[2011] JMCA Crim 25

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 69/2007**

**BEFORE: THE HON MR JUSTICE HARRISON JA**
**THE HON MRS JUSTICE HARRIS JA**
**THE HON MR JUSTICE DUKHARAN JA**

**COURTNEY TRAIL v R**

**L. Jack Hines for the applicant**

**Mrs Ann-Marie Feurtado-Richards for the Crown**

**4 October 2010 and 17 June 2011**

**HARRISON JA**

[1] The applicant was charged on an indictment containing two counts. Count one charged him with the offence of rape and the second count charged him with robbery with aggravation. After a trial before Norma McIntosh J (as she then was) and a jury in the St James Circuit Court on 26 April 2007, the applicant was convicted on both counts. He was sentenced to 15 years imprisonment on each count and the sentences were ordered to run concurrently. The crucial issue at the trial was whether it was the applicant who had sexually assaulted and robbed the complainant.

inserted it into her vagina. Whilst he was in the act of sexual intercourse, he told her that he always wanted to have sex with her and that he used to sit on the wall and watch her when she came from school. She made no response.

[7] When he was finished having sexual intercourse, he told her to give him her phone and money. She gave him $2,500.00 and a Motorola camera flip phone valued at about $20,000.00. The money and phone were in her handbag. She said she had given him these items to him because she was afraid "for her life". He told her to thank God for her life and he left the scene thereafter. She remained in the bushes for a few seconds in order to ensure that he had left. She got up and returned to the spot where she had taken off her clothes. She put them on and went home.

[8] Nobody was at home when she got there. She called her mother on the telephone and told her that somebody had just raped her. Her mother asked her if she knew who it was and she told her that it was somebody from church. She remained at home and a family friend came there and then took her to the Barrett Town Police Station. She was later taken to the Freeport Police Station where a Constable Graham gave her certain instructions. She went home and returned to the police station later in the morning.

[9] Under cross-examination, the complainant denied that the applicant had asked her as they walked up the road if she did not remember him. She also denied that she had told him that she did not know him. It was suggested to her that the applicant then told her that he was Courtney from the New Testament Church but she insisted that no

such conversation had taken place. She further denied that it was at that stage that she said "oh", and that it was then that she had recognized him. She denied the suggestion that she had told members in her community that the man who had sexually assaulted her was a tall man. She also denied that she had accused three other men of assaulting her. She further denied that she had made a mistake when she said it was the applicant who had held her up near to her house.

[10] In re-examination, the complainant testified that whilst the applicant was having sex with her, he had asked her if she knew who was talking to her. She said she told him no because she was afraid that if she had said yes, he would have killed her.

[11] The mother of the complainant testified that she was in Kingston on Sunday, 5 March 2006, when she received a telephone call from her daughter. The complainant told her that somebody raped her and when she asked her if she knew who the person was, she told her it was someone who went to her church. She then asked her who it was and, according to her, the complainant told her it was Courtney. The complainant's mother then asked the complainant to describe the person to her and the complainant's mother after hearing the description told her that it was Courtney Trail. Under cross-examination, the complainant's mother said that it was only after the complainant had described the person that the name Courtney was mentioned. The following dialogue is recorded in the transcript:

"THE WITNESS: Yes, when he (sic) gave me the description I know the person.

| | |
|---|---|
| Q. | And you gave the name? |
| A. | Yes, sir." |

In re-examination the complaint's mother explained as follows:

| | |
|---|---|
| "Q | ... you indicated to us that when ... called you on the phone, she told you - you asked her if she knew who it was and she told you that it was somebody we used to go to church with? |
| A. | Yes. |
| Q. | And then you said who is it and she said Courtney? |
| A. | But she don't remember the last name but I told her it is Courtney Trail. |
| Q. | She mentioned the name, Courtney? |
| A. | And I told her Courtney Trail. They call him Brother Trail at church. The young people say Courtney but the adults say Brother Trail." |

[12] The complainant's mother also testified that she had known Courtney Trail since 2002 and that he had attended the New Testament Church of God at Lilliput. Under cross-examination, the complainant's mother denied that she and her relatives had attacked and beaten one Joslyn Barrett, also known as Courtney, after he was accused of sexually assaulting the complainant. She also denied that a man by the name of Ronique was also accused of committing the offence.

[13] When the applicant was charged for the offences, he said under caution, "I did see her that morning but I did not rape or rob her".

[14] Both the complainant and her mother pointed out the applicant in the dock as the person they knew as Courtney Trail.

**The Defence**

[15] The applicant testified that he was at home on 5 March 2006, at the time this incident is purported to have occurred. He agreed that earlier on, at about 1:00 am, he was walking along the Lilliput main road on his way home when a white Corolla station wagon stopped by Bob Man shop. A young lady alighted from it but he was unable to recognize the person due to the distance between them. This lady, he said, went up a hill and he caught up with her. She looked around and he said, "Are you ...'s daughter?" She said yes. He asked her why it was that she was alone on the road at that time of the night but she did not respond. He continued with his questions and asked her if someone was coming to meet her and she told him no. He then asked her why she did not call her boyfriend to come and pick her up and she told him that he was not around. He then asked her if he could accompany her home because of what was happening in the community but she declined his offer. They continued walking without having any further conversation. On reaching a crossing, he said, he turned off, went to his home and thereafter to bed. Some five days later he received a telephone call from a church brother and as a result of what he was told he called his mother in Manchester.

[16] He denied that he had held up the complainant and that he told her that he was a gunman and that if she moved he would kill her. He also denied that he was armed with a knife, that he went behind her, held her and placed the knife at her throat. He further denied that he took her from the roadway to an unfinished house and ordered her to take off her pants and panties and that he took her into bushes and had sexual intercourse with her. He also denied that he took her money and cellular phone. He admitted however, under cross-examination, that he had known both the complainant and her mother prior to the incident.

**The Grounds of Appeal and Submissions**

[17] The applicant's initial application which sought leave to appeal his conviction was refused by the single judge. He has now renewed the application to the court. He abandoned the original ground of appeal and was granted leave to argue four supplemental grounds:

> "1(A) The learned trial judge erred in that she did not direct the jury that the evidence of the mother was discrepant in two regards:
>
> (a) It contradicted the unchallenged evidence of the complainant that she had not told the mother the name of her assailant but only that he was somebody from her church and
>
> (b) That most importantly the mother contradicted herself when she states (sic) in cross-examination that it was she who gave the name of the person - (meaning the assailant - see page 103

lines 14-16 and see in particular that she the complainant gave her the description and she the mother gave the name and also lines 20-22 but in re-examination lines 12-15 she says (sic) it was the complainant who said the name and further that this significant difference in her evidence remained unresolved and being unresolved there had to be an explanation for without an explanation no finding of fact could be made on this point, i.e. that it was the complainant who told her the name Courtney -see **R. v Williams and Carter** S.C.C.A 51 and 52 of l986.

(c) That further the evidence of the complainant therefore that she did not give a name remains a finding of fact

(d) Likewise the evidence unchallenged of the mother that she received a description from the complainant and she told her the name whether Courtney or Courtney Trail or Brother Trail is a finding of fact

(1)(B) That the learned judge further erred in that she failed to direct the jury particularly in the light of (b) (c) and (d) above that the identification of the applicant by the complainant was flawed in that it was not an independent or unassisted identification as is required by law, but an identification assisted by or given by her mother, who received a description from the complainant and proceeded to identify the assailant who robbed and raped her as Courtney or Courtney Trail or Brother Trail.

2. The learned trial judge erred in that although in her summing up she mentioned the failure of the complainant to name the applicant as a factor which might weaken the identification, she did not explain why or how? In other words she did not enlighten the

jury with her wisdom and experience: **R. v Oliver Whylie** (1977) 15 JLR 163 at page 166.

3. The learned trial judge erred in that she failed to point out that in these unusual circumstances of the encounters as stated by the complainant (that the applicant met with her twice in a short time and distance and he was wearing the same clothes. (sic) And the applicant's evidence to the contrary that there was only one encounter and that the clothes he wore then in this encounter was (sic) different from the clothes described by the complainant) that on the specific and fundamental issue of the clothes if they believed him or they were in doubt as to his evidence on this matter, they should find this point in favour of the applicant.

4. That in the circumstances surrounding the identification (see 1B above) the learned trial judge should have pointed out to the jury that no identification parade was held and that this was the only way of testing the independence and authenticity of the identification."

[18] We are of the view that all four grounds can be conveniently dealt with together. Mr Hines for the applicant placed in the forefront of his argument the fact that the evidence of the complainant's mother had contradicted the evidence of the complainant as to the name of the person who had allegedly sexually assaulted the complainant.

[19] Mr Hines submitted that the discrepancy between the mother's evidence and that of the complainant was not resolved nor explained to the jury. The jury, he said, were not told that it was not resolved and neither were they told that no positive finding of fact could be made on that point, that is, that the complainant gave her mother, the name Courtney as the person who raped her. -He referred to and relied on

**R v Williams and Carter** SCCA Nos 51 and 52/1986 delivered 3 June 1987. He submitted that with no finding of this fact, the jury was left with the evidence of the complainant who stated that she gave no name but only that it was somebody from the church, and the evidence of the mother that she was given a description and then gave the name Courtney or Courtney Trail or Brother Trail.

