

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL

Criminal Appeal No.30 of 2002

BETWEEN:

STEVENSON ANTONIO HOLDER                      *Appellant*

AND

THE QUEEN    *Respondent*

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, Hon. Colin Williams, Justice of Appeal, and Hon. Frederick Waterman, Justice of Appeal

2004: 2 December

2005: 20 May

Mr. Michael Lashley and Mr. Marvin Patterson for the Appellant

Miss Manila Renee for the Respondent

**DECISION**

*Introduction*

**SIMMONS CJ:** The principal issues raised on this appeal are the admissibility and use of voice identification evidence in a case which does not wholly or substantially depend upon the correctness of an identification. On 12 July 2002, the appellant was convicted of rape and buggery of a woman (the complainant) and sentenced to two concurrent terms of 14 years' imprisonment by *Garvey Husbands J.*

*The Prosecution Case*

[2] The prosecution case was that in the early hours of 8 July 1997, the complainant was asleep in her bedroom with

her two-year old daughter when she was awakened by the presence of a person lying on top of her. This person had covered her face and head with a burgundy coloured towel and was trying to spread her legs apart and undress her. Because the young child was becoming restless, the person forced the complainant, still blindfolded, to walk in front of him from her bedroom to another. There he proceeded to rape and bugger her. For the purpose of this appeal, it is unnecessary to recapitulate the complainant's evidence of the commission of the offences.

- [3] The prosecution relied especially upon oral statements and a written statement made by the appellant to Sgt. Errol Ellis in which the appellant graphically admitted the offences. In one of the oral statements, the appellant had told Sgt. Ellis, 'I don't know what get into me, but I feel somebody working obeah 'pon me. I is who do it'.
- [4] The evidence of voice identification was adduced during the evidence-in-chief of the complainant. Counsel for the appellant 'objected' to any evidence which the Crown might lead 'in relation to voice identification'. The exchange between Counsel and the trial judge is important in the context of this appeal. We reproduce the relevant part of the record: (pp.47 to 49)

*"Mr. Lashley: I am objecting, My Lord, to the virtual complainant giving evidence in relation to height and also, My Lord, in relation , My Lord, because I believe my learned friend now will be going to voice My Lord, and My Lord, my submission My Lord, is in relation to voice. The voice identification, My Lord, is grounded in Tiwarie v. The State, 1996, 61 West Indian Report, page 389, My Lord.*

*The Court: Anything else?*

*Mr. Lashley: My Lord, can I make respectfully, My Lord, with your permission, make a submission in relation to the evidence to which my learned friend will be seeking now to produce in relation to voice identification.*

*The Court: Let me hear that again?*

*Mr. Lashley: I am objecting. Firstly, My Lord, to any evidence my learned friend will be seeking to produce in relation to voice identification.*

*The Court: Yes?*

*Mr. Lashley: The submission is My Lord - -*

*Miss Renee: My Lord - - sorry. Before Mr. Lashley proceeds - -*

*The Court: Wait a minute, wait a minute. Is this case Mr. Lashley based on voice identification?*

*Mr. Lashley: My Lord, the case for voice identification was debated in - -*

*The Court: No, no, no. Is this case – the one which we are doing dependant on voice identification?*

*Mr. Lashley: One limb of the Crown's case is that we know there is no evidence of identification, My Lord. The only evidence of visual identification and the only evidence they are seeking to rely on is the smell, My Lord, and after that I believe they are seeking to raise the issue of voice.*

*"The Court: Voice, if I understand it, voice identification is quite proper. When you attend identification parades, the virtual informant -- I shouldn't be saying all of this in front of her. I don't know where the evidence is going to lead.*

*Mr. Lashley: Out of an abundance of caution My Lord, can we say this in the absence of the sitting jurors and in the absence of the virtual complainant, My Lord?*

