

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 478
CR 17/2017

In the matter between

THE REPUBLIC
(rep. by H Kumar)

Petitioner

and

KNF
(rep. by A Amesbury)

Accused

Neutral Citation: *R v KNF* (CR 17/2017) [2020] SCSC 478 (27th July 2020)
Before: Govinden J
Summary: The Turnbull warning; reliability of dock identification; necessity of holding identification parade; reasonable doubts as to the identification of Accused person; acquittal.
Heard: 14th June 2019
Delivered: 27th July 2020

ORDER

The Accused person is acquitted for reasons given in the judgment and bail conditions, prior to imposed, are revoked.

JUDGMENT

GOVINDEN J.

The Charges

[1] The Accused person is charged as follows:

Count 1

Statement of Offence

Acts intended to cause Grievous harm contrary to and punishable under section 219(a) of the Penal Code.

Particulars of Offence

KNF of [. . .] on the 10th December 2017 at Grand Anse, Praslin unlawfully caused grievous harm to the person, namely, Ms MBN who was strangled and attacked by him by his hand.

Count 2

Statement of Offence

Sexual Assault contrary to section 130(2)(a) of the Penal Code and punishable under section 130(1) of the Penal Code.

Particulars of Offence

KNF of [. . .] on the 19th of December 2017 at Grand Anse Praslin did an indecent sexual assault on the person, namely, Ms MBN by means of showing his penis to her; he tried to have sexual intercourse with her forcefully in attacking her brutally.

The Prosecution's Case

[2] The prosecution evidence commenced with the testimony of the Virtual Complainant, Ms MBN. Her evidence was led *de bene ese* with the agreement of the defence. She testified that she is a 27 years old Swedish national who had come to Seychelles on an exchange study programme for 12 weeks and intended to go back to Sweden on the 1st of January 2018. She went to Praslin from Mahe on the 8th of December 2017 in order to some time there. She stayed on Praslin until the 10th of December when she was brought to the hospital on Mahe. She testified that on the 10th of December, after lunch, she went to the Grand Anse beach between the Indian Ocean Lodge and a post that said Ocean Villa, it was a place not very far from where she was staying. There she laid her belongings on the

sand after she had greeted a British couple who was also on the beach a distance off and after that she went to have a swim. She identified the area where she was in an album of photographs marked as **Exhibit P1** and the location where the couple was found. When she was swimming she saw the Accused person coming from a yard through the bushes, he walked passed her things on the beach and went into the bush a little distance away. She came out of the sea and sat down and read a book and suddenly at the corner of her eyes she saw the Accused person standing over her, he was wearing a t-shirt and shorts that had its upper part unzipped. He ordered her to remove her pants as he said that he “was going to put his dick in her”. Upon her refusing to do his wish, he pressed her down by her throat and beat her face with his right hand and said that he was going to kill her. This took place for a few minutes. She finally managed to scream and the couple she had seen earlier ran towards her. The Accused, who at that time was sitting on top of her, released his grip and ran off. She was assisted by one of the couple whilst the other went to search for the Accused. Thereafter, one of the neighbours came to assist and it was the latter who phoned the police. The Virtual Complainant did a dock identification of the Accused person in court after she had described his physical features. She was taken to the Praslin hospital, where she was x-rayed and was prescribed pain killers by the doctor and was later conveyed to the hospital on Mahe where she was admitted. She gave a statement to the police and photographs of her was taken at the hospital.

- [3] Corporal Raymond Dubel testified next. His testimony is that he is a police officer and he was performing duty on Praslin on the 19th of December 2017. Whilst he was at the Grand Anse Police station at around 4p.m. he received a call that a person had been attacked and he was asked by SI Boniface to assist on the alleged crime scene. When he arrived on the scene at the Grand Anse beach he was informed that the suspect had ran off in the direction of the ex Airtel office. He and SI Boniface went towards this location and when he arrived there, there he saw a person wearing light blue shorts talking on a phone upstairs. He had been informed that the suspect was wearing blue shorts. He then went upstairs where the person was in the company of SI Boniface and that person was the Accused person. According to him, the description that he had gotten earlier fitted the Accused person who he knew as KNF. After this he caution the Accused person as a suspect in the attacking of a tourist and conveyed him to the police station. Thereafter, he

went to search the place where the suspect was living. He wanted to search for black trousers that, according to information received, the Accused was wearing. He went to search in the company of Boniface and the person in charge of the place and there they found black shorts near a washing machine. The premises were being occupied by the 24/7 security guards of whom the Accused was an employee. Later upon examining KNF at the station he noticed some scratches on him, he was then put in a cell.

