ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 16 OF 2003

BETWEEN:

WYCLIFFE LIBURD

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C.	Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C.	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal [Ag.]

Appearances:

The Appellant in Person
Mr. Dennis Merchant, Director of Public Prosecutions in Person, with him Ms. Janine Harris, Crown Counsel

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2004: July 27;
December 6.
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JUDGMENT

[1] RAWLINS, J.A. [AG.]: On 13th October 2003, the Appellant, Mr. Liburd, was convicted of wounding Althea Harris with intent to do her grievous bodily harm. Baptiste J. sentenced him to serve 8 years in prison to run consecutively with any sentence that he was then serving. He appealed on 5 grounds.

[2] The Appellant stated the grounds of appeal as follows:

1. The learned trial judge erred in law in failing to assist or sufficiently assist the jury in relating the law to the evidence.
2. The learned judge erred in law in failing to adequately put the case for the accused to the jury.
3. The learned trial judge erred in law in failing to point out the inconsistencies in the case for the prosecution.
4. Sufficient evidence pertaining to the crime was not offered to the court by the prosecution.
5. Description of perpetrator and accused did not correspond; mistaken identity was evident.

[3] The first ground was not pursued at the hearing of the appeal. In any case it has no merit in the light of the learned trial judge's summation to the jury. He carefully explained the law that was involved on each aspect of the charges. He adequately related the law to the evidence on the important matters and the ingredients of the offences for which Mr. Liburd was charged for the jury to consider.

[4] With regard to the fourth ground of appeal, there was evidence of the time and place of the offence as well as of the wound that Ms. Harris sustained in the attack. Ms. Harris was attacked just after 5:00 o'clock on the morning of 19th July 2001 while she was out walking with a friend, Ms. Patrick. Her assailant had driven up in a motor jeep from behind and passed them. He turned the vehicle around, approached them again and stopped a few yards away from them. Ms. Patrick ran towards a nearby bakery. The assailant, who was masked, alighted from the vehicle, threatened to attack Ms. Harris if she did not instruct Ms. Patrick to stop running away and then attacked Ms. Harris with a knife.

[5] In the attack, Ms. Harris' left thumb was almost severed. She also sustained cuts around her right wrist, to the left side of her face and the middle finger of her right

hand. Dr. Cameron Wilkinson, Surgeon Specialist at the J.N. France General Hospital, confirmed that he attended Ms. Harris surgically at the Hospital on 19th July 2001 for several lacerations. She was hospitalized and discharged on 30th July 2001.

[6] There was ample evidence from which the jury could have found that the wounds were inflicted upon Ms. Harris deliberately and without lawful cause and excuse. Ms. Harris described the manner in which she was attacked. There is no evidence that Ms. Harris sustained the wounds accidentally or that her assailant inflicted them upon her in the process of defending himself.

[7] There was also sufficient evidence from which to find that the attacker intended to inflict grievous bodily harm upon Ms. Harris. The question is, however, whether Mr. Liburd was the assailant. Ms. Harris identified him as the person who attacked her at an ID parade that was conducted at the Basseterre Police Station Recreation Room on 25th July 2001. He has insisted that he was not the person who attacked Ms. Harris. His identification as the assailant was at issue in the case.

Identification

[8] The identification of Mr. Liburd as Ms. Harris' assailant is raised to some extent by ground 4 of the appeal. It is also the central question that is encompassed in the issue of mistaken identity in ground 5. It is the key issue that ground 3 of the appeal raises. Mr. Liburd contended before us that the evidence of identification was unreliable. He also contended that the learned trial judge did not point out the inconsistencies in the evidence by which the prosecution sought to identify him. The gravamen of this appeal, therefore, revolves around the evidence of identification. I shall consider this in the light of the applicable principles.

The applicable principles

[9] The applicable guidelines where identity is at issue were laid down in R v Turnbull and others [1977] Q. B. 224, at pages 228-231. According to those guidelines, a trial judge should withdraw a case from the jury if he thinks that the evidence of identification is poor and unsupported. Even in the absence of submissions from the defence, the judge should invite submissions and withdraw the case from the jury, in appropriate circumstances. (See, R v Fergus (Ivan), 98 Cr. App. R. 313). A judge is also required to revisit and assess the identification evidence after the defence closes its case. Even at that stage, the judge may withdraw the case from the jury if he or she determines that the identification evidence is unreliable. The rationale is that this protects a jury from acting upon evidence that could be a possible source of injustice.

