the police brought C and her boyfriend and had C look at all the men. She looked and shook her head. Thereafter a police officer called "Mr Spy" brought C and her boyfriend to look where Mr Maitland was with the other men. Mr Spy was, thereafter, engaged in whispering to C and her boyfriend.

[15] He said that the account that C gave at the police station was that she and her boyfriend were walking together when "one man run out pon dem 'roun a Cornwall". The police did, however, take Mr Maitland's underpants that night and were showing them to C and her boyfriend.

[16] Although he maintained that he had nothing to do with any rape or robbery, whatsoever, he sought to cast doubt on C's account of the incident. He said that City Centre was a place that had a security post and that any such abduction, as C had described, could not have escaped notice. He said:

> "...nobody could go from KFC an bring them up pass KFC an [sic] bring dem down roun a cornwall [sic] as dem saying. Dere is security post, nobody a walk wid nobody all di way

round deh soh goh all di way round deh soh. Mi nuh know noting [sic] whey dem a talk bout, an security deh a Cornwall."

Ground One: Deficiencies in the summation in respect of identification evidence

[17] Mr Fletcher set out in his written submissions, the argument that although the learned trial judge gave the standard warning about relying on visual identification evidence, she failed to "specifically bring to the jury's attention weaknesses in [that] evidence, as is required". According to Mr Fletcher, those weaknesses were:

> "1. The variable lighting which attended the journey in the incident
>
> 2. The fact that the time for the [identification] was relatively brief
>
> 3. The difficult circumstances surrounding the incident – fright etc
>
> 4. The fact that the circumstance [sic] of the identification at the Police Station was highly suggestible in that the appearance of the Appellant and a police officer at that time could prompt an inaccurate [identification]."

[18] Learned counsel also included in those submissions, the argument that the learned trial judge erred in failing to bring to the jury's attention the implied assertion that there may have been prompting by the police officers to secure C's identification of the appellant.

[19] In addressing this ground, it is to be noted that the learned trial judge did warn the jury of the dangers of visual identification evidence. She did not, however,

specifically advise the jurors about the weaknesses of the identification evidence. The learned trial judge did mention the issues of fright, the time for which C saw the faces and the fact that it was night. She did not, however, deal with them in the context of the warning of the dangers of visual identification. In that regard, the learned trial judge did run afoul of the requirements of a proper **Turnbull** direction (**Turnbull v R** [1976] 3 WLR 445). Whether that error is fatal to the conviction depends on the evidence in the case.

[20] A defect in the summation may not necessarily be fatal to the conviction. In **Peter Campbell v R** SCCA No 17/2006 (delivered 16 May 2006), this court dismissed an appeal against conviction although the trial judge did not use the words, "a mistaken witness can be a convincing one". The trial judge's communication of the relevant principles was what was important and the court found that he had fulfilled that obligation.

[21] In **David Lyons v R** SCCA No 82/2007 (delivered 30 July 2009), this court considered a complaint that the learned judge at first instance in that case, failed to direct the jury in respect of the weaknesses in the identification evidence. McIntosh JA ((Ag) as she then was), in giving the decision of this court, noted that the judge had reviewed the identification evidence and had given the requisite warning. She accepted that the judge "did not expressly state that the areas highlighted were weaknesses". The court found, however, that the approach taken by the judge was sufficient to bring

to the minds of the jury that those areas required careful consideration. Based on that finding the complaint on appeal was found to be without merit.

[22] That approach may properly be adopted in the instant case. The learned trial judge did tell the jury of the need to consider the various matters including the lighting. She did remind the jurors of the time of night, although, it is true, she placed more stress on the significant amount of artificial lighting that was present rather than on the fact that it was night. That would be a matter which would be open to the jury to assess based on their actual experience of visiting the scene. The learned judge also did not remind the jury that C did not look at the faces of either of the men as they escorted her along the route to the open lot.

[23] If there is other evidence which bolsters the identification evidence then an error in the summation may not necessarily be fatal. The fact that other evidence may bolster that relating to identification, was in fact, recognised in **Turnbull**. Lord Widgery CJ said at page 448G, that where the identification evidence is poor, 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**" (emphasis supplied).

