[2012] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 25/2009

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

RICHARD ANDERSON v R

Oswest Senior-Smith for the applicant

Miss Joan Barnett for the Crown

20 February and 16 March 2012

BROOKS JA

[1] On 22 December 2008, the applicant, Mr Richard Anderson, was convicted in the High Court Division of the Gun Court for the offences of illegal possession of firearm, robbery with aggravation, abduction and rape. On 6 February 2009, he was sentenced, in respect of these convictions, to 10, 5, 10 and 15 years imprisonment, respectively. The learned trial judge ordered that the first two sentences should run concurrently, as should the last two. He ordered, however, that the last two sentences should run consecutively to the first two. The result was that the applicant would serve a total of 25 years. The learned trial judge described the circumstances of the commission of

these offences as "absolutely outrageous". On hearing the prosecution's case in this matter, few would disagree with that assessment of the crimes.

[2] The applicant applied for leave to appeal against the convictions and sentences but was refused leave by a single judge of this court. He has renewed his application before us. Mr Senior-Smith, on his behalf and with our permission, abandoned the original grounds of appeal. He argued instead, four supplemental grounds.

[3] Learned counsel, with commendable sensitivity, provided a concise summary of the prosecution's case. It is repeated here, with only the omission of the victim's name:

> "The prosecution's witness [Ms J] detailed a course of almost unspeakable sexual assault visited upon her by three (3) assailants on the 20th day of July, 2006. [Ms J] was by all measures safely ensconced in the comfort of her sister's home in the Seville Heights area of Saint Ann about 11 p.m. on July 20th, 2006. The attackers invaded the house using the witness' sister's boyfriend as a decoy and route to entry after they forced him at gunpoint to call requesting the opening of the door.
>
> In an ordeal that lasted to the break of dawn, [Ms J] suffered forced sexual acts as well as further physical violence and intimidation, at her sister's house as well as in an isolated area in the bushes off the main road in the Seville Heights community, where the marauders had taken her.
>
> For several hours she was subjected to sheer physical and mental terror as the three (3) gun-wielding miscreants exacted their whims and fancies...."

[4] One of the gunmen had a distinctive characteristic. He suffered from a severe stutter. Despite that defect, he was the most assertive of the three, was the one who

apparently spoke the most and the one who gave directions. At an identification parade, held on 16 August 2006, Ms J identified the applicant as one of the gunmen. At the trial, she identified him as the one who had the stutter. When called upon to answer the *prima facie* case, the applicant exercised his right to remain silent.

[5] Without conceding that the applicant stutters, one of the major thrusts of Mr Senior-Smith's submissions to this court was that there was insufficient lighting for Ms J to identify her attackers. He argued, against that background, that it was only after listening to the men speaking in the line-up, at the identification parade, that she pointed out the applicant. Learned counsel submitted, therefore, that the "claimed identification was thus not a product of a recall of facial features".

[6] Learned counsel also criticised aspects of the learned trial judge's summation. The grounds of appeal are set out in full below:

> "1. The evidence of Identification was inadequate in terms of the Turnbull Guidelines, and as a result the Applicant lost the protection of the law which occasioned unsustainable convictions.
>
> 2. The lighting reportedly provided by a cellular phone and an almost full moon, was deficient in terms of identifying an assailant who was unknown to the witness before.
>
> 3. The learned Court respectfully fell irretrievably into error when he opined in the summation (P 219) that the Applicant/Accused having elected to remain silent, the Court then, could 'see no reason when having examined the logic and structure of the Police Officer's evidence to doubt his word that he conducted the parade in the manner that he has identified'.
>
> 4. The sentences imposed were manifestly excessive."

Grounds one and two may be conveniently dealt with together, as they both address the issue of the adequacy of the opportunity for viewing the assailants. Grounds three and four will, thereafter, be dealt with in turn.

Ground One: The quality of the identification evidence.

Ground Two: The adequacy of the lighting.

[7] The circumstances of Ms J's opportunity to view these gunmen may conveniently be assessed in accordance with the guidelines set out in **R v Turnbull** (1976) 63 Cr App R 132; [1976] 3 All ER 549. Firstly, she did not know them before. Secondly, while they were in the house, they wore masks. It appears also that only the light of a television assisted the vision during that time. Thirdly, as mentioned before, Ms J was able to see these men, their general physical appearance, from just after 11 pm to just about daybreak the following day. She was able to see them at close quarters for the entire time.