*The Court: What I was going to say I will say it. I don't think it is necessary, but what I am going to say is this. My understanding of it is that at ID Parade the witness is entitled to ask certain things and this would only have been on the basis of what was heard before. I do not know whether that would be the position in this case. So therefore, on the basis of your voice identification, all I can say is that at this stage I'll permit the evidence, but clearly at the end of the day you will have an opportunity to make your various submissions when the evidence has gone in because I do not think -- anyhow. I do not think that that -- whatever the Court decides now is going to get to the crux of the matter; if you understand what I am saying. In short Mr. Lashley, if I understand the law, I do not think that you can identify -- I may be wrong, but I do not think that you can identify an individual by smell and voice. That is my understanding of it that is what is getting you uncomfortable, I am saying the evidence of what she observed, it can go in.*

*Mr. Lashley: From my learned friend's opening address, she mentioned a peculiar stench. She mentioned voice. So I am saying My Lord, that it seems to me respectfully that that is the basis upon which they are relying on, but I am in your hands, My Lord.*

*The Court: Mr. Lashley, I don't think that I am called upon to make any determination about that until at a certain time. Yes, go ahead."*

- [5] We interrupt the narrative of the background to say that our interpretation of the trial judge's response to Counsel's 'objection' is that **Husbands J** was making 4 points. First, that the case was not based on identification evidence. Secondly, that at an identification parade, a witness may ask a person on parade to speak. Thirdly, he was indicating to Mr. Lashley that, if he was not satisfied with the quality of the prosecution's evidence, he could make a submission of no case to answer at the close of the prosecution's case. Fourthly, although he doubted whether a person could be identified by smell or voice, he was of opinion that, in the usual way, the witness could give admissible evidence of what she observed by smell or voice.

#### *The Voice Identification Evidence*

- [6] The complainant was allowed to give evidence of the appellant's smell and voice. She said he had a most unpleasant odour. As to his voice, she said that, during 'the ordeal', she asked the appellant if he had a knife and he said 'yes'. He warned her not to make any noise, otherwise she would get hurt. He asked her what was her name, what the area was called, where did she live before. She asked him what made people like him 'do that sort of thing' and he said 'demons, obeah'. She said that she encouraged him to speak so that she would form a good impression of his voice 'because at that stage that's all I had to go on -- his voice...well, mostly his voice'. (p.245). After having sexual intercourse with her, the appellant warned her not to follow him or call the police. She said that he warned her in those terms several times during the assaults. Since she was afraid, she told him that she would not follow him. In her evidence the complainant said that she spoke to the appellant and he spoke

to her for a considerable time. She said that the incident also lasted “a considerable time” which she estimated to be 10 minutes.

- [7] At no time did the complainant actually see her attacker but she said that there were certain things about him that she would always remember. So there was no evidence of visual identification. In addition to a distinctly unpleasant and offensive odour, even though he never spoke loudly, he had a heavy voice which she heard clearly. She said she was also able to form an impression of his height because, as he was leading her from one bedroom to the other, she sensed that he was a short person, about her own height.
- [8] All of this evidence assumed critical importance in relation to other evidence of the complainant concerning events on 8 July 1997 about 7.00 p.m. The complainant said that she was in the supermarket near to her apartment. She said that a man came and stood up next to her in the queue. Immediately she smelt the same offensive odour that she had experienced during the sexual assaults. She looked at the man and observed that he was short. He spoke to her and she recognised his voice distinctly ‘because during the ordeal since I could not see anything, and since I knew that, no matter what he said, I would make a report to the police, and I had to have something to identify him by. So I impressed his voice on my mind and I am 110% positive that that was the accused.’ She and the appellant continued to speak and he asked her if she knew him and she said, ‘I do not know you but I heard your voice very recently’. She said that answer was given in such a manner as to allow him to know that she knew that he was the person who had attacked her.
- [9] After paying for her purchases, the victim telephoned the police. They came to the area and Sgt. Ellis testified that the appellant was pointed out by the complainant but, when he approached him, he ran away. He was eventually caught and charged.

#### *The Defence*

- [10] In a short unsworn statement from the dock, the appellant denied giving the oral and written statements to the police. He denied the offences and said that he had been tortured by the police to sign the written statement and he only signed it out of fear for his life. He told the jury that rape and buggery were a health risk and he was concerned about his health. He would not do those things to a woman since he had female relatives.

