BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 29 of 2000

BETWEEN:

WAYNE TYRONE BRATHWAITE ***Appellant***

AND

THE QUEEN ***Respondent***

BEFORE: The Honourable Errol DaC. Chase, the Honourable Colin A. Williams and the Honourable Frederick L.A. Waterman, Justices of Appeal.

2003: February 17, 20

2006: March 1

Mr. Wren Herbert for the Appellant.

Mrs. Donna Babb-Agard for the Respondent.

DECISION

INTRODUCTION

[1] On 10 October 2000 the appellant, Wayne Tyrone Brathwaite, was convicted before a judge and jury of two offences, one of burglary contrary to ***section 24(1)(a) of the Theft Act, Cap. 155***, and the other of rape contrary to ***section 3(1) of the Sexual Offences Act, Cap. 154***. On the same day he was sentenced by ***Mac Cormack J*** to 12 years' imprisonment for the burglary and to 13 years for the rape, the sentences to run concurrently.

The Prosecution Case

[2] The prosecution case was that on 12 September 1998, the appellant entered as a trespasser the dwelling house of P.G. situated at Thorpes Cottage in St. George with intent to rape her, and that after entering the house he had sexual intercourse with her without her consent. The case rested mainly on the evidence of P.G., the investigating police officers, Dr. Belfield Brathwaite, as well as on the oral and written statements attributed to the appellant, which were challenged at the trial.

[3] In her evidence-in-chief P.G. said that on the night of 11 September 1998, she was at home alone in her bedroom listening to the radio. Sometime after 1.00 o'clock on the following morning she heard a noise which sounded like glass moving. She went to investigate. She was not wearing any clothes and she turned on all the lights in the house. She noticed that some glass panes from the window in the living room were missing. One of the louvres was out completely and one was partially removed. She sounded her voice and said "I am not sleeping, don't try to come in". There was no response to what she said and she returned to her bedroom and locked the door. A couple of minutes after, she heard the noise again. She went back into the living room and noticed that more glass panes had been removed from the window. Then she heard a voice that said, "I am coming in for some cunt". She did not recognise the voice, all she knew was that it was a male voice coming from outside the house from the direction of the patio.

[4] P.G. gave evidence that after hearing the voice she ran back to her bedroom, locked the door and telephoned the police at Boarded Hall. While she was on the phone she was naked. The lights in her bedroom were on. The door to her bedroom was then kicked down. She turned around and saw the appellant at the door. He then approached her, pulled the telephone from her hand and threatened her with violence if she screamed. She was afraid. The appellant pushed her on to the bed. She pleaded with him to leave her because she was having her period and felt sick. The appellant pushed her back on to the bed in a lying position, pulled his pants down, snatched a rag off the table next to the bed, removed her sanitary napkin and put his penis into her vagina and had sex with her without her consent. After he had finished, the appellant left the bedroom and went out of the house through the side door.

[5] In cross-examination, evidence was adduced from P.G. which revealed some inconsistencies between her evidence at the Magistrates' Court and at the trial. This evidence related to description of the clothing which she alleged the appellant was wearing on the morning of the incident, the length of the entire incident and the method by which the appellant left P.G's house. Further, P.G. gave evidence that she was able to identify the appellant during the informal identification exercise as the person who entered her home on the morning of 12 September because the lights in her house were on, coupled with the fact that she had known the appellant for over two years as a casual acquaintance from his passing through the area where she lived and his speaking to her.

[6] Sergeant Shurland Alleyne gave evidence that on 12 September 1998 he responded to a report made by P.G. to District 'B' Police Station. When he arrived at P.G's residence she was crying and appeared to be hysterical. He collected certain items of clothing from P.G. and later returned to the Police Station.

[7] On 12 September 1998, Station Sergeant Elliott Bovell conducted an informal identification exercise. When the object of a parade was explained to the appellant and when told that he could decline to participate in an identification parade, the appellant said, "Bring she, she know me. You ain't got to hold no parade". The appellant was placed in a room with four other men and P.G. in identifying the appellant said, "the one in the red shirt".

[8] Police Constable Frederick Catwell gave evidence of the oral statements made to him by the appellant on 12 September 1998, at page 42 of the record as follows:

> "I know my rights sir, it don't make no sense getting no lawyer now, if I get charged with something I will get a lawyer to represent me" … "You don't have to go any further I do it. I raped the woman. I do that cause I was drinking and didn't know what I was doing". … "Yes Sir, you write down what I say."