[20] Mr Hines further submitted that the identification in these circumstances would not be an independent or unassisted identification by the complainant as is required by law but that it was identification by the mother or assisted by the mother from the description given to her by the complainant. Furthermore, he submitted that the court did not hear what the description was, or how the conversation was conducted, or whether there was any undue influence or suggestion twisting the complainant to come to the conclusion that the person who robbed and raped her was the applicant.

[21] Mr Hines did argue quite forcefully that in the circumstances surrounding the identification, the learned judge should have pointed out to the jury that no identification parade was held and that this was the only way of testing the independence and authenticity of the identification.

[22] Finally, he submitted that the evidence did "cry out" for the holding of an identification parade because a parade that was properly conducted would give credence to any identification. He argued that notwithstanding the complainant having given a description to her mother and her mother naming the applicant, an identification parade would have ensured that she was properly tested.

[23] Mrs Feurtado-Richards, for the prosecution, submitted that the learned judge had given satisfactory directions to the jury as to how they should deal with the issues that were raised in the evidence. She referred specifically to the directions on identification and discrepancies, which we shall look at in detail later in this judgment.

[24] Mrs Feurtado-Richards argued that it would have been ideal for an identification parade to be held based on how the name was elicited. However, she submitted that one has to look at the evidence. There was prior knowledge of the applicant and this was not refuted by him. She submitted that when one looks at the summation, the learned judge gave proper directions. In the circumstances, she submitted, it could not be said that the trial was unfair. Furthermore, no miscarriage of justice had occurred.

**The Discussion and Analysis**

[25] Mr Hines had submitted that the discrepancy between the mother's evidence and that of the complainant regarding the name of the applicant was a major issue which the jury needed to have resolved but not much assistance was given by the learned judge in this regard. The complainant had testified that she did not tell her mother the name of the applicant. She simply said that it was someone from church who had raped her. The complainant's mother testified however as follows:

| | |
|---|---|
| "THE WITNESS: | ... was crying and she said, 'Mom, somebody just raped me' I said to her... |
| HER LADYSHIP: | Wait. 'I said to her...? |

| | |
|---|---|
| THE WITNESS: | Do you know who the person is, and she said, 'Yes'. I said, 'Who it is?' She said, 'It is somebody who used to go church with... |
| HER LADYSHIP: | You said to her, 'Do you know who the person is,' and she said, 'Yes.' |
| THE WITNESS: | Yes. |
| HER LADYSHIP: | And what came after that now? |
| THE WITNESS: | I said, 'Who it is?', and she said, 'Courtney'. |

The complainant's mother asked the complainant to describe the person for her and this is what followed:

| | |
|---|---|
| "HER LADYSHIP: what? | She gave the description of |
| THE WITNESS: | She gave me the description of the person. |
| HER LADYSHIP: | Yes? |
| THE WITNESS: | And she did. I said that description - ... said that is who. |
| HER LADYSHIP: | Wait, wait. That description, I know the description? |
| THE WITNESS: | That description you gave me I know the person. |
| HER LADYSHIP: | Yes? |
| THE WITNESS: | I told her it was Courtney Trail. |
| HER LADYSHIP: | You told her it was Courtney Trail? |

| | |
|---|---|
| THE WITNESS: | Yes. I told her his name is Courtney Trail. |
| ... | |
| Q. | And you are the person who said that you knew that person by the description you got? |
| A. | Yes, Yes, I did." |

The dialogue continued:

| | |
|---|---|
| "HER LADYSHIP: | What was the question that you were just asked? |
| THE WITNESS: | He said if it was after she described him to me that I know -- that I mentioned the name. |
| HER LADYSHIP: | That was the question before. What was the last thing? |
| THE WITNESS: | I don't remember. |
| HER LADYSHIP: | Can you read it back for her for me, please. |
| THE WITNESS: | Yes, when ... she gave me the description I know the person. |
| Q: | And you gave the name? |
| A: | Yes, sir. |
| HER LADYSHIP: | Why are you not listening to what is being asked of you, ma'am? |
| Q: | You were the one who provided the name, Courtney? |
| A: | Yes, sir. |
| MR. MORGAN: | I have no more questions." |