[24] In the instant case, three specific circumstances would have assisted the jury in considering the issue of visual identification. The first is the fact that the jury visited the location of the offences starting from the point of abduction and walked the route that the perpetrators used to the place where C was eventually assaulted. It is of

importance that the jury did so at night. They were, therefore, able to see for themselves, the lighting conditions of which C spoke and the variations in lighting on which Mr Fletcher commented. The actual experience would have made a vivid impression on the members of the jury.

[25] The second element that would have bolstered the visual identification evidence, is the forensic evidence, namely, the match of the DNA on Mr Maitland's underpants with C's DNA and the extremely low probability that the female DNA on the underpants was from some other woman. The statistics would have had a telling effect on the jury. It is true that the learned trial judge seemed to have fallen into what is called "the prosecutor's fallacy" when she addressed the issue of the DNA evidence. This is when she sought to state that only C could have left that stain on the underpants. The learned trial judge said at pages 48-49:

> "Now members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there is only one female in Jamaica and even in the world from which this DNA of female could have come and the complainant is that female."

She did soften that position somewhat in the sentences that immediately followed that erroneous statement:

> "If that is the position, the decision you have to reach on all the evidence is whether you are sure that it was the complainant who left that stain there. So, you have to look at that evidence carefully."

[26] Despite those errors, it may fairly be said that the evidence against Mr Maitland was very strong and that the jury would have convicted even if the errors had not been

made. If necessary, the *proviso* to section 14(1) of the Judicature (Appellate Jurisdiction) Act should be applied.

[27] The third element that strengthened the identification evidence is C's evidence that when she saw Mr Maitland at the police station he was wearing the same clothing that the perpetrator had on at the time that the offences were committed. Given the relatively short period (half an hour), between the time of the commission of the offences and the time of the identification at the police station, the jury would have been entitled to consider this as supporting the correctness of C's identification of Mr Maitland. It is accepted that the period of time was not as short as in **Kerrick Thompson v R** SCCA No 206/2001 (delivered 20 December 2004). In that case the apprehension of an injured Mr Thompson was very soon after an exchange of gunfire between the police and criminal gunmen, one of whom dropped a gun during the exchange. Mr Thompson was also wearing clothing identical to the man who dropped the firearm. The case does, however, lend support to the principle that evidence as to clothing can support visual identification evidence.

[28] Ground one, accordingly, fails.

Ground Two: The sentence is manifestly excessive.

[29] Mr Fletcher argued, in support of this ground, that a review of relatively recent decisions in cases involving sentences as punishment for rape shows that the sentence of 30 years in this case was manifestly excessive. He cited the cases of **R v Kenton Salmon** SCCA No 176/2006 (an oral judgment delivered 14 November 2012), **Sheldon**

Brown v R [2010] JMCA Crim 38, **Paul Allen v R** [2010] JMCA Crim 79 and **Marvin Reid v R** [2011] JMCA Crim 50.

[30] Kenton Salmon was convicted of illegal possession of firearm, rape, burglary and robbery with aggravation. The evidence against him was that he and another man broke into a house in which the complainant, a schoolgirl over the age of 16, was sleeping. Mr Salmon was the principal offender, being the man armed with the firearm and taking the lead role. Both men raped the complainant twice, in turns. They also robbed her of money and her cellular telephone. He was sentenced, on conviction, to 25 years imprisonment for the offence of rape.

[31] This court, reduced that sentence to one of 18 years on the basis that the learned trial judge, in imposing sentence, did not consider the elements of rehabilitation and the particular circumstances of the offender. The court found that the sentence was somewhat out of the range of the sentences usually imposed for the offence. It does not appear, however, that the cases mentioned below were brought to the attention of the court at that time.

[32] In **Sheldon Brown**, the complainant was abducted from her home, taken to various places and raped several times by the applicant. He returned her to her home and raped her yet again. She suffered this ordeal in the context of the applicant having informed her that he had been contracted to kill her. This court had no difficulty in affirming the sentence of 20 years imprisonment at hard labour that was imposed upon conviction.

