Hon. Mr. Justice Peterkin

(8)

IN THE COURT OF APPEAL

GRENADA

CRIMINAL APPEALS NOS. 3 4 5, 6 7, 8 & 9 of 1974

BETWEEN·	(1) KINGSTON COUTAIN (2) NORRIS ST. BERNARD (3) DOMINIC HAMLET (4) ESLEY PAUL (5) MOTLEY HAROLD CALLISTE (6) LENNOX EDWARDS (7) TREVOR REGIS	APPELLANTS

v.

THE QUEEN

Before The Honourable the Acting Chief Justice
The Honourable Mr. Justice E.L. St. Bernard
The Honourable Mr. Justice N.A. Peterkin

Lloyd Noel for the appellants
D.H. Lambert, Acting D.P.P., for the Crown.

1974, October 24

J U D G M E N T

LEWIS, C.J.(Ag.) delivered the judgment of the Court:-

The appellants were jointly charged on three counts of an indictment with committing the following offences· First, burglary, by unlawfully breaking into the dwelling house of Howard Drucker situate at Levera in the Parish of Saint Patrick, on the night of the 18/19th August 1973, with the intention of committing a felony, to wit, stealing; second rape, by carnally knowing Andrea Ripa a female person without her consent; and third, robbery with violence in that they, being armed with a gun and knives, did steal from the said house certain sums of money and travellers' cheques enumerated in the third count of the indictment.

All the appellants were convicted and each was sentenced to concurrent terms of 7, 8 and 7 years in respect of each count. Each appellant has appealed against his conviction and sentence and identical grounds of appeal have been filed on his behalf. With the consent of counsel for the appellants these appeals have been heard together.

The case for the prosecution is that on the night of the 18th August 1973 Andrea Ripa and her boyfriend, John Cooney, and two other persons - Paul Drucker and Jill Schiesser - were living in a house at Levera Beach belonging to Paul Drucker's father. Jill Schiesser and Paul Drucker went away at about 9.30 p.m. leaving Andrea Ripa and John Cooney in the house. Around 11.00 p.m. they prepared for bed, and after securing the house by turning on some of the outside lights and closing the windows and doors, they retired to bed at about 11.30 p.m. They were both sleeping in the same bed and in the room there was a small light which came from a small lamp which was plugged into the wall of the bedroom. The next thing Andrea Ripa knew was that three young men had jumped into the room, had awakened them and asked them for money. She claimed that these three men were the appellants Coutain Hamlet and Paul. The appellant Coutain who is nicknamed Gobi had a gun and the other two had knives about 12 inches long. They jumped out of the bed and tried to explain to these three appellants that they had no money. Nevertheless, the appellants started to search the house. The bedrooms were ransacked the telephone wires she noticed had been cut, and when she came out of the first bedroom in which they were sleeping she observed there were other men in the house. In all, there were about nine men in the house that night, and of these nine seven were subsequently arrested and charged.

An examination of the house revealed that one of the windows of the bedroom had been tampered with. Several louvres had been removed the wire netting had been cut and entry had been effected by means of this window. Andrea Ripa particularly remembered the appellant Coutain because he had pulled her boyfriend Cooney out of the room. She was then alone with the other six who made her go to the bed and at least five of them had sexual relations with her. Dominic Hamlet pulled up her nightgown, while Regis held open her legs and put a knife at her thigh. Coutain did not have sexual relations with her but she was uncertain whether or not Calliste did. Coutain was not in the room when the other appellants were having sexual relations with her, but while this incident was taking place he brought John Cooney into the room. The men remained in the house for about 45 minutes then she heard a hissing sort of sound in the hall, they all rushed out of the house and left the premises. She showed John

Cooney her nightgown on which spermatazoa had been exuded. She had a bath, and was taken to Dr. John Otway, who examined her. The doctor said that he found evidence of recent interference with her vagina in that redness and moisture were present; that she complained of pain in her lower abdomen and he found it to be tender in the region just above the pubic bone, the bladder and uterus.

John Cooney's evidence supports what Andrea Ripa said in certain respects. He also claimed to have identified the men who were in the room and he found that some of the louvres for the window were missing. He said that one man attached himself to him throughout the whole time that they were in the house and that this man was Coutain. He also said that another man Paul, kicked him in the chest and in the region of the groin, when he either could not or would not open the closet door; that he was taken back into their bedroom by Coutain at a certain stage and he saw Andrea on the bed and the appellant Edwards was having sexual relations with her. He called out, saying "Leave my baby alone", and Edwards turned round and that was how he saw his face.

