JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 17 OF 2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag).

PETER CAMPBELL

V

REGINA

Dr. Randolph Williams for the Appellant

Miss Opal Smith, Crown Counsel for the Crown

January 28 & 29 & May 16, 2008

HARRISON, J.A:

1. The appellant was convicted in the Montego Bay Circuit Court before the Hon. Mr. Justice Donald McIntosh, J and jury of the offence of rape and was sentenced to 15 years imprisonment at hard labour. On the 9th October 2006, a single judge granted him leave to appeal.

Background to the appeal

2. The facts of the case for the prosecution are that on Monday January 17 2005, the complainant, a school girl, was on her way to school at about 11:00 a.m. She went down the road and took a taxi that she had taken on four occasions. It was driven by a man who she knew as Colin and who was identified in court as the accused man. This was a name

which the complainant said he had given to her. She had also seen him at her school. She sat in the front passenger seat and was able to see his face. On reaching a certain point along the road he turned off into a "short cut" and drove into some bushes. He stopped the car and alighted from it. He came to her door, opened it, pulled her out and pushed her to the ground. He lowered his pants and came on top of her. She tried to fight him off. He then boxed her in the face, held her hands over her head, lifted her school uniform, shifted her panty and pushed his penis in her vagina. After he was finished he drew up his pants, went into the car and drove off leaving her on the ground.

3. The complainant said she remained in the bushes until about 5:16 p.m. and then left for home. One of her eyes was swollen and a button for her school uniform was torn off. When she got home she took a shower and did not make a report to her mother with whom she lived until Friday morning the 21st of January. She was 13 years of age at the time of the incident. She had not seen her period and when she was questioned by her mother she began crying. The mother said she felt that something was wrong and insisted that she needed to speak to her. She sat her down and she asked her mother if she knows Colin. The mother did not know him and she told her that he was a taxi driver. She asked her what about Colin and she told her how he had sexually assaulted her on the 17th January 2005. She was taken to the police station subsequently where a report was made.

4. The mother also testified that she went to the daughter's school on the 24th January 2005 and spoke to the principal. Her daughter was also present. Whilst they were at the school the appellant drove his taxi on to the school premises. He alighted and took out a bag from the car for a lady. Her daughter spoke to her about the man. She got pen and paper and wrote down the motor car licence plate numbers. This information was passed on to the police.

5. The following morning, the mother saw the said taxi and the driver she had seen the day before at the school. She took the taxi and told the appellant that she had a bag to pick up at Mount Salem Police Station and that she wanted him to take her there before she proceeded downtown. He took her to the station and she went to the police officer to whom she had given the information on the bit of paper. The officer went and spoke to the appellant and told him to step out of the car. They went inside the station and the officer asked him his name. He told him that he was Peter Campbell. The mother called the complainant on her cellular phone and she came to the station. The police officer asked her if she knew the car and she told him yes. She was taken inside the station and was asked if she knew the appellant and she told the police officer that he was the man who had driven her away into the bushes and had raped her. The appellant then said: "Oh, I know her. I would never do a thing like that to Yanique." He was subsequently arrested and charged for the offence of rape. When cautioned he said: "What mi a go need".

6. The appellant gave evidence and raised the defence of alibi. He said he worked as a sanitation officer at the Wyndham Rose Hall Hotel but he drove a taxi sometimes. At about 9:00 a.m. on the 17th June 2005 he and his wife went to look about some papers for his car. They went to the Transport Authority and the Mount Salem Taxi Association Building at Artwell Plaza in Montego Bay. They also went to pick up a tyre at Market Circle, and then proceeded to the National Commercial Bank. He also went to fix the rear lights for the car at about 10:30 a.m. He left his car at the garage and about 11:00 a.m. he went to the tax office. He returned for the car at about 11:28 a.m. The car was not ready so he and his wife had to sit and wait for it. They eventually left the garage at about 12:30 p.m. They then went to the examination depot and left there close to 2:00 p.m.

