

IN THE COURT OF APPEAL

GRENADA

Criminal Appeal No. 5 of 1973

Between: MARTIN BERROTTE Appellant

and

THE QUEEN Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

K. Radix for appellant

D. Lambert, D.P.P. for respondent

1973, September 17 and 18

JUDGMENT

The judgment of the Court was delivered by -
LOUISY, J.A. (Ag.)

The appellant was indicted on three counts before the High Court. The first count for rape, the second count for stealing from the person, and the third count for indecent assault. The jury convicted the appellant on the counts for rape and stealing from the person. Against these convictions, he appealed on four grounds, but counsel for the appellant argued only two. The first ground is that - "the verdict of the jury is unreasonable and should be reversed or a new trial ordered because the trial judge failed to give full and adequate direction on the law of identification, and as a result, the attention of the jury was not focused upon certain portions of the evidence of Theresa Brathwaite, Inspector Adonis Francis, Martin Berrotte and Ophelia Berrotte". The other ground argued was that the sentence was excessive.

The facts of the case are that the virtual complainant, Theresa Brathwaite, is a married woman, and a school teacher. At the time of the commission of the offences she was nine
/months

months pregnant. On the 12th October, 1972, she went to the Grenada Boys' Secondary School auditorium about 4.15 p.m. for lessons in English. She left the auditorium about 6.30 p.m. on her way home in Woolwich Road. She said that as she was going up the steps, half-way up, a man came from the bushes and approached her. She was walking in the middle of the steps. He held her by her neck and squeezed her throat with his right hand. She began to bawl. She said the man was wearing a blue jersey and a dark coloured pants. He had bumps on his face, bright eyes, and he was wearing a semi afro. The man told her to give him the money that she had. She had fourteen dollars in her pocket and because she was frightened she gave him twelve dollars. After she gave him the twelve dollars he asked her for the change, and she gave him the change - two dollars. He then held her by the throat tighter. She said at that time she was unable to bawl. He then told her "let us go into the bushes". He dragged her with one hand and pointed a knife in her face telling her that if she did not go with him he would kill her. He had taken the knife from his pocket. All during that time, she was crying and struggling. However, he succeeded in taking her into the bushes, threw her to the ground, went over her, pulled down her pantie with one hand held her by the throat with the other, and had sexual intercourse with her. During the time that he was having sexual intercourse with her, she was in much pain during intercourse because of her condition at the time - she was nine months pregnant - so she asked him to let them turn on the other side. As he was turning around she pushed him off and gave him a cuff on his temple, and got up. Apparently the blow she gave him on the temple knocked him out and he remained lying on the ground. She ran towards the home of the Nedd sisters and made a report to them. She said that

/whilst

whilst he was with her, he kept telling her not to look at his face, but she said she looked at his face while he was in front of her, and although it was a dark night, the lights from one of the neighbours' houses was on, and the light reflected where they were. That the light was shining on them, and that the appellant was the man who had sexual intercourse with her that night. The Nedd sisters gave evidence that Theresa Brathwaite came to their home that night. Ena Nedd said she heard a noise and cries about 7.30 that evening, later she heard a woman's voice. She opened the door, and Theresa Brathwaite entered crying, shivering, shaking and trembling.

Sheila Nedd stated that she heard a bawling about 7 p.m. She opened the kitchen door and looked out. She saw two figures struggling by a cherry tree 40 - 50 yards from where she was. After the struggle she saw one figure pull the other up the hill and she lost sight of them. Then she heard somebody bawling. Some fifteen minutes later, she heard a woman's voice at the door of her home. Her sister opened the door and Theresa Brathwaite entered and made a complaint to them.

In the struggle, Theresa Brathwaite lost some articles which were later recovered. She then went home, her husband came home after a while, she spoke to him and they went and made a report at the police station, St. George's.

On Sunday 22nd October, 1972 about 9.00 p.m., ten days after the incident, Theresa Brathwaite was sitting on her front step when she saw the appellant passing down Woolwich Road. She first saw him when she was at the window, after she saw him she went on the steps of the house and saw the same man who had raped her. She said she saw him by the light from one of the neighbours' home which was reflecting on him. On the following day, the 23rd of October about

/11 a.m.

11.00 a.m. she went to the Criminal Investigation Department and made a report to the police. Later on, at an identification parade she pointed out the appellant as the person who raped her on the night of the 12th October. The appellant was arrested after the identification parade and charged with robbery with violence, rape and indecent assault. He was cautioned and he said nothing.

The appellant gave evidence. His evidence amounts to what is commonly known as an alibi. His defence is that he knows nothing about the incident as he was at home sleeping at the time. His mother also gave evidence in support of his alibi. The appellant however, in his evidence as to what took place before the identification parade stated as follows.-

"Where I was sitting there I saw a woman come from the back of the office. The C.I.D. office. The office facing the carenage The woman was the same woman (pointing to Theresa Brathwaite) She came and stood about two feet from where I was sitting down. Constable Barriteau came and stood on the right of where she was standing. He ask me if I know this woman. I told him No. He asked me if I see she before. I told him No. Then he ask me if that is the woman I rape in Tanteen. I told him No I din not rape no woman."

The allegation was derived by Theresa Brathwaite.