A report was made to the Police Station about this incident and at the station Andrea Ripa informed the police that she heard the name "Gobi" mentioned, and as a result of that statement, the police who knew the appellant Coutain by that name arrested him and the other appellants who were apparently his associates. Five of them were arrested later the same day and another two on the Monday and Tuesday following. The five arrested men were taken to a police station, and there they were allegedly identified by Andrea Ripa and John Cooney. The other two were taken to the house. One at least of them was manacled at the time; there they too were identified by Andrea Ripa and John Cooney.

The defence was an alibi. The appellants all said that they were not present at the house in question they knew nothing about what happened there, and any purported identification of them as the persons taking part in the alleged offences was mistaken. In these circumstances, before the prosecution could hope to obtain a conviction, they would have to satisfy the jury beyond reasonable doubt on the issue of identification, which was

the cardinal issue at the trial and is also the only ground on which these appeals were argued.

Both in the court below and in this court the method employed to identify the appellants has been severely criticised. No identification parade was held. In the opinion of the court, this ought to have been done in the circumstances of this case, especially as it was claimed by the witnesses Ripa and Cooney that they had been the appellants before on the beach at Pirate's Cover and also when they had passed along a track at the back of the house where the witnesses were living. Sergeant Bernard gave a peculiar reason for not holding an identification parade. He said that he felt the accused would be fairly dealt with in case there were any doubts. What he did was to invite Andrea Ripa and John Cooney to the station to view the five accused who had been arrested and were being held in custody at the station. When the witnesses arrived, he sent them into the room where the five men were. They went into the room together and when they came back outside they conferred, and according to Andrea Ripa she had a talk with Sergeant Bernard, and they discussed the question of the identification of the appellants. Andrea Ripa admitted that she did not point out any of the persons in the room as being her attackers though Sergeant Bernard said she did point out Gobi as being one of those present in the house but she herself did not say that.

In the opinion of the court this method of identification of these five men was quite improper. So too was the method employed in regard to the other two men who were taken to the house. This court wishes to emphasize that this procedure was wholly wrong contrary to the accepted practice laid down for the holding of identification parades and totally unsatisfactory.

I should like at this stage to refer to the question of the visual identification of accused persons by witnesses at a trial, and see what principles have been laid down for the assistance of judges in their charge to the jury, when this issue arises. Comparatively recently, the question has engaged the attention of the Courts of England as to how juries should be directed when the issue at the trial is whether a witness who either knew or did not know an accused before the incident

out of which the trial arises has made a correct identification.

The first case to which I wish to refer is Arthurs v. Attorney General for Northern Ireland (1970) 55 Cr.App.R.161. In this case the Court of Criminal Appeal for Northern Ireland, in dismissing an appeal by the appellant against his conviction, gave him leave to appeal to the House of Lords, after certifying that their decision involved a point of law of general public importance. The point of law which was reserved for the decision of the House of Lords was formulated in the following questions which appear on page 163 of the report. They are these:-

> "1. When, in the course of a trial on indictment a conviction appeared to depend wholly or substantially on the visual identification of the accused by one or more than one witness, was it in law the duty of the presiding judge to give a general warning to the jury of the dangers of acting on such evidence?
> 2. In the present case, was it the judge's duty in law so to warn the jury in relation to the identification evidence of Constable Alexander Spiers of the Royal Ulster Constabulary?"

Lord Morris of Borth-y-Gest, who delivered the leading judgment in which all the other members of the House concurred, answered the first question in the negative, and his conclusion is aptly summed up in the head-note of the case, which reads as follows:-

> "Where the case against the defendant depends wholly or substantially on the visual identification of the defendant by one or more than one witness, if the summing-up had dealt fully and fairly with the evidence relating to identification and is impeccable in every other respect, it is not to be regarded as defective merely because it does not contain a general warning to the jury of the danger of acting on evidence of visual identification. It would be undesirable to lay down as a rule of law that a warning in some specific form or partly

defined terms must be given."