7. He denied that he is called Colin and that he knew the complainant. He also denied that he was involved in the incident that he was accused of. He called several witnesses including his wife to support his alibi.

The grounds of appeal

8. The original grounds were abandoned and leave was granted for the appellant to argue three supplemental grounds of appeal. He contends in ground 1 that the directions of the learned trial judge on visual identification were inadequate in that he omitted to instruct the jury:

> "(a) that a mistaken witness can be a convincing one. ***R v Turnbull*** (1976) 3 WLR 445 at 447 C-D;
>
> (b) on the circumstances in which false alibi could provide support for the identification evidence – ***Turnbull*** at p. 449 D-F;

> (c) that even in cases of recognition there is the danger of mistaken identification; (Summing up p 32 line 23 – p 33 line 24).
>
> (d) that they should be satisfied beyond reasonable doubt that the identification of the appellant by the complainant at the police station was not assisted or influenced by the actions of her mother; (Summing up page 17 line 1 - p 18 line 6).
>
> (e) the direction of the trial judge was inadequate and included a misdirection on the evidence. He misdirected the jury on the opportunities of the complainant to recognise the accused. (see page 18 of the summing up compared with pages 22-23 of the notes of evidence)."

Ground 2 relates to the issue of recent complaint and it is contended that the learned trial judge erred by admitting in evidence the complaint made to the mother by the complainant in that;

> "(a) the complaint was not made at the first opportunity which reasonably arose; and
>
> (b) it was not spontaneous ..."

Ground 3 contends that the directions which the learned judge gave to the jury in relation to intent in rape were inadequate.

Ground 1

The identification issue

9. Dr. Williams, for the Appellant, submitted that the directions by the learned judge on visual identification were brief, and amounted to what can be described as an afterthought having been reminded by Crown Counsel that he needed to give these directions. He referred to ***R v Barrett*** (1990) 27 JLR 308. Rowe, P said at p. 313:

> "It is absolutely necessary that trial judges within our jurisdiction must take the most careful note of the decisions of the Privy Council on the issue of visual

> identification evidence. ... More comprehensive directions must be given. ... However positive the witness, there is a strong possibility that he might be mistaken for a number of reasons. Consequently ... (the jury) must distinguish between the apparent honesty of the witness and the accuracy of the evidence which he gives."

10. Before considering the line of arguments in respect of sub-paragraphs (a), (c) and (d) of ground 1, it is convenient to set out certain passages from the summing up. At page 32 the learned judge said:

> "Counsel for the Crown has reminded me that this is a case of visual identification. Now, although Yanique is saying that she knew the accused man before that day, it is still visual identification, because the accused man is saying he did not know her. Bearing in mind, of course, that the police say that the accused man did tell him and her, that he knew the complainant, but would not have done whatever she says he did to her, but the accused man is saying he did not know her before that day.
>
> So, Crown Counsel thinks that I ought to warn you about the dangers of convicting on the offence (sic) of visual identification and that is because there has been wrongful convictions in the past as a result of mistaken or wrongful identification. That is because, simply put, people look like people. Because simply put, it is possible to make mistakes as to individuals. So, before you accept the evidence of identification, you must take great care to examine the circumstances in which the identification has been made. You take into consideration whether or not this is a person who the complainant knew before. The complainant said she did, the accused man said she didn't. But, of course, you can know somebody who don't know you."

11. The learned judge next directed the jury to consider the opportunity which the complainant had to identify the appellant. He said:

> "You must take into consideration the lighting at the time and there seem to be no issue that it was broad daylight. It would have been 11 o'clock in the day

> and nobody said it was raining and if you took into consideration the fact that this offence occurred outdoors, even in the bushes, that the time, from the time he picked her up until the time the offence took place was about twelve minutes in which she was saying she could see his face, that even if the offence only took two minutes, or three minutes, or they were together in the bush for ten minutes, in a situation where the man pushes you down on the ground and is over you, would she have been able to see him? Would she be in a position to identify him? Is she identifying the right persons? These are matters for you. These are matters of evidence. You take into consideration all the factors involving the evidence of identification."