[10] The judge should examine closely the circumstances in which the identification was made; the length of time that the witness had the accused under observation; the distance; the light; whether observation was impeded at any time; whether the witness saw the accused before and if so how often; if occasionally whether he or she had any special reason for remembering the accused. The judge should also consider the time that elapsed between the original observation and the subsequent identification and whether there was any material discrepancy between the description of the accused that the witness gave to the Police and the actual appearance of the accused.

[11] A trial judge should withdraw a case from the jury when the quality of the evidence of identification is poor. This could be, for example, when identification depends upon a fleeting glance, or even upon a longer observation that is made in difficult conditions. In such circumstances, the judge should usually withdraw the case from the jury unless there is other evidence that supports the correctness of the identification.

[12] The **Turnbull** guidelines enjoin a trial judge, during the course of summation, to warn a jury of the special need for caution before the jury convicts an accused whose identification is at issue. The judge should also explain to the jury the reason for the need for the warning and refer to the possibility that a mistaken witness could nevertheless be a convincing witness.

No case submission

[13] When the prosecution closed its case, the accused made a no case submission. He based it on mistaken identification. He referred, among other things, to the inconsistency in the evidence regarding his height. In response, the prosecution pointed out that Ms. Harris also said that she identified the accused by his voice and his eyes. The learned trial judge ruled that the evidence of identification was sufficient to permit the case to go to the jury. He overruled the no case submission.

[14] In overruling the no case submission, the learned trial judge noted that Ms. Harris identified the accused as her assailant not only by his height, but also by his voice, his eyes and by his face. According to her evidence, the accused passed shortly after the attack, but with his face uncovered. He was driving the same jeep that was used when she was attacked. She saw his face because he looked in her direction. The judge found that there was sufficiently reliable evidence of identification for the jury to consider. In arriving at that conclusion he stated that the voice evidence showed that the victim stated what her assailant had said to her and that there was no indication that she did not hear or understand what he had said.

Was the identification evidence reliable?

[15] In my view, the learned trial judge gave an unimpeachable **Turnbull** direction in his summation to the jury. The question, however, is whether the evidence of

identification was sufficiently reliable to permit the case to go to the jury.

[16] The prosecution relied on identification of the attacker by his eyes, voice and height. Ms. Harris' evidence is that she had never seen or heard the accused before that morning. She said, however, that she heard the same voice when Mr. Liburd spoke at the ID parade after she pointed him out as her attacker.

[17] According to Ms. Harris' evidence, at the time of the attack, her assailant wore a mask that was made from a white t-shirt. The mask was over his face and head but his eyes were not covered. She saw his eyes clearly. His nose was partially covered. The light was bright and natural. Her assailant was about 5 feet tall and weighed about 135 pounds. She explained the events that occurred just prior to the attack and the verbal exchanges between her and the assailant. He was dressed in blue long jeans and a blue shirt. She focused on his eyes. She observed that her attacker had unusual eyes. The ball of each of his eyes was oblong and not round.

[18] Ms. Harris explained the attack upon her. Her evidence is that it ended when she ran back to the bakery where a gentleman assisted her. He was banding her wrist. She was sitting while he was doing that. She heard and saw the vehicle that her assailant had earlier driven travelling in an easterly direction towards Bird Rock about 5 minutes after the attack upon her. She looked up and saw the accused driving the same jeep. He was wearing the same blue shirt. When the jeep passed her the accused looked in her direction. He did not then have the mask over his head and she saw his face. She particularly remembered the eyes.

[19] In cross-examination, Ms. Harris repeated that the mask did not cover the eyes of her assailant. She said that his eyes still had an abnormal shape. They were not totally round. According to her, there are 2 pieces of flesh that is protruding almost on the ball of his eyes that gave them a different shape.

[20] Ms. Harris explained the circumstances in which she identified Mr. Liburd as her assailant at the ID parade on 25th July 2001. She spoke of the instructions that she received from the Police and what transpired after she entered the Police Recreation Room. According to her evidence, there were 9 young men in the recreation room in a straight line. She walked over in front of the number 9 person and then straight down to the accused. She stood in front of him, touched him and identified him to the police officer as her assailant. He then jumped back and shouted words to her. The voice was the exact voice of the person who attacked her on 19th July 2001. When she was cross-examined, she said that he still had the same voice.

Findings

[21] I feel nothing but sympathy for Ms. Harris for the trauma that she has experienced as a result of the attack upon her. However, I think that the evidence that was adduced in the case fell short of the standard of reliability that the **Turnbull** guidelines require.