#### *The Grounds of Appeal*

- [11] The main grounds of appeal are that the trial judge erred in law in admitting evidence of voice identification and in saying in the presence of the jury that voice identification evidence is proper – see paragraph [4] *supra*.
- [12] There are no Barbados authorities on the issue of voice identification evidence. We therefore have to approach this issue *de novo* to determine whether the evidence should have been admitted and how it should have been treated by the trial judge.
- [13] We consider, first, s.2 of the ***Evidence Act, Cap. 121***, where ‘identification evidence in relation to criminal proceedings’ is defined as “evidence that is –

- (a) an assertion by a person to the effect that an accused was, or resembles a person who was present

at or near a place where,

- (i) the offence for which the accused is being prosecuted was committed; or
- (ii) an act that is connected with that offence was done,

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the first-mentioned person saw, heard or otherwise noticed at that place and time, or

- (b) a report, whether oral or in writing, of an assertion as mentioned in paragraph (a).”

[14] This definition equates with the definition in the equivalent section of the ***Evidence Acts 1995 (C<sup>th</sup> and NSW) of Australia*** from which jurisdiction the Barbados Evidence Act was copied. Australian authorities are very much in point upon a consideration of the issues in this appeal. It is regretted that only one Australian case was cited to us viz. ***Miladinovic v. R. 124 A.L.R. 698***. We have had to do much of the research ourselves. It is our opinion that the citation of English authorities is unhelpful since the matter of voice identification in England is bound up with the applicability of Codes made under the ***Police and Criminal Evidence Act 1984 (PACE)*** and which have no application in Barbados.

[15] Having said, however, that Australian authorities are relevant to this appeal, we ought to mention immediately that there is a dichotomy in the treatment of voice identification evidence as between the courts of New South Wales and Victoria. This will become apparent later when we survey the cases.

[16] Returning to the statutory definition, it is our interpretation that identification evidence under the Act includes aural and voice identification where a witness asserts what he saw or heard at the location and time that the crime occurred.

[17] Identification is essentially an act of the mind by whichever of the senses the mind is informed. At common law, it has long been held that identification of a person by means of his voice alone is sufficient evidence – see ***R. v. Murray (1916) 33 D.L.R. 702***. As a matter of the basic law of evidence, why should a statement by a witness that he identified a person or recognised him by his voice be ruled inadmissible? On principle, it seems to us that voice identification evidence is receivable in cases where a crime (as in this case) was committed in darkness or where an accused was disguised or masked and spoke. Take the case of a blind man who was attacked by a person well-known to him. It would put an unusual strain on commonsense, far less the logic of the law, to suggest that the blind man could not give evidence that he recognised his attacker by his voice. It would, strictly, be evidence of opinion but over the years the distinction between fact and opinion in the law of evidence has become blurred.

[18] While dealing with first principles, it seems to us that a discussion of some of the rules of opinion evidence would not be out of place in this appeal. Section 65 of the Evidence Act enacts an exception to the general rule against admissibility of opinion evidence. It provides:

“65. Where

(a) an opinion expressed by a person is based on what the person saw, heard or otherwise noticed about a matter or event, and

(b) evidence of the opinion is necessary to obtain an adequate account of the person's perception of the matter or event,

the opinion rule does not prevent the admission or use of the evidence.”

[19] This section, the equivalent of s.78 of the **Australian Evidence Act**, clearly expands the circumstances under which a lay person may give evidence of matters which are really opinions. **Cross on Evidence, Sixth Australian Edition (2000)** states at p.827:

“There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, sobriety, speed, weather, handwriting *and identity in general*; bodily health, emotional state, the worn, shabby, used or new condition of things.” (Emphasis supplied).

[20] In **R. v. Van Dyk (1999) 47 NSWLR 419**, it was held that evidence that the appellant used to look at young girls ‘with a look of wanting’ was admissible under s.78. Lay opinion evidence may be admissible under the Evidence Act, if it is relevant and necessary. We remind ourselves that the complainant was not giving evidence as an expert comparing voices. The complainant in this case was giving evidence as to the identity of a person whose voice she said that she had heard during the sexual assaults and at the supermarket. She was saying no more than that, in her opinion, she perceived that the voice was the same on both occasions.

[21] Although it was not argued before us, (so we leave the point open), it was at least arguable that her opinion as to the similarity of the voice was *relevant* within s.45 of the Evidence Act based on her perception that the voice was the same on both occasions. For the same reasons, it was arguable that the evidence of voice was *necessary* to provide an adequate account of her perception of the person who sexually assaulted her and her perception of the similarity in the voice she heard at her apartment and in the supermarket. Nevertheless, we are satisfied that, in the circumstances of this case, the complainant was giving the evidence as a witness of fact. As such, the credibility and reliability of that evidence was a matter for the jury. We turn next to a review of the Australian authorities on voice identification evidence.

*The Australian Authorities – The R. v. E.J. Smith line of cases*

[22] The leading authority in New South Wales on voice identification is the decision of **O’Brien CJ** in **R. v. E.J. Smith [1994] 1 NSWLR 462**. A murder was committed during the course of an armed robbery. The victim's daughter heard the commotion and the voices of persons. Nine months later in different proceedings, she heard the accused conducting his own defence and identified him as one of the persons involved in the armed robbery and murder. **O’Brien CJ** held a *voir dire* to determine the admissibility of the voice identification evidence and ruled that the evidence was admissible. In his ruling, the Chief Justice examined Canadian and United States authorities and referred to some of the problems associated with voice identification evidence. He admitted the evidence of the daughter on the basis that the jury, using their own recollection of how the accused conducted his

defence, would be entitled to find that the accused's voice had 'highly distinctive features' which could 'leave an indelible mental impression'.

[23] In a passage which has been heavily criticised in the State of Victoria, **O'Brien CJ** concluded at p.477 that:

"Evidence of the voice of a person present at a crime as being the same as the voice of the accused can only amount to positive identification *where the witness is very familiar with the voice before hearing it at the crime, or that the voice heard at the crime was very distinctive*, which means that the witness need not have heard the voice before the crime but heard it as the voice of the accused for the first time after the crime and then noted it to have the same very distinctive features as had the voice at the crime. (Our emphasis).

[24] The Chief Justice's *dictum* was approved on appeal to the Court of Criminal Appeal, though the appeal was allowed for other reasons which need not concern us – see **R. v. E.J. Smith (1986) 7 NSWLR 444**. **Smith** was approved in **R. v. Brownlowe (1986) 7 NSWLR 461**, **Corke v. R. (1989) 41 A Crim R 292** and **R. v. Brotherton (1992) 29 NSWLR 95**. In **Brownlowe**, the Court of Criminal Appeal accepted that in **Smith** the Court had on appeal determined that there was a rule of law that a witness giving evidence identifying the accused by his voice must have satisfied the tests of familiarity or distinctiveness adumbrated by **O'Brien CJ. Brooking J** in **R. v. Hentschel [1988] VR 362 at 368** said of the **Smith** and **Brownlowe** cases:

"The view taken appears to be that it is in law a condition of the admissibility of an opinion that the offender's voice was that of the accused that either the witness should have been already familiar with the voice or the voice should have been very distinctive."

[25] In **R. v. Brotherton**, the appellant had been found guilty of a number of sexual offences with a female groom of racehorses. She was asleep in quarters at Radwick Racecourse when she was awakened by a man sitting on her stomach and trying to strangle her. He had sexual intercourse with her and forced her to perform fellatio on him. During the assaults she said, in recognition of him, 'Oh, it's you', to which he replied: "What do you mean? You don't know me." The groom was able to describe the voice of the man as "husky", "a really low husky voice", and, having seen and heard the man on the day before the assault, she said it was "the same voice" that she had heard the day before.

[26] At p.312, **Hunt CJ** said:

"The issue which arose as to the admissibility of the complainant's evidence in the present case depended upon the extent of her familiarity with the appellant's voice. The complainant had spoken to the appellant only the once before the assault upon her, two days earlier and then only for 10 minutes. She had not spoken to him when she saw him again earlier on the day when the offences were committed. Yet she said that the man who had sexually assaulted her had the same voice as that which she had heard earlier, and that the voice was one of the factors that had led her to recognise him at the time..."

