NMG

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 39/2000

BEFORE: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE HARRISON,J.A
THE HON. MR. JUSTICE WALKER, J.A.

R. v. ASTON MYRIE

L. Jack Hines for the Appellant
Carrington Mahoney Acting Senior Deputy Director of Public Prosecutions for the Crown

June 30, and October 28, 2004

WALKER J.A:

On January 28, 2000 after a trial by jury presided over by Marva McIntosh J in the St. Catherine Circuit Court sitting in Spanish Town the appellant and another man with whom he was charged and tried jointly were both convicted of the crime of rape. Following conviction, the appellant and his co-accused were each sentenced to serve a term of imprisonment of seven years at hard labour.

On June 30, 2004 we dismissed this appeal, affirmed the appellant's conviction and sentence and ordered that the sentence should commence as from April 28, 2000. We promised then to put the reasons for our decision in writing at a later date and now do so.

The case for the prosecution was a short one. It rested wholly on the visual identification of the appellant by the virtual complainant, she being the prosecution's sole eyewitness to the incident. Apart from the evidence of this witness there was no other evidence to implicate the appellant in the crime. The witness testified that she was at her home at about 11:a.m. on the day in question when the appellant and a male companion (the co-accused) came to the house. She had known both men previously. The appellant she had known by the alias name "Ninja" for about five to six months before that time. She was grabbed by the other man who was armed with a long knife and dragged further into the house where that man had sexual intercourse with her against her will. During this event the appellant stood at the doorway and watched. At one stage the appellant came nearer and pointed a gun at the complainant while telling her to be quiet. When the other man had finished having sexual intercourse with her that man said "Ninja, your turn now" after which the appellant drew her by the hand, threw her on to a bed and, himself, had sexual intercourse with her without her consent. Afterwards having cautioned her that if she told anyone what had happened to her they would return, burn down her house and kill her, both men went away. Subsequently, defying the men, the complainant reported the matter to the police as a consequence of which the appellant was apprehended and charged as aforesaid.

In his defence the appellant gave evidence in the course of which he denied going to the complainant's house and having sexual intercourse with her. He admitted having known the co-accused and members of the co-accused's family prior to the date of the incident, but he swore that he had no previous knowledge of the complainant and was seeing her for the first time in court. He also denied being known by the alias name "Ninja".

On this state of the evidence it is clear that the critical issue in this case was one of visual identification. It was, therefore, imperative that the learned trial judge should have given to the jury the warning prescribed in ***R v Turnbull*** [1976] 63 Cr. App. R. 132: (1977) 1 Q.B. 224. The reasons for giving that warning were re-stated in ***Freemantle v R*** [1995] 1 Cr. App. R 1. In ***Freemantle*** in the course of delivering the judgment of their Lordships' Board, after referring to a number of decisions including ***Scott v R*** [1989] 89 Cr. App. R 153; ***Palmer v R*** [1990] 40 W.I.R 282 and ***Beckford and Others*** [1993] 97 Cr. App. R 409, all of which followed and explained ***Turnbull,*** Sir Vincent Floissac said at page 3:

> "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 and of the special need for caution before 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 their 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."

Unhappily, in the present case the ***Turnbull*** warning was not forthcoming and the failure to give it was a non-direction amounting to a misdirection on the part of the trial judge. Indeed, that was the gravamen of the appellant's complaint on this appeal.

The question now must, therefore, be whether in the circumstances of this case such a misdirection is fatal to the conviction of the appellant, or whether those circumstances allow for the application of the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

Mr. Mahoney for the Crown submitted that they did, whereas Mr. Hines for the appellant said they did not.

The appropriateness of the application of the proviso in a case such as this was considered in ***Freemantle*** (supra) where at pages 4-5 of the report Sir Vincent Floissac said:

> "In ***Scott v R*** (supra) at p. 163 and p.1261, Lord Griffiths said:
>
> > 'Their Lordships have nevertheless concluded that if convictions are to be allowed upon

> uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning. In this capital offence their Lordships cannot be satisfied that the jury would inevitably have convicted if they had received the appropriate warning in the summing up and they will accordingly advise Her Majesty to allow the appeal of Scott and Walters'.

In ***Palmer v R*** (supra) at p. 285, Lord Ackner said:

> 'The trial judge never told the jury that visual evidence of identification is a class of evidence that is particularly vulnerable to mistake, and the reasons for that vulnerability, nor that honest witnesses can well give inaccurate but convincing evidence. Their Lordships have previously stated in ***Barnes, Desquottes and Johnson v R.; Scott and Walters v R.*** [1989] 37 W.I.R. 330, 343, and repeated the observation in ***Reid, Dennis and Whylie v. R.*** that unless there were exceptional circumstances to justify such a failure the conviction will be quashed, because it will have resulted in a substantial miscarriage of justice.'

In ***Beckford and Others v. R.*** (supra) at p. 415 , Lord Lowry said:

> 'Their Lordships, however, having regard to their conclusion upon the judge's failure to give a general warning, and also because they wish to emphasise that such a failure will nearly always by itself be enough to invalidate a conviction which is substantially

> based on identification evidence, deem it unnecessary to devote to counsel's second point the care which it would otherwise deserve.'
>
> Their Lordships are satisfied that none of these dicta was intended to close the door to the application of the proviso whenever the trial judge has failed to give to the jury the requisite general warning and explanation in regard to visual identifications. On the contrary, the door was deliberately left ajar for cases encompassed by exceptional circumstances and has not been closed by the observations of the Board in ***Reid (Junior) v R*** [1990] 90Cr. App. R. 121, 130, [1990] 1A.C. 363, 384C. Their Lordships consider that exceptional circumstances include the fact that the evidence of the visual identification is of exceptionally good quality. Accordingly, the ultimate issue in this appeal is whether the evidence of the visual identifications of the appellant was qualitatively good to a degree which justified the application of the proviso."

What then are the circumstances of the present case? Firstly, the identification of the appellant was by way of recognition inasmuch as the complainant testified that the appellant had been previously known to her for about five to six months.

Secondly, the incident occurred in broad daylight, the evidence being that the time was about 11'o'clock in the morning.

Thirdly, the encounter between the complainant and her attackers occurred at close quarters which provided a good opportunity for the complainant to identify her attackers.

Fourthly, the encounter lasted for some time during the course of which both men had sexual intercourse with the complainant one after the other, the appellant (according to the complainant) being the second in time.

Fifthly, the evidence of the complainant was that after the appellant's companion had sexually assaulted her, he invited the appellant to do likewise saying "Ninja your turn now", an invitation to which the appellant immediately responded by, himself, sexually assaulting the complainant. It seems to us that the enthusiastic response of the appellant to this invitation could reasonably be interpreted as an implied acknowledgment by the appellant that he was called "Ninja" and that he had been correctly identified by the complainant by way of recognition.

Lastly, the evidence in the case disclosed no material discrepancies, contradictions or other weaknesses in the evidence of identification of the appellant.

In the result we are of the opinion that the quality of the evidence of visual identification of the appellant by the complainant was exceptionally good and was qualitatively good enough to justify the application of the proviso. Accordingly, we apply the proviso so as to sustain this conviction having concluded as we have done that there was here no miscarriage of justice because the jury, acting honestly and

properly, would inevitably have found that the appellant was guilty of rape had they been given the requisite ***Turnbull*** warning and explanation by the trial judge.