12. It is quite obvious that the learned trial judge did not give the standard ***Turnbull*** directions. See ***R v Turnbull*** (1976) 3 All E.R. 549. Dr. Williams' first criticism of the summing up, is that the judge did not use the words, "a mistaken witness can be a convincing one". But he did alert the jury on the dangers of convicting accused persons of offences based on visual identification because of "mistaken or wrongful" identification.

13. It has often been emphasised in cases on visual identification that no rigid form of words is required, but the basic principles have to be underscored, that is to say the jury ought to be told of the need for caution and exposure to the jury of the weaknesses and dangers of identification evidence. See ***R v Lawrence*** [1982] AC 510 at 519 and ***R v Kevin Geddes and Others*** SCCA Nos. 56, 57 & 58 of 1995 (un-reported) delivered July 31, 1996.

14. Having regard to the very strong warning given by the judge ("you must take great care to examine the circumstances in which the identification has been made") and the repeated references to the possibility of a mistaken identification, we do not regard the absence of the word 'convincing' as being fatal to the summing-up. See ***Rose v Regina*** (1994) 46 WIR 213, (Privy Council Appeal).

15. This was not a 'recognition case' in the ordinary sense. The complainant had only known the appellant by a first name ('Colin') and had taken his taxi on four occasions. We are therefore of the view that there was no need having regard to the circumstances of the instant case for the judge to have warned the jury that even in cases of recognition there is the danger of a mistaken identification. It was a case which depended upon identification evidence by a single witness in the course of an incident lasting minutes rather than seconds. We believe that the witness had sufficient time in which to make a reliable identification. Furthermore, the learned judge did warn the jury that the evidence of the witness was to be viewed with utmost caution.

16. It seems to us therefore, that the learned judge had captured all of the essential features with respect to the dangers of convicting accused persons for offences based on visual identification. He had warned the jury that it was possible for people to make mistakes as to individuals; that there have been wrongful convictions in the past which have arisen as a result of "mistaken and wrongful" identification and most importantly, that they should take "great care" in examining the circumstances of the identification.

17. Dr. Williams also submitted that the jury were not directed that they had to be satisfied beyond reasonable doubt that the identification by the complainant at the police station was not assisted or influenced by her mother. We agree with Counsel for the Crown that this submission is not supported by the evidence. It is abundantly clear on the evidence of the

complainant and her mother that the complainant had independently identified the appellant to her mother at the school and it was this that prompted the mother to record the appellant's registration number.

The alibi issue

18. At pages 12-13 of the summing-up the learned judge directed the jury in relation to the defence of alibi as follows:

> "So that when he raises that which is called an alibi, when he says "a nuh mi, I wasn't there" it does not lay a burden on him to prove it, although he has attempted to do so. The burden is still on the prosecution to disprove his alibi and, they can only do it by placing before you, evidence which is of the quality ... which leaves you in no doubt as to the guilt of the accused."

And later at page 21 he said:

> "He gave detail starting from 9:00 a.m. and he could tell you every ten or fifteen minutes. In one case he was telling you about three minutes and so on and he had a full day when he was looking after his car, when he spent time with Mr. Lincoln Robinson and Roxine Powell and that at all times that day, his wife was right there beside him, as a good wife should be."

19. Dr. Williams submitted that these directions were inadequate as the learned judge ought to have directed the jury on the need to consider whether the appellant had put forward a "false alibi" since the absence of such a direction would amount to a misdirection.