However, in re-examination the complainant's mother said:

| | |
|---|---|
| "Q. | ... you indicated to us that when ... called you on the phone, she told you - you asked her if she knew who it was and she told you that it was somebody we used to go to church with? |
| A. | Yes. |
| Q. | And then you said who is it and she said Courtney? |
| A. | But she don't remember the last name but I told her it is Courtney Trail. |
| Q. | She mentioned the name, Courtney? |
| A. | And I told her Courtney Trail. They call him Brother Trail at church. The young people say Courtney but the adults say Brother Trail." |

[26] What is abundantly clear from the excerpts from the transcript outlined above is that the complainant's mother had given two versions of who had mentioned the name Courtney. This was certainly a matter for the jury to decide whom they believed at the end of the day. Further, the judge had given directions to the jury as to how they should deal with discrepancies. This is what she said:

> "Now, in most trials it is possible to find differences in the evidence of the witnesses. A witness may say something on a particular point at one stage in the evidence and then that same witness may go on to say something different on the

same point at another stage or, it may be the case where one witness may say something on a particular point and another witness may say something different on the same point. Now, these differences are referred to as discrepancies and inconsistencies. It is for you as judges of facts to decide whether there are any of these differences and/or inconsistencies in the evidence that you have heard in this trial.

Now, if you decide that there are any such differences, then you must go on to assess them; that is to say, you must decide whether those differences that you find are slight or serious. And of course, you would assess them in that way as it relates to the issues that you have to decide in this case, how they affect the issues that you have to decide in this case.

Now, if you decide that the discrepancy or inconsistency that you find is slight, then you would be well entitled to say that it does not really affect the credit of the witness concerned on the issues that you have to decide, and that you can still rely on the evidence of that particular witness. On the other hand, if you decide that it is serious, you may feel that it would not be safe to rely on the evidence of that witness on that particular point where you find this difference, or indeed, it may be so serious that you may say to yourselves that it would not be safe to rely on that witness's evidence at all. It is for you to say whether any difference you find is slight or serious and then go on to deal with it as I have directed you.

Now, you must bear in mind that a difference in a witness's evidence does not necessarily mean that the witness is lying, although it could mean exactly that. So, you have to consider the evidence carefully, and when assessing the discrepancies or inconsistencies, you should take into account for instance, the age of the witness, the witness's level of intelligence as it appears to you, because remember, I told you that you have seen and heard the witnesses and it is for you to form your own views about the witness's level of intelligence as it seems to you, as well as the witness's powers of observation, ability to express himself or herself in words, to vividly recall the incident, and if there is any lapse of time between the incident and the time when the witness

> has come before you to give evidence. You may make up your minds whether you think that has any effect on the witnesses and the differences you find in the witnesses (sic) evidence. In this case, the witness was giving evidence in 2007, about something that took place in March 2006; she has told you. So, it is for you to decide, not on the basis of how it seems to you how you would recall, or whether you would think that it is a long time, but according to how you assess that witness and what you think the impact would be on that witness as you have assessed that witness. And, I have tell you that it is open to you to accept a part of a witness's evidence if you find it to be true and to reject the part if (sic) you do not accept as true."

We are of the view that the learned judge gave excellent directions and cannot be faulted.

[27] There were also directions to the jury as to how they should consider the evidence of the complainant's mother regarding the applicant's name. At page 49 lines 5-25 of the transcript the learned judge stated:

> "...and it is the last name of the accused that the complainant did not know and that is what she supplied but that the complainant had known that it was Courtney, bearing in mind though, Madam Foreman and members of the jury that the complainant in her evidence did not tell you that she said it was Courtney. She told you that she said somebody rape her and when she was asked who it was she said somebody from church. So that is an aspect of the identification evidence that you will need to be looking at very closely. Remember I told you that you need to view the evidence very carefully and come to your conclusions as to whether you accept that the complainant has told you the truth and that she really did have an opportunity to be able to recognize the person and not being (sic) influenced by anything that she may have been told thereafter in that conversation with her mother."

[28] The entire case clearly turned on the issue of identification by recognition. There is no dispute that both the applicant and complainant are known to each other. The complainant and applicant had known each other for some three years prior to the incident. She knew him from church and that he attended Lilliput New Testament Church of God. She would see him occasionally at the bus stop downtown (Montego Bay) but he was not someone she would sit down with and converse. She would say "hi and bye". Shortly before the sexual assault and robbery took place, the complainant testified that the applicant had approached her and had stood in front of her for less than a minute (about 40 seconds) before he went behind her. As she stood under the bulb she saw his face from the moment he came up until he went behind her. She said that when the applicant told her this was a gunman and she should not scream, he was within arm's reach of her, about an arm's length away from her. When he took her behind the unfinished house she was able to see because the lights had reflected there. That light came from another house beside the unfinished house. There were electric lights on the outside of that building. Of course, the jury had to consider what the complainant said whilst the applicant was having sexual intercourse with her. She did testify that although he was facing her as he had sex with her she could not see him that clearly because of the bushes and that it was "a bit dark in there".