At page 168 of the report, the learned Law Lord said this:-

"It is manifest that in all cases where the vital issue is whether the identification of the accused person is certain and reliable the judge must direct the jury with great care. However careful is his general direction as to the onus of proof, the judge will feel it necessary to deal specifically with all the matters relating to identification. Where a conviction will involve acceptance of the challenged evidence of one or more witnesses in regard to identification a summing-up would be deficient if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however greatly differ. Thus there can be cases in which a witness can say that at a certain place and time he saw and clearly recognised the accused person. If the accused person was someone who was well known to him or at least well known to him by sight, and if the conditions at the relevant time were such that there was nothing to impede or to prevent recognition or to make recognition difficult then a jury would mainly have to consider whether the witness was both truthful and dependable."

Then lower down on page 169 he said this:-

"A summing-up that fails to give adequate instruction to the jury or which in the circumstances and in relation to the facts of a particular case fails carefully to alert them to the risk of convicting an innocent person might in any event be held to be defective and to warrant the use by the Court of Criminal Appeal (Northern Ireland) of certain of its ample powers. But I do not think that it would be helpful to prescribe that in certain defined or described circumstances a judge must use certain words. Nor

> do I think that reference to cases in the past is either necessary or desirable. I consider, therefore, that it would be undesirable to seek to lay down as a rule of law that a warning in some specific form or in some partly defined terms must be given. A summing-up does not follow a stereotyped pattern. It need contain no set form of words."

It is clear from these remarks that a trial judge had a duty to deal with particular care with the circumstances relating to identification of an accused, where this is a vital issue in the case (as it is in the instant case); and his failure to do so might result in the summing up being regarded as either unfair or defective.

Lord Morris of Borth-y-Gest's conclusion related to circumstances where the identifying witness knew the accused and he specifically reserved for future consideration the question whether there was need to lay down any rules for the guidance of the Courts in cases "where a witness has seen someone whom he does not in any way know and has had over a period of time, carried in his mind's eye a recollection of the person and then is at some later date asked (either at an identification parade or at some place) to say whether he can recognise the person whom he previously saw." The very point which Lord Morris of Borth-y-Gest reserved arose for consideration in Long (1973), 57 Cr.App.R.871, where as it happened the identifying witness did not know the accused. In the course of his summing up the trial judge made the following comment, which appears at page 876 of the report:-

> "The defence point out how easy it is to make mistakes in a matter of identification and as an example of that they say that Mr. Garner, who identified both Baldwin and Long on successive parades, himself made a mistake on the first parade, and mistakenly identified a member of the public."

In the Court of Appeal there was a criticism of the trial judge's comment and Lawton, L.J. who delivered the judgment of the Court, made the following observations on that criticism. He said this at page 877:-

"Mr. Cox criticised the judge's comments about the possibility of mistakes because he had put this forward as a defence submission, whereas he should said Mr. Cox, have told the jury that such a possibility was the experience of the Courts and that its existence called for caution. He (Mr.Cox) asked the Court to adjudge that in all cases where the issue is identification and guilt depends upon visual identification by witnesses who did not know the accused the judge should warn the jury of the dangers of such evidence and alert them to the need for precaution.

In Arthurs v. Att.General for Northern Ireland (1970) 55 Cr.App.R.161 the House of Lords held that there was no legal requirement for such a direction when the identifying witness knew the accused, but at page 169 Lord Morris of Borth-y-Gest said that he left open for future consideration whether in such a case as this there was need to lay down any rule for the guidance of the Court."

Lawton L.J. then went on to state the opinion of the Court as to the necessity or otherwise for a specific warning in a case where the identifying witness does not know the accused, and he also pointed out the method which a trial judge should adopt in dealing with the issue of identification in his summing up. He said this at page 877:-

"In our judgment the law does not require a judge in this kind of case (that is, a case in which the identifying witness does not know the accused) to give a specific warning about the dangers of convicting on visual identification. Still less does it require him to use any particular form of words. In these cases as in all, a judge should sum up in a manner which will make clear to the jury what the issues are and what is the evidence relevant to these issues. Above all he

must be fair; and in cases in which guilt turns upon visual identification by one or more witnesses it is likely that the summing up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it. Reference to the circumstances will usually require the judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position that he was in, his distance from the accused, and the quality of the light. If the witness had made mistakes on the identification parade or at any other relevant time, fairness probably requires that the jury should be reminded of them. Above all the jury must be left in no doubt, that before convicting, they must be sure their visual identification is correct. This can be done in many ways. Often a direction along the lines given by Kingswell Moore J. in The People v. Casey (No.2)(1963) I.R.33 may be appropriate. The trial judge is in the most advantageous position to decide what kind of direction is best suited in the case which he is trying. This Court will not interfere with the exercise of his discretion in this respect unless there is good reason for thinking either the jury may not have appreciated that they had to be sure about the accuracy and reliability of their visual identification before convicting or that the summing up was unfair."