Counsel for the appellant submitted yesterday morning and this morning that the incident which took place at the police station before the identification parade was improper and was sufficient ground for the Court to quash the convictions. The incident being that Constable Barriteau, in the presence of Theresa Brathwaite asked the appellant whether he knew her or not and whether she was not the woman he had raped in Tanteen. Counsel submitted this was a malpractice and as the incident took place before the identification parade the trial judge should have warned the jury that it would be dangerous to convict on this type of identification as Theresa Brathwaite was provided with an opportunity to
/identify

identify the appellant later on at the identification parade. He stated that the trial judge had not warned the jury on this aspect of the case. On looking through the summation of the trial judge, it seems to me that he dealt adequately with the question raised by counsel. On more than one occasion he indicated to them that they should not convict the appellant if they were not satisfied with the identification of the appellant by Theresa Brathwaite. The learned trial judge, at pages 53 - 54 of the record directed the jury as follows -

"That is the cross-examination by counsel for the accused of Theresa Brathwaite in respect of the morning of 23rd. This cross-examination is urging that the witness Theresa Brathwaite was afforded an opportunity to see Martin Berrotte before the identification parade later that day, and that Barriteau intimated to her then, that the accused was the person to implicate. It has also been advanced that when Barriteau asked the accused if this was the woman he raped in Tanteen, the accused said "No". Later on when you come to the evidence of the accused, you will compare the cross-examination with the evidence actually given. Now the question which was supposed to have been put by Barriteau as put to the witness was that Barriteau asked the accused if this was the woman he raped in Tanteen. That is the way in which Barriteau was alleged to have framed the question to the accused. It is not to be taken as an admission by the accused that he raped a woman in Tanteen but not Theresa Brathwaite. Whether the question was allegedly put by Barriteau, it would be a loaded question; you might say: is that the woman you raped in Tanteen? It would be a question for you to decide whether you believe that any such thing happened or not".

At page 55 he directed the jury as follows-

"Before you can convict you must be left in the position where you can say you feel sure, after analysing all the evidence led by the Prosecution in respect of identification that Martin Berrotte is the person. There is no evidence other than the
/evidence.....

evidence in respect of the identification parade."

At page 58 he directed the jury as follows -

"If you are not satisfied that the fact and circumstances of the identification parade were absolutely fair and just, or if you find that on an analysis of the evidence you do not feel sure that the parade was scrupulously fair, then you must reject it. Reject it entirely, if you are not satisfied that it was scrupulously fair. I have told you what Theresa Brathwaite said took place on the afternoon of the 23rd at the Police station; that is eleven days after the alleged incident."

At page 60 he directed them as follows -

"If Therese Brathwaite was called on after having seen Martin Berrotte in the morning and having had a hint or a suggestion made to her that he was the person she should identify later, that would not be an absolutely fair identification".

And at pages 89 - 90 he directed them as follows -

"The prosecution has lead evidence and ask you to accept that Theresa Brathwaite saw the man whom she said raped her on the 12th - ten days later on the night of the 22nd ^{and that she picked out that man on the 23rd} from an identification parade. The prosecution asks you to find that the parade was carried out eleven days after the incident in an absolutely fair manner. On the other hand the accused has asked you to say that Theresa Brathwaite did not see Martin Berrotte on the 22nd, and that the identification parade was highly improper and unfair, because some three hours before it was done, Theresa Brathwaite was afforded an opportunity to see Martin Berrotte, and to have it suggested to her then that he was the man who raped her.

I have already dealt with evidence in respect of the parade, and there is nothing more which I can add about that, to what I have already said. You have to decide whether you accept or reject the identification parade, and the identification at that parade. Was the parade a fair and just parade or not. In each of these counts, if you find that the prosecution's evidence has not satisfied you that Berrotte was the man, your verdict will be not guilty in each case. If the Prosecution has satisfied you that Berrotte was the man, then have you also been satisfied of the essential elements that go to make up the offence of rape."

/Assuming

Assuming that the direction given by the learned trial judge on this alleged incident was inadequate, counsel for the appellant seems to have forgotten that on two previous occasions Theresa Brathwaite had identified the appellant. Theresa Brathwaite saw the appellant on the 12th of October, the night she was robbed and raped. She saw him again, on the 23rd when she was standing on the steps of her home. It would not be unreasonable to infer that the appellant was arrested and subsequently pointed out by Theresa Brathwaite at the identification parade as a result of her identifying him on the 23rd October. The trial judge told the jury to reject the evidence of identification if they thought it was not scrupulously fair. Having regard to the directions given by the trial judge the jury must have rejected the evidence of the appellant in respect of the incident at the police station prior to the parade. The jury had all the evidence on this point before them, and from their verdict, they must have been satisfied that the appellant was the person who attacked Theresa Brathwaite, stole money from her, and raped her. The jury, in my view, on the evidence before them came to the right verdict. This ground of appeal therefore fails.

Counsel addressed the Court on the second ground - the question of sentence. He pointed out that the appellant was seventeen years old at the time of the offence, he lived with his mother. That his father had left a long time ago for the United States of America and he and his brothers had been left on their own. He stated that the sentence of eight years was excessive. The appellant is a person who really needs psychiatric treatment, and to send him to prison for as long as eight years was harsh, even though there was provision for psychiatric treatment at the prison. He urged the Court to consider reducing the sentence of eight years. The Court
/has

has heard and considered the plea made by counsel for the appellant, and will vary the sentence of eight years for rape. I would dismiss the appeal, and affirm the convictions. Sentence of eight years hard labour for rape is reduced to one of seven years, and the sentence of two years for stealing from the person is affirmed.

Allan Louisy
Justice of Appeal (Ag.)

F. Cecil Lewis
Acting Chief Justice

E.L. St. Bernard
Justice of Appeal