[33] In **Marvin Reid**, the complainant was abducted at gunpoint as she walked along a roadway. She was taken to a house where two men raped her. The sentence of 10 years imprisonment was not disturbed.

[34] **Paul Allen's** case involved a sentence of 20 years for the offence of rape. The evidence was that the complainant in that case was abducted at gunpoint from a street in Montego Bay. Her attacker took her to a house where he raped her, indecently assaulted her and robbed her of cash. On appeal, there was no reduction of the sentences imposed for the individual offences, although a consecutive element was overturned.

[35] It may be fair to say that the sentence imposed in **Marvin Reid** was significantly less than the norm. It may, therefore, be excluded from this analysis. The cases of **Sheldon Brown** and **Paul Allen** did not involve two rapists, as in the instant case, but they do indicate a level of sentence that this court considers appropriate. The fact that two perpetrators defiled C cannot be ignored. Although only one person has been convicted of the offence, and it may be said that he should only be punished for his acts, the fact remains that he was present and supporting the other offender. The fact of the multiple rapes warrants a sentence greater than that imposed on a man who acts alone, providing that there is no unusual depravity or other aggravating circumstance.

[36] Although the overall effect on C cannot be ignored, it seems that the circumstances of this case are not so different from those in **Paul Allen** to warrant an

additional 10 years imprisonment. The circumstances of the instant case are not far removed from those in **Kenton Salmon**. As in **Kenton Salmon**, the learned trial judge in the instant case did not specifically address the issue of rehabilitation but she was addressed on that issue in mitigation and she did consider Mr Maitland's unique situation. She said, at page 58 of the record:

> "You have admitted to two previous convictions, and as your attorney said, between 2004 and 2008 you have managed to keep yourself out of trouble, according to the records."

[37] Despite the similarities with **Kenton Salmon**, it seems that 18 years is inadequate punishment when all is considered. This court has a duty to be "aware of the state of crime in the country and the current outcry of the populace against the spate of crimes involving the defilement of women and young children" (see **Regina v Kory White** (1997) 34 JLR 30 at page 45). Since that case, this country has seen several horrible cases of that ilk and our courts must reflect the outrage that the society has expressed against their occurrence, always bearing in mind, of course, all the principles to be observed in imposing sentences.

[38] In the instant case, what must be considered would include the ordeal to which C was subjected, the fact that Mr Maitland was 35 years old at the time of conviction, did not employ a firearm in the commission of the offences and had a previous conviction for an offence involving the person of another, namely, robbery with aggravation. An appropriate sentence would be 23 years imprisonment. In the

circumstances, the sentence of 30 years would be manifestly excessive. This court may, therefore, set it aside and substitute a lower term.

Separate consideration of offences

[39] The court was concerned that the learned trial judge had failed to specifically direct the jury of their duty to give separate consideration to the evidence concerning each offence charged on the indictment. She did, however, give accurate guidance concerning what had to be proved in respect of each offence. In giving her final charge to the jury the learned trial judge also indicated the options open to them on each count. She said at page 51 of the record:

> "The verdict on count one is, not guilty or guilty of rape and on count two, not guilty or guilty of indecent assault."

It is undoubtedly true that she did not direct the jury that a verdict in respect of one of the counts did not bind them to a similar verdict in respect of the other count. In the instant case, however, where the issues joined were those of identification and C's credibility, and not whether the acts of violation occurred, but the learned trial judge's error cannot be held to be fatal to the conviction.

Conclusion

[40] Although the learned trial judge failed to specifically bring the weaknesses in the identification evidence to the attention of the jury in the context of warning them of the dangers of visual identification, the strength of the evidence against Mr Maitland is such that the jury would have convicted him even if they had been correctly directed. There has therefore been no miscarriage of justice.

[41] The sentence of 30 years imposed for the offence of rape is, however, significantly outside the range of recent decisions and can be said to be manifestly excessive.

[42] As a result, the appeal against conviction is dismissed. The appeal against sentence is allowed in part. The sentence of 30 years for the offence of rape is set aside and a sentence of 23 years at hard labour substituted therefor. It is to be served concurrently with the sentence of three years for the offence of indecent assault, which is confirmed. The sentences are to be reckoned as having commenced on 22 July 2010.