20. Miss Smith, for the Crown, submitted that even where a ***Turnbull*** direction was not given in relation to the effect of a false alibi, this was certainly not fatal. She referred to ***R v Francis*** (1990) 91 Cr. App. R 271 at 272 and ***R v James Penman*** (1986) Cr. App. R 45 at page 50 and submitted that the ***Turnbull*** warning only became necessary where the

learned trial judge invites the jury to find that the accused was lying or where he suggests to the jury that lies have corroborated the identification evidence. See ***R v Geddes*** (supra) pages 9-10.

21. We start with the fundamental rule that a warning on identification is mandatory in cases where the defence is putting forward an alibi and thereby raises for the jury's consideration, the issue of mistaken identification. In ***Turnbull*** (supra) at 553 Lord Widgery C.J said:

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi:"

The reasons for such care are stated:

> "False alibis may be put forward for many reasons: an accused, for example, who has his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can."

The learned Lord Chief Justice went on to state that:

> "It is only where the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence."

22. This court has laid down some guidelines in ***Oneil Roberts and Christopher Wiltshire v Regina*** SCCA 37 & 38 of 2000 (un-reported) delivered November 15, 2001, regarding the warning concerning the rejection of the alibi defence. Smith J.A (Ag.) (as he then was) said that the warning is necessary in the following circumstances:

> "(i) Where the fact of rejection of the alibi is identified by the judge as capable of supporting the evidence of identification.
>
> (ii) Where because of discrepancies inconsistencies and contradictions in the evidence adduced by the defence the alibi evidence is in such a state that there is a risk that the jury may conclude that a rejection of the alibi necessarily supports the identification evidence. See for example, ***R v Gavaska Brown et al*** where the discrepancies between the defendant's unsworn statement and the alibi witness' evidence were pointed out to the jury. In the circumstances of that case this Court felt that the judge ought to have given the jury the ***Turnbull*** - false alibi - warning. However it should be observed that a full ***Turnbull*** direction may not be in the interest of the accused. It is open to the judge, to say that while an innocent person may put forward a false alibi out of stupidity or fear, the deliberate fabrication of an alibi, if it can be established beyond doubt, might properly be counted against the accused - ***Coley v R*** (supra) at p. 316 (d-e).
>
> (iii) Where the alibi evidence had collapsed as in ***James Pemberton v R*** * and there was a risk that the jury might regard the collapsed alibi as confirming a disputed identification. See also ***R v Drake*** (1996) Crim. L.R. 109."

23. In ***James Penman*** (supra) Hutchinson J. said inter alia at p 49:

> "It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence."

24. We believe that the directions by the learned trial judge were adequate. They contained the essential ingredients of the alibi defence, namely:

***Jason Clive Pemberton v R (1994) 99 Cr. App. R. 228**

(i) that the appellant is saying he was elsewhere at the material time;

(ii) that the burden of proof is on the prosecution and that the appellant does not have to prove he was elsewhere at the material time but rather it was for the prosecution to disprove the alibi;

(iii) that to convict the appellant the jury had to be satisfied to the extent that they feel sure on the prosecution's evidence of his guilt.

Misdirection on the evidence

25. It was contended that the trial judge had misdirected the jury on the opportunities of the complainant to recognise the accused. We really see no merit in respect of ground 1(e) and completely disagree with these submissions.

The conclusion on ground 1

26. We are of the view that the directions on visual identification and alibi were totally adequate and comprehensible. We also find no merit in the submission that the learned judge had misdirected the jury on the evidence. We therefore reject grounds 1(a) (b) (c) (d) and (e) of this ground of appeal.

Ground 2

The recent complaint or report issue

27. We turn to the second ground of appeal. No issue has been joined with the learned trial judge's directions on recent complaint. We think that the directions were adequate to get across to the jury the main message that, if

they accepted the evidence, it was not independent evidence of the truth of the complaint but could only go to consistency.

28. Dr. Williams submits however, that the complaint was not made at the first opportunity after the offence was committed. This is a pre-condition, he said, for admission of the evidence as it relates to the recent complaint. See ***R v White*** (1997) 34 JLR 30 at p 43 letter D, and Cross on Evidence 4th ed. 1974 p 210. He argued that the first reasonable opportunity in this case was Monday 17th January 2005 but the complaint was not made until Friday the 21st of January 2005 - 4 days after the incident.