The question therefore which arises in this appeal is to what extent did the summing up in this particular case satisfy these principles. We are satisfied the trial judge made it clear to the jury on more than one occasion that identification was the vital issue in this case. He also told them they should be sure that the accused persons had been correctly identified before a verdict of guilty could be found against them but in our view his summing up was defective in that he did not criticise the evidence of

identification. He did not point out that the purported identification was conducted in a manner which was so contrary to accepted standards as to render it unfair and unreliable. If there had been such a direction to the jury, one is unable to say that they would inevitably have convicted. In short, the trial judge did not specifically point out the weaknesses in the purported identification and the dangers inherent therein. It is true that he told the jury at page 56 of the record -

> "The case for each of the accused is also that the Prosecution's evidence shows no proper identification and you ought not to rely on such evidence of identification as has been given. It is clear that on behalf of the accused - those represented as well as those unrepresented by counsel - it is urged that there never was an identification parade held in respect of each of the accused, where each accused was picked out, and that the evidence, such evidence that was given about the identification, showed that the manner in which the identification took place was highly improper and unsatisfactory; and further that the witnesses Ripa and Cooney were assisted by the Police with the identification and that in effect they were told or advised after consultation, to identify the accused as those whom they saw in the house that night."

Counsel for the appellants quite rightly pointed out that in that passage the trial judge was merely putting forward a criticism made by the defence of the vital issue of identification, and in the opinion of the Court this is not enough. He should himself have told the jury as a matter of law that the purported method of identification was so improper by accepted legal standards as to render it of very little value. Nor in our opinion did the trial judge deal adequately or in detail with the events which took place in the house in so far as they related specifically to the issue of identification, so as to link all the attendant factors of that issue together. For example, although the men were said to be in the house for about 45 minutes, there were circumstances such as to prevent a detailed recognition by the witnesses Ripa and Cooney of the appellants; and bearing

in mind the fact that the men were moving from room to room, that there was admitted confusion, that there was only a small light in the room, and also the fact that Andrea Ripa confused the appellant Paul with the appellant Bernard, and said that the appellant Coutain had a gun, whereas Cooney said he had a knife with which Coutain threatened him; it was the duty of the trial judge in all the circumstances to draw these discrepancies to the attention of the jury. It was not enough merely to say that there were discrepancies between the evidence of the witnesses Cooney and Ripa. He should have gone into them in detail and drawn them to the attention of the jury. This he failed to do, and as a result his summing up fell short of the requirement of fairness which is laid down by Lawton L.J. in the case of Long (supra) on pages 877 and 878.

In the opinion of the Court, in these circumstances it would be unsafe to allow the convictions of all of the appellants to stand, and the Court will accordingly allow the appeals of the appellants, Norris St. Bernard, Dominic Hamlet, Esley Paul, Motley Harold Calliste, Lennox Edwards and Trevor Regis, quash their convictions, set aside their sentences of imprisonment, and order that a verdict of acquittal be entered on behalf of each of these appellants.

We, however, regard the position of the first appellant Kingston Coutain, as being different from that of the others. His name was called on the night in question and when a report was made to the police this fact was told to them. The police immediately knew who Coutain was, and they went and arrested him and his associates. He was the man who Andrea Ripa specifically identified as the one who did not have sexual relations with her. He it was who attached himself to her boyfriend John Cooney throughout the whole time they were in the house. He kept him moving from room to room: He first of all took him out of the room in which the others were having sexual relations with Andrea Ripa, then he brought him back, then took him out again. The probability is that by his conduct he was so conspicuous as to stand out from the others and so attracted special notice. Evidence was given that at one stage he had held Cooney at knife point and had caused him to retreat backwards out of the room and through a door. Cooney, when he got outside, closed the door behind him, but as there was no lock on it, he could not keep the door closed. Gobi then opened the door and pulled him back inside.

In the opinion of the Court, the appellant Coutain alias Gobi was properly identified and his appeal will accordingly be dismissed.

CECIL LEWIS
Acting Chief Justice

E.L. ST. BERNARD
Justice of Appeal

N.A. PETERSKIN
Justice of Appeal (Ag.)