[8] Fourthly, she testified that they had removed their masks by the time that they had taken her to the isolated area, which has been mentioned above. There was then nothing covering the faces of any of the men. At that location, she was "face to face" with the gunman with the stutter for about three to four hours (page 54 of the transcript). There was nothing preventing her from seeing him (page 60). When he first approached her for sex, upon reaching that location she was face to face with him for five minutes (page 58). She was then looking at him (page 112). This was behind the vehicle in which she had been transported from the house. She also saw his entire

body as they sat talking side by side inside that vehicle. At that time, she was able to see his face, although not "a direct stare", for about 10 minutes (page 62). She was able to see his face when it was illuminated, while he used a cellular telephone for about two to three minutes (page 53). She said that she also saw his face while she used the light from a cellular telephone to search for some money in the vehicle (page 51).

[9] Fifthly, this was, to say the least, a terrifying time for Ms J. She was crying for some of the time (page 100). Tears were running at some point and at other times she was sobbing. At one stage, she was vomiting in revulsion, at what she was being forced to do.

[10] Finally, the matter of the lighting must be specially assessed. Firstly, her testimony was that the roof light and dashboard lights of the vehicle assisted her to see the faces of the men. She said the vehicle, which had belonged to her sister's boyfriend, was giving the men trouble to operate. From time to time, they would turn on the roof light "to sort of operate the vehicle and switch it back off" (page 87). Secondly, while outside of the vehicle, she was able to see the men by the moonlight. She said, "with regards to the moon it was pretty bright, almost a full moon" (page 53). She testified that it was "not dark that I could [sic] accustomed to it, it was night outside with moonlight" (page 99). With regard to the cellular phone, she said the light on the phone came on when the keys were dialled. "It was in front of his face and the lighting of the phone reflected on his face" (page 53). "The phone that [she] had had

light [sic] enough so that when you press the keys and hold down on it the light bright up so you can search for anything basically" (page 53). By the time the men decided to leave her, she said, "[i]t was now close to morning…[I know] [b]ecause of the light that was shining through, like break of day" (page 35).

[11] Despite what appears to be adequate opportunity to see this gunman, Mr Senior-Smith argued that Ms J's assertion of identification in her testimony "was replete with incertitude". He pointed to a number of points in the transcript in connection with her identification of the applicant at the identification parade:

> "I I.D. as best as possible, **I thought**, the person fitting the description involved in the rape on the 20th of July" [pages 48 – 49].
>
> "I went into the room and I carefully looked at all nine persons that were on the first parade. I looked as to the description of the person **I thought** I saw on the 20th and carefully identified him, Mr. Anderson" [page 49]
>
> "I identified him as one of the men who abducted me, the **stammer man** at the crime scene" [page 49]. (Counsel's emphasis)

Mr Senior-Smith submitted that those passages "underline the infirmities in the evidence of identification". He argued that the learned trial judge did not demonstrate fidelity to the **Turnbull** principles in his handling of this evidence. In addition, Mr Senior-Smith submitted that the lighting described by the witness was "deficient in terms of identifying an assailant who was unknown to the witness before".

[12] Mr Senior-Smith also submitted that Ms J's behaviour, at the identification parade, should have alerted the learned trial judge that she was not relying on a visual

recognition of the gunman. Learned counsel submitted that the "claimed identification was thus not a product of a recall of facial features". He stressed the following portion of the transcript as demonstrating the force of his submission:

> "…I moved up and down the line for some time, carefully looking at the men. I remember asking if the men could talk. They were talking anyway, but I remember asking if they could be quiet and speak at once [sic] but I was told that I should just move along the line and identify the man that I see that fits the description….They did not direct them to talk. I moved up and down the line, as I said and I stopped when I thought I was directly in front of each man and carefully looked at them and I stopped now and then and listened while they were talking…" (page 149)

Then came the following exchange:

> "Q You said you stopped and listened. After you stopped and listened, did you do anything right after that?
>
> A I remember pointing out one of the men." (page 150)

According to learned counsel, these matters constituted a fundamental weakness in the identification evidence which weakness the learned trial judge barely touched on in assessing the evidence concerning identification. Mr Senior-Smith argued that, in this regard, the learned trial judge did not satisfy the duty to clearly reveal his mind concerning these issues.