29. Dr. Williams further submitted that the complaint must be voluntary and spontaneous and not elicited by leading, inducing or intimidatory questions. He submitted that in the instant case the complaint was induced after repeated questions by the complainant's mother and that in these circumstances, the complaint was not spontaneous, timely nor voluntary. He argued that the conditions for admissibility were not satisfied and that the evidence of the mother relating to the complaint was therefore inadmissible. He submitted that the wrongful admission of the complaint effectively raised the credibility of the 12 year old complainant whereby the appellant was denied a fair chance of an acquittal.

30. We have examined a number of authorities on recent complaints and have extracted the following principles from the cases:

(i) the admissibility of the complaint in evidence will depend on the circumstances of each case (***R v Keith Robinson and Others*** SCCA Nos. 59, 70 and 71 of 1996 delivered July 14,

1997; ***R v Kory White*** Privy Council Appeal No. 12/98 delivered 10th August 1998; (1997) 53 WIR 293);

(ii) the lapse of time between the committing of the offence and the making of the statement is important (***R v Rush*** (1896) 60 JP 777;

(iii) the admissibility of the complaint will depend also on whether it was spontaneous in the sense that it was voluntary and unassisted (***R v Rush*** (supra);

(iv) in order for the complaint to be admissible it must have been made voluntarily and not as a result of leading or intimidatory questions (***R v Osborne*** (supra)1 KB 551);

(v) the mere fact that the statement was made in answer to a question does not make it inadmissible (***R v Osborne*** (supra) ***R v Norcott*** [1916] Crim. App. R 166). Questions of a suggestive or leading character such as "did so and so (naming accused) assault you" or "did he do this and do that to you" will have that effect; but not natural questions put by a person in charge such as "what is the matter" or "why are you crying" In each case the decision on the character of the question put as well as other circumstances, such as the relationship of the questioner to the complainant must be left to the discretion of the judge (***R v Osborne*** (supra) at 556).

(vi) the fact that the complaint was made to others before it was made to the witness who gives the evidence of it does not render it inadmissible (***R v Denzil Halstead*** SCCA No. 3/97 delivered March 30, 1998,) ***R v Wilbourne*** [1917] 12 Cr. App. R. 280);

(vii) where the complainant is unable to testify, the complaint made to another is inadmissible (***R v Guttridges*** (1840) 9 C & P 471; ***Wallwork*** 42 Cr. App. R 153);

(viii) evidence of a complaint is inadmissible if the person to whom the complaint is made does not give evidence (***R v Gene Taylor***

SCCA No. 132 of 1997 delivered December 18, 1998, ***R v Leonard Fletcher*** SCCA No. 20 of 1996 delivered 25th November 1996.

(ix) account should be taken of the fact that victims both male and female often need time before they can bring themselves to tell what has been done to them. Whereas some victims find it impossible to complain to anyone other than a parent or member of their family, others may feel it quite impossible to tell their parents or family members (***Valentine*** [1996] 2 Cr. App. R 213 at p. 224);

(x) it is for the jury to determine whether a complaint really was made and whether it is consistent with the complainant's evidence.

31. The transcript reveals the following at page 27:

"Q. Did you tell anybody what happened to you?

A. I tell mi mother the Friday.

Q. What did you tell your mother?

A. She ask why don't mi period come.

Q. And what did you say?

A. And I say nothing first.

Q. We are not hearing you so clearly, you said nothing the first time?

A. Yes, miss.

Q. And then what after that?

A. An then she ask mi what happen and mi tell her what mi did tell you.

Q. What is that?

A. I tell her if she know this man name Colin."

She thereafter related the story to her mother what the accused had done to her.

32. We hold in the instant case that the mere fact that the statement is made in answer to a question is not itself sufficient to make it inadmissible as a complaint.

33. The complaint was made four (4) days after the alleged offence was committed but we are of the view that four (4) days were still recent enough for the report to be admitted and considered by the jury. In ***Hedges*** (1909) 3 Cr. App. R 262 a complaint made after one week was admitted. In ***R v Keith Robinson and Ors.*** (supra), the complaint was made five days after the incident and no apparent reason was given for the time lapse. This Court held that "... in the circumstances of the case, four days after the commission of the offences by the applicants were still recent enough to be admitted and considered by the jury."
We do not think that this ground of appeal is made out.

Ground 3

The intent issue

34. The appellant has complained that the learned trial judge failed to direct the jury on the necessity to prove the intention to have sexual intercourse with the complainant without her consent or was reckless whether she consented or not. Dr. Williams submitted that the directions were inadequate and failed to follow the classic definition of rape in the ***Director of Public Prosecutions v Morgan*** [1975] 2 All ER 347. He argues that the non direction of an essential element renders a conviction of rape unsatisfactory.

35. The question we have to consider now, is whether the definition of rape was deficient and what effect if any, it would have on the outcome of the case. In directing the jury on what constitutes the offence of rape, this is what the learned trial judge said at page 8 of the summing-up:

> "... the offence is committed when a male person has sexual intercourse with a female person without her consent, whether he does this by force, fear or fraud, because if he has sexual intercourse with a female by force, fear or by fraud, she is not consenting."

36. The learned judge had omitted to use the words: "or with indifference as to whether she consents or not"; "and with the intention to have sexual intercourse whether she consented or not." See ***DPP v Morgan*** [1976] A.C. 182) and ***R v Trevor Davis*** (1993) 30 JLR 30.

37. In relating the evidence to the offence, the judge said at page 15:

> "... incident that took place on the Monday, the 17th of January, 2005, at about 11 o'clock. She was on her way, she saw this taxi driver she says is the accused. She went into his taxicab, this taxicab (sic) and the taxicab drove away into some bushes and there he pulled her from the car, pushed her down in the bushes and had his way with her.
>
> Essentially, when she was resisting, he boxed her and then pinned her two hands over her head, using the other hand to remove his pants, pulled up her skirt, pulled away her panty, inserted his penis into her vagina and had sex. Having done that, he then drove away and left her in the bushes."

38. Counsel for the Crown submitted that the defence in this case was one of alibi, a total denial of the appellant's involvement in the offence. She submitted that the question of intention is only relevant in cases where there is an issue as to whether or not the complainant had consented. There is no such contention in this case.

39. In ***R v Andrew Fuller*** SCCA 108/99 delivered December 20, 2001, Harrison J.A (as he then was) said at p 6:

> "Whenever the issue in the case is whether or not the complainant consented, the learned trial judge must direct the tribunal of *fact* that the prosecution must consider the *mens rea* of the accused, that is, his intention to have sexual intercourse with the complainant without her consent or with indifference, namely, not caring, whether or not she consented.
>
> *In* ***R v Kenneth Robinson*** (supra) the learned trial judge failed to direct the jury to consider specifically the *mens rea* of the appellant, and therefore the Court held that, in that respect, the summing-up was flawed.
>
> Where an accused raises a defence that he honestly believed that when he had sexual intercourse with a complainant she was consenting, a direction to the jury is dependent on the facts of the particular case. That defence attracts an examination of the state of mind of the accused. It requires a subjective test."

40. We are clearly of the view that the question of the appellant's state of mind never arose in this case since he has maintained that he was never at the scene and had not committed the offence. We therefore agree with Counsel for the Crown that there was no need for the learned trial judge in defining rape to give an expanded definition pursuant to *the* ***DPP v Morgan*** (supra) principles. This ground of appeal also fails.

Conclusion

41. The appeal is therefore dismissed. The conviction and sentence are affirmed. Sentence is to commence as of April 27, 2006.