Eyes and voice

[22] Ms. Harris had never seen Mr. Liburd before and she was not able to see very much of his face. The time that she had the area of his eyes that was not covered by the mask under observation cannot easily be discerned from the evidence. It is not clear how keen her observation of that limited area could have been in the circumstances that obtained in order to render reliable her identification of him by his eyes as her attacker at the ID parade on 25th July 2001.

[23] Ms. Harris gave no evidence of any specific particularities of Mr. Liburd's voice. The particulars that she gave in relation to the eyes are not sufficiently reliable. The result is that her evidence regarding identification by his eyes and voice is of very limited

objectivity and therefore tenuous. There is no evidence that Ms. Harris heard Mr. Liburd speak before the day of the attack. There is no evidence regarding the length of time that she actually had him under observation. The circumstances under which Ms. Harris saw her assailant on the morning of the attack were difficult. They did not permit her very much opportunity or composure to observe any helpful particulars.

[24] Additionally, no evidence was adduced from the Police at the trial that Ms. Harris provided them with a description of the eyes or voice of her assailant prior to the ID parade. Her evidence was that at some point in time she described the eyes of her attacker to the Police. She could not say when she did this. When he was cross-examined, the investigating Officer, Robert Charles, said that the description that Ms. Harris gave to him of her attacker was that the person was short in height, medium in build and wore blue clothing.

[25] According to Officer Charles, Ms. Harris did not mention anything about the eyes of her attacker at all. She told him that her attacker wore a white band-aid wrapped over his head, which prevented her from seeing his complete face. I note that Ms. Harris' evidence was that her attacker's face was covered with a white t-shirt. Officer Charles' further evidence was that Ms. Harris told him during his investigations that she saw the complete face of her attacker when the jeep passed again shortly after the attack, but she did not describe the face that she saw to him. He did not ask her any questions to illicit particulars of the face that she saw.

Height

[26] Before this Court, Mr. Liburd submitted that the evidence that relates to his height was quite inconsistent. In her evidence in chief, Ms. Harris said that at the time that she was attacked there was bright and natural light. Ms. Patrick confirmed this. Ms. Harris said that, from her observation, her assailant was about 5 feet tall. She

repeated this in cross-examination. She gave her own height as 5 feet 3 inches. According to Ms. Harris, on the day of the attack and also on the day of the ID Parade, 25th July 2001, "eye contact to eye contact", she was looking down at her assailant.

[27] However, when he was cross-examined, Inspector Robert Liburd said that all of the persons who were on the line at the ID Parade were about 5 feet 5 inches tall. He also said that at that parade Mr. Liburd looked slightly taller than Ms. Harris.

[28] Whereas evidence of identification by eyes and voice in this case is of limited objective value in the absence of any specific particularities relating to the voice or reliable specifics of the eyes, height is measurable objectively. Ms. Harris insisted that her attacker was shorter that she was and that, "eye contact to eye contact", she looked down him because he was about 5 feet tall while she was 5 feet 3 inches tall. However, the Assistant Superintendent of Prisons gave evidence that Mr. Liburd's height was listed as 5 feet 8 inches in the Prison Records on 26th July 2001. This is a significant difference, which was merely an incident of Ms. Harris' perception.

Conclusion

[29] The circumstances in which Ms. Harris was injured were very unfortunate. Those circumstances did not afford her a reasonable opportunity to identify her attacker. She heard her attacker speak. She said that she saw his eyes because they were not covered at the time of the attack and she saw his face moments after the attack. However, she gave no evidence that described the face that she saw. No evidence was adduced from the Police that indicated that she gave any specific particularities of her assailant's voice to the Police prior to the ID parade. The particulars that she gave of the eyes were insufficient and unreliable. No evidence was adduced from the Police that she described her attacker's eyes to them prior to the ID parade.

[30] Ms. Harris' evidence is that she never saw Mr. Liburd before the attack in which she sustained injuries. She is 5 feet 3 inches in height. Her evidence is that her attacker was shorter in stature than she was and, on the day that she identified Mr. Liburd as her attacker, she looked down to have eye contact with him. However, the prison records show that at that time Mr. Liburd was 5 feet 8 inches tall. The evidence of identification by height is unreliable. The compendium of the evidence of identification by eyes, voice and height is unreliable.

[31] In the foregoing premises, the evidence of identification in this case was so tenuous and unreliable that the case should have been withdrawn from the jury in the light of the **Turnbull** guidelines. The result is that the appeal is upheld and the conviction and sentence quashed.

Hugh A. Rawlins
Justice of Appeal (Ag.)

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal