In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2007: No. 31

BETWEEN:

NIRMALAN ANANDACOOMARASAMY

Appellant

- and -

ANGELA COX (POLICE CONSTABLE)

Respondent

Date of Hearing: Wednesday 19 March 2008
Date of Judgment: Thursday 10 April 2008

Mark Pettingill of Wakefield Quin for the Appellant; and
Cindy Clarke for the DPP.

JUDGMENT

1. The appellant was convicted on 18 September 2007 of committing a sexual assault on a female on 22nd December 2006. The assault alleged was placing his hand upon her thigh while sitting next to her on a bus.

2. The prosecution case was that the appellant boarded the bus at the Hamilton depot, and sat next to the complainant although other seats were empty. When the bus left she dozed off and was awoken by a hand on her right leg by her knee. She looked at the man, but said nothing. She thought she might be dreaming. She dozed off again and the sequence was repeated. Again she dozed off and again she felt a rubbing, this time higher up. She then lifted her handbag and saw the hand of the man sitting next to her. At that

point she twice said out loud that the man had assaulted her, but no-one else on the bus did anything. The man, however, got up and went to the front of the bus, saying he had done nothing, and got off at the next stop.

3. The complainant did not immediately report the matter, but did so later "after a certain e-mail came out". I take that to mean that she saw an e-mail about similar assaults, and then decided to report the one on her. Whatever the reason, the result was that she did not identify the appellant as her assailant until 17 February 2007, when she picked him out of an identification parade. It appears that the description that she gave of her assailant was that he had "a neatly shaved goatee beard[1]," but at the time of the identification parade the appellant was clean shaven[2]. While that may not be a very significant point, because her assailant could easily have shaved, it nevertheless remains a factor to be taken into consideration.

4. The case was tried with another alleged assault on another female under similar circumstances, but the learned Senior Magistrate acquitted the appellant on that charge on the ground that her identification of him was unreliable. That appears to have been on the basis that the other complainant had seen a photograph of the appellant before the identification parade. In such a case it would have been more appropriate to dismiss the case at the close of the prosecution evidence, but, subject to that minor point, the learned Senior Magistrate was, in my respectful view, correct to take that course.

5. The sole ground of appeal is –

> "That the Learned Judge erred in law in failing to properly apply the correct legal principals relating to identification evidence."

The appellant does not otherwise contest the veracity of the complainant. Nor indeed could he, it being his case that he was not the person present on the bus, and he gave

[1] See the statement of Insp. Morfitt, which was admitted by agreement, at p. 36 of the record, and see also the complainant's evidence at p. 17: "I do remember this man having some facial hair".
[2] See the photograph album, also admitted by agreement.

evidence to that effect. This is not, therefore, a case in which the honesty of the identification was challenged. The sole challenge was to the accuracy of the identification, which is a very different thing.

6. The law recognizes that visual identification can be a dangerous and misleading process. The principles were canvassed at length in the leading case of R v Turnbull [1977] 1 QB 224. Those principles were argued before the learned Senior Magistrate at the trial, and he plainly had them clearly in mind. Indeed, he recited them at length in his judgment. He also analysed the detail of the transaction, setting out the various opportunities that the complainant had to look at her assailant. After conducting these exercises he concluded –

> "I am particularly impressed with the quality and scope of the identification of the defendant by [the complainant] when[3] she was on the bus. In my view the circumstances cannot be described as a fleeting glance notwithstanding that she says that she was asleep most of the journey."

7. What it comes down to is whether the learned Senior Magistrate was right in his assessment of the quality of the identification evidence. This has nothing to do with the quite separate question of whether he was right to believe the complainant. There was no suggestion that she was not telling the truth to the best of her ability, and in any event this Court would rarely intervene where an assessment of credibility was involved[4]. The question is whether there was such a risk that she might be mistaken as to render it unsafe to rely on her identification of the appellant. I think that that is how the statutory test in section 18(1)(a) of the Criminal Appeal Act 1952[5], applies in a case such as this.

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[3] The judgment as it appears in the record contains a transcription error at this point. I have checked the Magistrate's original manuscript and the version as set out here is the correct one.

[4] This issue was discussed in Turnbull at [1977] 1 QB 231 D - E

[5] "18 (1) Subject as hereinafter provided, the Supreme Court in determining an appeal under section 3 by an appellant against his conviction, shall allow the appeal if it appears to the Court—

(a) that the conviction should be set aside on the ground that, upon a weighing up of all the evidence, it ought not to be supported; or

(b) that the conviction should be set aside on the ground of a wrong decision in law; or

(c) that on any ground there was a miscarriage of justice;

and in any other case shall dismiss the appeal:"

8. In approaching this I think that the test is the same as it would be on consideration of a no case submission in a jury trial. If there was evidence which it would have been proper to leave to a jury, this court should not intervene now. On the other hand, if the case was such that it would not have been safe to leave it to a jury, then this court should intervene now and quash the conviction.

9. In Turnbull the Court said –

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

10. It is instructive to look at the examples of safe identifications which Lord Widgery CJ gave in Turnbull[6]: a kidnap victim who had been with his captor over many days; two police officers both identifying a person after a period of surveillance; a co-worker recognizing a colleague. On the other hand, in the case of a witness to a street robbery who gets only a fleeting glance of the thief's face as he runs off, and who then later picks out the accused at an identification parade, Lord Widgery considered that a judge would be obliged to withdraw the case from the jury in the absence of some other supporting evidence[7].

11. In this case, the prosecution case against the appellant at trial turned solely on the identification evidence of the complainant. There was nothing in the evidence to support or corroborate her. On the other hand the appellant gave evidence and asserted his innocence. It was his case that he was at work at the time of the alleged assault. He was unable to produce any witness to support that. However, that cannot be held against him or support the identification, because, once the defendant raises an alibi, the burden of

[6] [1977] 1 QB at 229

[7] Ibid. at 230B

disproving it is on the prosecution[8]. In any event, the lapse of time between the incident and the complaint would necessarily make it very difficult for someone in the ordinary course of things to produce alibi witnesses.

12. Nor does the evidence of the other complainant support the prosecution case, as the learned Magistrate dismissed her identification as unreliable. It is true that the evidence of multiple complainants can properly be used to support each other: see e.g. Anthony Barnes [1995] 2 Cr. App. R. 491 (CA). But if the evidence of one is tainted (as it was in this case) then it would be unsafe to rely upon it for this purpose. This would have been clearer if the learned Magistrate had dismissed the other case at the close of the Crown's evidence.

13. Against that background, the quality of the identification evidence in this case was, in my judgment, insufficient on its own to support a conviction. It was little more than a fleeting glance. The complainant had been in a dozy state for much of the time. There was nothing to support the identification. There was a delay between the incident and the formal identification, and the description the complainant gave of the assailant differed from that of the appellant at the time of the identification parade.

15. In these circumstances I consider that the conviction is unsafe, and ought not to be supported. I therefore allow the appeal and quash the conviction.

Dated the 10th day of April 2008

Richard W. Ground
Chief Justice

[8] For a discussion of the dangers of seeking to rely upon a rejected alibi in support of an identification, see Turnbull at 230 G – H.