[9] On the same day Constable Catwell recorded a statement which the appellant made and signed and which is set out at pages 80 and 81 of the record as follows:

> "Last Friday night I was up the road drinking rum at a shop in Thorpes Cottage. I was there for hours and then I left. I can't remember what time it was. I leave the shop and start to walk home. On my way home, I don't know what get in me, but I just walk towards the woman house. I start pulling out the louvres. I take out some louvres in the front house and I went through. When I get inside the house I see the woman run in the bedroom. I try to get the door open but it was lock. I give the door a hard kick and it fly open. I see the lady sitting down on the bed talking to the phone. I don't remember if she drop the phone or if I take it away. I tell she to lay down. She was already naked and I had sex with she. She did not scream or fight with me. After I finish I walk back out and went through the kitchen door. I walk back round the front of the house and take up the louvres that I take out to get in the house. I throw these in the grass when I was going home. I just went home and sleep after."

[10] Constable Catwell also testified that, when told that the police wanted him to point out certain areas to them which he mentioned in his written statement, the appellant said under caution, "Alright". The appellant then directed the officers to a vacant lot at Thorpes Cottage, St. George, and said: "I dropped the louvres in that grass". When asked by Constable Catwell what he could say about the louvres the appellant said: "These is the louvres".

[11] Dr. Belfield Brathwaite, the Police Medical Officer for the Southern Division, testified that he examined P.G. on 12 September 1998, and found an abrasion of recent origin at the posterior or back part of the vagina. The abrasion was of less than 24 hours. He said that some sort of blunt instrument could have caused the abrasion which would be consistent with forced sexual intercourse. Under cross-examination, Dr. Brathwaite said that normal regular sex would not cause an abrasion and that if there was sex, it was forced. He conceded that it was also possible that the abrasion found at the back of the vagina could have come from no sexual activity at all.

THE DEFENCE

[12] The appellant's defence was that he was not involved in either of the offences; that he was not the man who went into P.G's house; and that this is a case of mistaken identity. He denied that he made the oral statements or gave the written statement, and said that the statements were the fabrications of the police officers involved in the

case.

[13] The appellant made an unsworn statement from the dock in which he gave this version of the events (pages 74-76 of the record):

> "On 17th October 1998 I was … On 15th September I was in Thorpes Cottage, St. George speaking with my father Milton Williams. Whilst speaking to my father this car pulled up in front of the house. My father was in the gallery.
>
> I was on the outside. About 4 men in the car got out and rushed at me. I was told by officer Catwell that he wanted me to accompany him at the station for questioning. I asked him for what reason or for what matter. He never answered me. I asked to speak to my father which I was refused and shoved into the car, handcuffed. He took me to the station. When I reached there it was approximately 10 past 9. I asked for a phone message to speak to my mom or someone in my family which I was refused. I was asked to give a statement I refused to do so. Police Constable threatened to beat me if I don't give him answers. He start writing on a white sheet of paper. When he got a certain way, he start asking questions again I refused to answer him because I knew nothing about what he asking me about.
>
> He said to me if you don't start giving your answers now - pointed to the left hand corner of the room, he said "I will throw some licks in you with that there if you don't answer me". If you don't start answering me. Answer me right. I never gave him any answers.
>
> I was at the station for about an hour and a half before he finished writing. During the period of time when writing the statement he asked me to sign my name which I refused at first. I did so then. After being threatened, I signed the statement four times. My last signature I signed when police constable Browne entered the office. He signed it after me. Later that day I was asked to accompany Mr. Browne, Mr. Catwell and a next officer, I can't remember his name now, to Thorpes Cottage, St. George.
>
> I did not give any directions. They drove into Thorpes Cottage to an open lot. I was in the back seat of the car handcuffed and sitting down on the right side of the car with Mr. Browne on my left. Mr. Catwell get out of the car, walked round the back of the car, walked on the open lot spend about 2 minutes, took up some glass, came back to the car. He asked me if I know anything about them. My answer was no. He got back in the car, went to my home and asked me to give him the clothes I was wearing on that night the lady accusing me of. I give him the clothes. We left Thorpes Cottage, returned to the station. I was put in a room opposite to the one I was being questioned in. I asked for a phone message. I was refused (no one answered me).
>
> They put me in a corner to sit down on a bench. Minutes after that I saw a police officer Catwell accompanying P.G. to his office. There was a walk you could see from one office to the next. I don't know what they were speaking about but as she left the officer she stopped look at me and told a policeman in the station "look how comfortable my boy sitting down there in that corner".
>
> I did not see her until I was asked to go in this room and stay up for an ID Parade.
>
> I had on a short jeans pants and a red T shirt a pair of boots.

P.G. walked in accompanied by an officer and as she walked in the office she looked around for a few minutes and she said "That is he there".

I was at the station from about 6:30 to 7:00 in the evening. Later on that night I was taken to Oistins Police Station. That is where I get my phone message then. I was put in a cell after giving my name and address to the sergeant at the desk. My mother brought something for me to eat that said night. I was put back in my cell after I was finished eating. I went to Court the next morning at around 9:15, where I plead not guilty to what was being asked. I came home on bail.

That is it your ladyship."