[29] The complainant also testified that the applicant was dressed in the same green, grey and black striped shirt and khaki coloured shorts that she had seen him wearing earlier on when he approached her shortly before the incident occurred. There was one

additional feature and this was the yellow "dorag" which covered his head and forehead just above the eyebrows. The "dorag", she said, was long and was like a scarf with two "strips" that were tied at the back. According to her, the material which made this "dorag" was thin and it did not prevent her from seeing who it was. Nothing was between them when he told her he was a gunman.

[30] However, in cross-examination of the complainant it was suggested to her that she was mistaken when she said it was the applicant who was her assailant.

[31] It was therefore of the utmost importance that the jury should receive proper directions on how to approach the evidence of the complainant identifying the applicant as the person who sexually assaulted and robbed her. The general requirements for such directions have been laid down in the judgment of Lord Widgery CJ in **R v Turnbull** [1977] QB 224 at 228 and 229:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light?

> Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.'
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. If the quality 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."

32. In **Shand v R** (1995) 47 WIR 346 at 351, Lord Slynn of Hadley, giving the advice of the Board, said:

> "The importance in identification cases of giving the **Turnbull** warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of

> defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in *Turnbull*."

[33] In summing-up, in the instant case, the learned judge gave the jury a careful warning about the dangers of identification evidence. She reminded the jury of the special need for caution and that it is possible for even an honest witness to make a mistaken identification. The learned judge went further to warn the jury that even in a recognition case mistakes can still be made so they would have to look at the evidence with caution and be extremely careful about it. The learned judge had also reminded the jury that credibility was another live issue in the case having regard to the different versions as to what had taken place.

[34] We believe that the learned judge had also directed the jury quite properly that there was no question about the identity of the person with whom the complainant had conversed that morning as she walked up the hill. They were also told that the area of identification that they were concerned about would be the second meeting which the complainant spoke of.

[35] We are of the view that once the complainant was found to be credible and reliable, there would be sufficient support for the conviction. The issue of credibility as between the complainant and the applicant was left to the jury with appropriate directions and they clearly believed the complainant. At page 77 of the transcript, the learned judge directed the jury:

> "You saw and heard Miss... as she told you of her experience from the witness box. You also saw and heard the accused man as he told you - as he, spoke from the witness box, electing to give evidence on oath and being cross-examined although he was not obliged to do so. Whom do you believe? ..."

[36] The jury may clearly have had ample justification for believing the complainant. We are certainly handicapped in forming a view on the matter because we did not see the witnesses. Furthermore, the applicant made no request for an identification parade after he was taken into custody in connection with the report made to the police. There was also no objection made at the trial when the applicant was pointed out in the dock by the complainant as the person who she said was her assailant.

[37] Although one may speculate about the possibility that a parade could have destroyed the prosecution's case, it is not possible to say that the absence of a parade made the trial unfair. The learned judge was entitled to leave the question of credibility to the jury on the evidence before them. Once the complainant was accepted as a credible witness, no criticism was or could be made of the learned judge's directions that the jury was to be careful about accepting her evidence that the applicant was her assailant.

[38] The learned judge did not give the jury a specific direction about the absence of an identification parade and the dangers of dock identification. If the complainant had picked out the applicant on an identification parade no doubt the prosecution's case would have been strengthened, although the learned judge would have had to direct the jury that the evidence went only to support her claim that she knew him and did

not in any way confirm her identification of him as the alleged rapist and robber. However, we consider that in the present case such directions were unnecessary. The learned judge told the jury that they should first consider whether the complainant was a credible witness. If they thought she was lying, the applicant had to be acquitted. This appears to us to be sufficient, because if she was not lying, it would follow that there would have been no need for an identification parade and the dock identification would have been the purely formal confirmation that the man she knew was the man in the dock.

[39] We do believe that based on the evidence presented, the complainant would have had ample opportunity to have been able to see and to recognize the person who she said was the applicant.

[40] We do not think there is any merit in the issue raised by the applicant as to the clothes he was wearing when he and the complainant had met earlier before the incident. This too was a matter for the jury to consider and they clearly believed the complainant.

**Conclusion**

[41] We agree with the conclusion arrived at by the single judge. It is also our view that there is no merit in the grounds filed and as such, the application seeking leave to appeal is refused. Sentences shall commence as of 4 August 2007.