[13] We cannot agree with Mr Senior-Smith in respect of these submissions. The learned trial judge did demonstrate his appreciation of the need for special caution in cases of visual identification. He said:

> "…Because this case depends subsequently [substantially?] or solely on visual identification evidence. [sic] It is important that the evidence of visual identification be examined very

> carefully, because there have been wrongful convictions based upon mistaken identification and an honest witness, which I accept that [Ms J] is an honest witness intends [tends?] to be a convincing witness, because honest witnesses by definition are just that, honest. And because they are honest, persons are tempted to believe them and the danger is that if the witness is just regarded as honest and believe that there is an error that the possibility of the error that the circumstances of the identification may not be as carefully examined as it ought to be. And it is for that reason, therefore, that a distinction is made between honesty and reliability. And the reliability is that to see whether this witness, if accepted to be honest, was in a position to make the identification in the circumstances which she says existed at the time she said the identification was made.
>
> So with that in mind let us see what [Ms J] had to say about this incident and the circumstances of the identification…" (pages 224 – 225)

[14] The learned trial judge then examined the evidence of the circumstances of the visual identification. He addressed all the evidence, which was outlined in the **Turnbull** guidelines, mentioned above. He mentioned the points of weakness, namely: the crying, fright and distress; the absence of streetlights and the reliance on the moonlight (pages 241 -242); the submission that in searching for the money she could not be seeing the gunman's face (page 244); the possibility that Ms J was identifying the men by voice only (page 247); the suggestion that she was too nervous to identify anyone (page 253); the time that had elapsed between the incident and the identification parades (page 260); and the fact that she failed to point out any one on the other two identification parades in which she participated (page 254).

[15] The learned trial judge made specific mention of the lighting. At page 258 of the transcript, he said:

> "So, the question is, was the lighting so poor throughout the duration of time, so as to prevent the witness or make it exceptionally difficult for the witness to make an identification? I conclude that the lighting was not in that state."

[16] It is true that the learned trial judge did not address the matter of Ms J's language in identifying the applicant on the identification parade. He, however, accepted that the parade had been fairly conducted and addressed the reason she would have been more likely to point out the applicant than the other two gunmen. The learned trial judge said, at page 258:

> "Based upon the narrative, is there an explanation in the evidence as to why it was that she would be able to pick out Mr. Richard Anderson over and above the other two? The answer to my mind is yes, there is. What is the evidence? One, face to face at the back of the van; two, [the] time that they were in the van; lights from the cell phone; enough lighting outside. He using the phone to make calls and so on. So, he would have been in close proximity to her."

[17] The evidence, we respectfully agree with the learned trial judge, was sufficient to enable him to conclude, as he did, that Ms J was an honest and reliable witness:

> "So, I am satisfied so that I feel sure that there was sufficient lighting, albeit, not the lights at the National Stadium, but there was sufficient lighting to enable her over this protracted period of time to make an identification.
>
> I am satisfied so that I feel sure that she had sufficient opportunity to see the face of Mr. Richard Anderson, for her to be able to be sure that this was the person whom she

> said she saw. I take into account that there is no supporting evidence for her testimony…." (page 259)

We find no basis to criticise his summation in this regard. We agree with Miss Barnett, for the Crown, that his summation was "quite comprehensive". These grounds must fail.

Ground Three: The learned trial judge's finding in respect of the conduct of the identification parade.

[18] There was some overlap between Mr Senior-Smith's submissions in respect of this ground with those for grounds one and two. In this ground, however, learned counsel stressed, what he submitted, were the differences between Ms J's evidence in respect of the conduct of the identification parade and that of Sergeant McDonald, who conducted the parade. Learned counsel submitted that, had the learned trial judge recognized the material variance between these portions of the evidence, he would not have "found inexorably, that he was 'satisfied so that [he felt] sure that the parade was properly and fairly conducted and there [was] nothing to suggest that the Police had embarked upon a course of conduct in the aim of having the witness identify the Defendant" (from counsel's skeleton arguments).

[19] Learned counsel pointed to Ms J's evidence where she said:

> "…I moved up and down the line for some time, carefully looking at the men....I stopped when I thought I was directly in front of each man and carefully looked at them and I stopped now and then and listened while they were talking…" (page 149)

He then pointed to Sergeant McDonald's evidence, where the sergeant said that after giving her the instructions, "[s]he walked for about 30 seconds and said Number 5." (pages 182 -183)

[20] Learned counsel also submitted that Sergeant McDonald failed to say that Ms J spent time listening to the men on the parade, before she picked out the applicant. The transcript reveals, however, that defence counsel asked Sergeant McDonald if the sergeant had asked the applicant to speak. The sergeant answered in the negative. Defence counsel then suggested to the sergeant that "[Ms J] was inside the room when you asked them to speak". He further suggested that the sergeant "told Richard Anderson to say the words, 'How far is it from here to Saint Ann's Bay'", and that it was after the applicant said those words that "the witness said that it was Number 5" (pages 187 – 188). The sergeant denied all of these suggestions.