If that had been all, I would have considerable doubt whether the complainant's familiarity with the appellant's voice would have been sufficient for the voice identification by way of recognition to go to the jury. But it was not all. Significantly, it was accompanied by visual identification, in particular the tattoo on the man's thigh when she was forced to fellate him..."

[27] His Honour emphasised that voice identification may be just one of several factors to be weighed in assessing the strength of a witness's identification of an accused. He said that where "one strand of identification evidence is of poor quality, another strand may support its correctness, *and what must be considered is the accumulation of the evidence*". (Our emphasis). His Honour held that the groom's evidence was properly before the jury. So much for the New South Wales cases. They have not been followed in Victoria.

*The R. v. Hentschel line of cases*

[28] In *Hentschel*, the appellant had been convicted of a number of sex offences. The complainant had been in the presence of her assailant for some 2 hours after he broke into her home. During that time, they had a number of conversations. Nine days after the incidents, the complainant compiled a photo-fit of her attacker's face and it was tendered at the trial. She gave evidence verifying the photo-fit and she identified the appellant's voice from a number of tape recordings played for her by the police. She also identified him when she was taken to observe him in the foyer of the courthouse on committal. His appeal was dismissed. *Murphy J* was of opinion that familiarity and distinctiveness were not matters of admissibility. Rather, they went to the weight of the evidence.

[29] *Brooking J* then carefully dissected the reasoning in *Smith* in his judgment in *Hentschel* at pp.368-369. He analysed the familiarity and distinctiveness tests propounded in *R. v. E.J. Smith* in this passage:

"Familiarity is a matter of degree. A girl may be familiar with the voice of her great aunt, but if she has just emerged from 24 hours in the company of a very talkative abductor, a jury may think she is in as good a position to recognise his voice the next day as that of her relation. This suggests very strongly, to my mind, that the whole matter of ability to recognise is one that turns on the facts of the given case. If a man is kidnapped by a masked but loquacious terrorist and held captive for a month, is he by some inexorable rule of law to be assigned to the category of "person not previously familiar" and so put in the same category as the bank teller who hears half a dozen words uttered by the bandit? Such an approach is, in my view, contrary to commonsense. Then take the second distinction on which the supposed rule of law depends whether the voice heard at the time of the crime was very distinctive. Once again... distinctiveness is a matter of degree. Is an American accent very distinctive? What of an Indian who studied in the United States and speaks English with a combination of accents?"

The supposed rule of law allows a person who has heard the offender utter only half a dozen words to make an identification provided that he was previously familiar with the voice or the voice was very distinctive. It refuses to allow a person who has heard the offender speak for several hours to make an identification even though the witness may, for example, have heard an excellent tape recording of the voice of the accused which is of considerable duration, unless the offender's voice was very distinctive. I cannot see why the law should say that in the first case the evidence is probative but not the second."

[30] *Hentschel* has been followed in *R. v. Harris (No.3) [1990] VR 310*. *Ormiston J* held that the reliability of the purported identification evidence went to the weight of the evidence only rather than to the power of the trial judge to exclude evidence if the interests of justice made it desirable. See also, the Federal Court of Australia in *Miladinovic v. R. 124 ALR 698*. The High Court of Australia cast doubt on the correctness of *Smith* and *Brownlowe* in *Bulejck v. R. (1996) 70 ALR 462*. *McHugh* and *Gummow JJ* thought that it was arguable (though they declined to be dogmatic) that *Smith* was wrongly decided in so far as it holds that evidence of voice identification is only admissible if it satisfies one or other of the tests enunciated by *O'Brien CJ*.

[31] In determining whether the trial judge erred in admitting the evidence of voice identification, it is, in our view,

important to consider how defence counsel had approached this matter at the trial. We think that it is evident from the dialogue between the trial judge and counsel that there was no proper application made for a *voir dire*. As we read Counsel's 'objection', it was lukewarm and more in the nature of a concern than a firm and categorical objection. The case of ***Tiwarie v. The State (1996) 61 WIR 389*** was mentioned without a request to explain, develop and apply the principles of the case to the instant matter. Significantly, when counsel submitted, unsuccessfully, that there was no case to answer at the close of the prosecution case, there was a definite and specific application to make the submission in the absence of the jury – see p.213 of the record. On that application there was full argument. That application is of significance too, because it reveals an absence of submissions dealing with the quality of the voice identification evidence even though Counsel described the whole of the prosecution evidence as 'tenuous'.