GROUNDS OF APPEAL

[14] **G*round 1***

This ground of appeal contends that the trial judge failed to give the jury a warning as provided for in ***section 136*** of the ***Evidence Act.*** Mr. Herbert submitted that the warning was not given under ***section 136*** that the oral statements attributed to the appellant and recorded by the police, but not signed or otherwise acknowledged in writing by the appellant, may have been unreliable. These oral statements have been referred to earlier in this decision.

[15] This Court considered ***section 136*** of ***the Act*** in ***Ian McClaren Gill v. R. (2003) 66 WIR 40*** and held that the requirement for a warning to be given is not mandatory, but directory. In the instant case, although the trial judge did direct the jury that they must be satisfied that the oral statements attributed to the appellant were in fact made, she did not give them a ***section 136*** warning. Nevertheless, we are satisfied that, in light of the

overwhelming evidence against the appellant, other than his oral statements, he suffered no injustice by the failure of the trial judge to give the ***section 136*** warning.

Ground 2

[16] This ground alleges that the trial judge's summing-up on corroboration was incomplete in that the jury were not warned as to the possibility that the evidence given by the virtual complainant of the alleged rape may have been fabricated.

[17] The judge dealt adequately with corroboration (at pages 9 and 10 of the record). However, both counsel agree that the judge should have warned the jury that sexual complaints are made for all sorts of reasons and sometimes for no reason at all and are very easy to fabricate but extremely difficult to refute. Depending on the circumstances of the complaint in a sexual offence case, a trial judge should formulate the warning in language that exposes the jury to the possibility that a complaint could be made for some reason that is not disclosed to the

Court or for no reason at all, and that they must be satisfied that the complainant is a reliable witness whose evidence they may accept.

[18] Although the judge failed to warn the jury as to the possibility that P.G. could have fabricated the story against the appellant, we are of the view that this was clearly not a fabricated charge. In light of the overwhelming evidence against the appellant, we are satisfied that he suffered no prejudice or disadvantage by the failure of the judge to give the warning.

Ground 3

[19] In this ground, the appellant contends that the trial judge erred in law when she told the jury in her summing-up (pages 9 and 10 of the record) that the appellant's written statement, if they accepted that it was made voluntarily, was capable of amounting to corroboration. This ground is without substance.

Ground 4

[20] This ground of appeal is that the trial judge erred in law when she failed or neglected to properly direct the jury on the law of identification having regard to ***sections 99-102 of the Evidence Act, Cap. 121***.

[21] Division 7 of the ***Evidence Act*** comprises ***sections 99-102*** and relates to identification evidence. ***Section 99*** provides that the Division applies only in criminal proceedings; ***Section 100*** provides the conditions for the admissibility of identification evidence adduced by the prosecution; ***Section 101*** relates to evidence of identification by pictures; and ***section 102*** makes provision with respect to the directions to be given to juries.

[22] In this case no identification parade was held and the virtual complainant P.G. picked out the appellant from a group of five persons in what Sergeant Bovell called an informal identification exercise. He testified that he told the appellant that it was his intention to hold an identification parade, that he explained to him what an identification parade is, that he told him among other things that he could object to the parade, and that if he elected to stand in the parade, he could have his attorney or friend present. His evidence is that the appellant responded, "Bring she, she know me. You ain't got to hold no parade". In the light of **section 100** of the **Evidence Act**, Sergeant Bovell's decision to hold an informal identification could only be justified if it was not reasonable to conduct an identification parade. The appellant's response did not justify it, nor did anything else in the evidence. There is substance in Mr. Herbert's submission on this point. We will return to this later when we assess the prosecution case against the appellant.

Ground 5

[23] This ground complains that the trial judge erred in law when she failed or neglected to properly direct the jury on the way to deal with or treat the alleged written statement of the appellant. The judge dealt fully and adequately with this matter at pages 9 and 10 and pages 27-29 of the record.

Ground 6

[24] In this ground the appellant complains that the verdicts were unsafe and unsatisfactory.

[25] The prosecution case against the appellant rested on the evidence of P.G. to the effect that she had known the man who entered her house and raped her for two years before 12 September, 1998 the date of the alleged offence, and that she had had a good look at his face as the lights in her bedroom were on. It was no fleeting or passing glance. In addition, the appellant had given the police officers self-incriminating oral and written statements which, if accepted by the jury, supported P.G's allegation that the appellant had had sexual intercourse with her, and there is evidence that he directed them to the place where he had put the louvres taken from P.G's house. The only issue remaining for the jury to determine was therefore one of consent. In light of there being ample and substantial evidence connecting the appellant with the offences, we do not agree that the jury's verdicts were unsafe and unsatisfactory.

[26] The appeal is therefore dismissed. The convictions and sentences are affirmed and the sentences will run from six weeks after the date of the convictions.

Justice of Appeal

Justice of Appeal

Justice of Appeal.