[21] We make two observations in respect of Mr Senior-Smith's submission. Firstly, in specific answer to the ground as formulated, it seems that, against the background of those suggestions, the learned trial judge would have expected evidence, or at least material, from the defence which provided the basis for the suggestions. That was not to be, as the applicant remained silent. In the circumstances, the learned trial judge was entitled, in our view, to say, as he did at page 219:

> "The accused man, as is his right, has elected not to speak. Having elected not to speak, there is no evidence coming in from any other source, at this point, to contradict what the police officer has said about how he conducted the parade. And so, I see no reason when having examined the logic and structure of the police officer's evidence, to doubt his word

> that he conducted the parade in the manner he has identified."

[22] The learned trial judge clearly applied two tests: firstly, the absence of contradiction of the sergeant's testimony and secondly, the objective credibility of that witness. We cannot fault his approach.

[23] The second observation we make in respect of Mr Senior-Smith's submission is that the testimony of Ms J and that of Sergeant McDonald were generally consistent. In this regard, we agree with Miss Barnett. We cannot agree, however, with Miss Barnett's submission that there was no variance between the testimony of the witnesses with respect to the time Ms J spent on the parade. In our view, the time it would have taken Ms J to carry out the exercise she described would have taken longer than 30 seconds. The learned trial judge did not address that variance. We find that it is not a major flaw, especially in the face of their general consistency. We find no major flaw in the learned trial judge's summation in this regard. This ground also fails.

Ground Four: The sentences.

[24] As part of his written submissions, Mr Senior-Smith accepted that the offences were "quite egregious". He, however, submitted that as they all emanated from one set of circumstances the learned trial judge was "enjoined to impose only concurrent sentences".

[25] Learned counsel submitted that this court "reinforces the totality principle". That principle, he argued, established that the most serious sentence should be imposed for

the most serious offence and all the other sentences should run concurrently to that sentence. He relied on the cases of **R v Walford Ferguson** SCCA No 158/1995 (delivered on 26th March 1999), **Rohan Chin v R** SCCA No 84/2004 (delivered 26 July 2005) and **Kirk Mitchell v R** [2011] JMCA Crim 1, in support of his submissions.

[26] This court has consistently set aside sentences, which have been made to run consecutively, where the total sentence is manifestly excessive. Its reasoning has been set out in **Kirk Mitchell v R** and certain guidelines were given therein. We find that the sentences imposed by the learned trial judge, in the instant case, conflict with the principle and the guidelines. We find that 25 years is excessive, when the case is looked at as a whole. The individual sentences were themselves moderate but the addition of the consecutive element was unwarranted. That aspect of the sentence must be set aside.

[27] It may be said that, given the circumstances of this case, the sentence for rape could have been longer. Whereas this court may be of that view, based on what we have seen on paper, we cannot say that the learned trial judge's assessment as to the appropriate individual sentence for that count was too low. It was the learned trial judge who saw the witness and would have assessed the extent to which she was still affected by the ordeal. It was he who saw the applicant and made his assessment concerning the suitability of the sentence for that individual. Although this court has the authority, pursuant to section 14 (3) of the Judicature (Appellate Jurisdiction) Act,

to substitute a more severe sentence, we are not inclined to interfere with that aspect of this sentence.

Conclusion

[28] We find that the learned trial judge correctly identified that visual identification was the main issue in the instant case. He showed, in his summation his appreciation of the need for caution with respect to this type of identification. He carefully assessed Ms J's evidence with regard to her opportunity to see the gunmen. As the tribunal of fact, he expressed the view, having seen her, that she was also an honest witness. In our view the learned trial judge was also quite justified in accepting Ms J as a reliable witness. We also find that there was more than sufficient evidence on which the learned trial judge could find that there was adequate lighting to enable Ms J to view her attackers so as to be able to recognise them at a later date.

[29] We also find no fault with the learned trial judge's summation with regard to the evidence concerning the identification parade. There was no evidence to support the suggestions to the contrary that were made to the Crown's witness in that regard. The learned trial judge was entitled to make reference to that absence and to go on, as a separate consideration, to accept the testimony of the witness as credible.

[30] Based on the reasoning set out above, we find no merit in the complaints advanced in respect of the grounds complaining about the convictions. We, however, do accept that the learned trial judge failed to abide by the general principle that offences committed in the same transaction should attract concurrent sentences. It is

accepted that the sentences must also be considered as a whole. In the instant case, the total of 25 years is manifestly excessive and as a result, the consecutive element in the sentence must be removed.

[31] On these bases, we find that the application for leave to appeal should be granted. The hearing of the application is treated as the hearing of the appeal. The appeal in respect of the convictions is dismissed and the convictions are affirmed. The appeal against the sentences is allowed in part. The individual sentences are affirmed but the order for consecutive sentences is set aside and the sentences are ordered to all run concurrently. The sentences are reckoned as having commenced on 6 February 2009.