[32] Ms. Renee contends that the prosecution case was not reliant upon identification evidence; it was based on the oral and written statements, albeit disputed, and the conduct of the appellant after he was charged. For example, Ms. Renee pointed to his identification of the towel with which he covered the complainant's head and his taking the police to the scene of the crimes and showing them how and where he had entered the complainant's apartment. ***Husbands J*** was not in any doubt whatever that the prosecution case was not based on identification. He therefore did not leave the issue of identification to the jury. During the summation (at p.242) he said "this case is not based on identification....I think I've made it quite clear that she cannot identify the accused." But plainly, the evidence was receivable as an assertion by the complainant of what she smelt and heard at her apartment at the time of the crimes.

[33] In ***Tiwarie v. The State*** the Court of Appeal of Trinidad and Tobago held that it was only necessary to hold a *voir dire* in a case of voice identification if there was a serious issue as to admissibility. Admittedly, the voice identification evidence was unchallenged in that case and ***de la Bastide CJ*** was of opinion that in the state of that evidence, the evidence of a witness's identification by voice was admissible without the necessity for a *voir dire*. None of the Australian cases referred to in this judgment was cited in ***Tiwarie***. We do not accept that in the way the case was conducted for the defence there was a serious issue as to the admissibility of the complainant's evidence of recognition of the appellant by his voice, either when there was the purported 'objection' or during the cross-examination of the complainant.

#### *Conclusion on Voice Identification Evidence*

[34] In the result, this Court holds that there was no need for a *voir dire* in the particular circumstance of this case. In any event, we prefer the approach of the Victoria courts. We do not accept that the alternative tests for admissibility as propounded by the courts in New South Wales should be followed in this jurisdiction. It is our view that voice identification evidence goes to the question of weight and is a matter to be properly decided by a jury. The complainant was testifying as a witness of fact, namely, that she recognised the voice in the supermarket as the same voice she had heard during the sexual assaults. This evidence could have been tested by vigorous cross-examination with a view to impugning its credibility and reliability. In the end, it was for the jury to say whether it impressed them or not. Voice identification evidence may, as here, be merely a strand in the total evidential fabric and the cumulative effect of all the evidence is a matter for the jury. If the purported voice identification evidence is tenuous, unconvincing, uncertain, or unreliable, those are matters which go to the weight to be attached to that evidence rather than to its admissibility.

[35] The strongest evidence against the appellant was his confessions. They were disputed by the defence but so long as the jury accepted their authenticity and reliability and so long as they accepted the complainant's evidence, guilty verdicts were axiomatic. Moreover, since the case did not depend wholly or substantially on the correctness of the purported voice identification evidence, the warning of the special need for caution in accordance with **R. v. Turnbull [1977] QB 244** and s.102 of the **Evidence Act** was not necessary in this case. The trial judge had given the jury full and proper directions as to how they should treat disputed or contradictory evidence. He put the evidence of the complainant under cross-examination on her recognition of the appellant's voice very comprehensively. In our judgment, the grounds of appeal on the issues of the voice identification evidence fail.

*Other Ground of Appeal*

[36] The other ground of appeal also fails. There, Counsel argued that the trial judge failed to explain adequately the elements of the offence of buggery to the jury. Not only did the trial judge read the relevant section of the Sexual Offences Act, Cap.154, to the jury but he immediately explained the elements of the offence to the jury and told them of the necessity for proof of penetration. Later in the summation he reminded the jury of the complainant's evidence on the issue of anal intercourse and the appellant's denial. We have no doubt that the jury understood the issue and the evidence relating to it. It took them 62 minutes to return guilty verdicts on both counts.

*Disposal*

[37] The appeal is dismissed. The convictions and sentences are affirmed. Sentences will run from 13 September 2002.

Chief Justice

Justice of Appeal

Justice of Appeal