[4] Police officer Jessica Radegonde was the next witness called by the Prosecution. She is from the Central Investigation Department. She was working at the Baie Ste Anne police station on the 10th of December 2017. At around 3:37 p.m. she received a phone call from the Grand Anse police station seeking for assistance in relation to an attack of a foreign lady name MBN on the Grand Anse beach. She went to the scene and met the complainant at the Ferrari resident at Grand Anse. She accompanied her to the Baie Ste Anne police station for medical attention as her face was covered with blood. At the hospital she was examined by doctor Leon and referred to the dental surgery. She examined the injuries on the Virtual Complainant face and noticed that her left side of her face was swollen with bluish bruises; left side cheek swollen with bruises; and some scratches under the neck. After that she was transferred to the Seychelles hospital. Before she left for Mahe MBN had informed her that a man had wanted to rape her on the Grand Anse beach. According to her, some clothes recovered in this case were send to Mauritius for analysis but she cannot say what they were.

[5] Police Officer Andy Bibi also testified as a prosecution witness. He was at the material time working at the Praslin Crime Investigation Department. He was appointed as the Investigating Officer in this case. He received a call to report to the Grand Anse police station on the 10th of December 2017. At that station he observed a commotion between some visitors and police officers and he was informed that there had been an attempt to cause grievous harm and he took the lead as an investigator. He began by taking statements from the witnesses and caution the suspect who was brought to him by Pc Dubel and later the suspect was later brought to the Magistrate court to be remanded. He saw the victim when she was being brought to the hospital, her face was bloodied. The witness identified the Virtual Complainant through a photograph in **ExhibitP1**.

According to this witness, the physical description given of the Accused by two British couples at the station was that the suspect was a tough guy with a light beard and a short hair and he was shirtless and wearing blue shorts at the time of the commission of the offence. He said that the couple managed to identify the suspect when they voluntarily came to the station, whilst he was sitting beside a civilian witness. He did a dock identification of the Accused as the suspect who he saw at the station, who he referred to as KNF.

[6] Police Officer Andy Bibi recovered several clothing items from the virtual complainant, which were: a jump suit, a bikini wrap, and a beach wrap. And from the Accused he retrieved blue shorts and black shorts. Swabs were also taken from the nails and the mouth of the suspect. They were all sent to Mauritius for analysis, from which no positive results were recovered. The black shorts were given to him by Dubel and the blue shorts were being worn by KNF at the time of his arrest. The witness also produced three medical certificates from Dr Miriam Leon, made following the examinations of the Virtual Complainant on the 10th of December and one done by Dr Franky Fanchette dated the same date. The witness also produced the Accused person's medical certificate of even date composed by Dr Miriam Leon. These documents were not objected to by the Defence.

[7] Mr and Mrs G, two British nationals, testified also for the Prosecution. They did so via live television link, using the Skype system. The two witnesses, who were in the United Kingdom at the time of their testimonies, were examined at the Regional Fusion and Law Enforcement Centre for Safety and Security situated at Bois de Rose following an application made by the Prosecution under Section 11(c) of the Evidence Act, with no objections from the Defence.

[8] Mr TG lives at [. . .] England, he is the husband of SG. Both of them arrived in Seychelles on the 4th of December and went back to England on the 11th of December 2017 and on the 10th of December they were staying on Praslin. Whilst being there between 2 to 3 p.m. on the beach, they witnessed an assault on a lady by a man who was punching her in the face. TG said that he shouted at him and the latter turned and looked

at him in the eyes for around ten seconds and then ran away. He gave chase but he could not catch up with him, though he managed to see his face again when the man fell down during the course of the chase. When the attack occurred he was 15 metres away. This witness gave a physical description of the attacker, being 5 to 6 feet; stocky and wearing blue shorts and green or white trainers. According to him, he later saw this same man in a police station and identified him. After having witnessed the attack he and his wife assisted the victim who was bleeding everywhere and took her to a neighbouring house. Mr G did a dock identification of the Accused person as being the person that he saw attacking the lady on the beach.

- [9] Mrs SG, on the other hand, gave the following evidence: she says that she was with her husband on Praslin on the 10th of December 2017, they went to the beach at around 1:30 p.m. and sat on the beach 15 metres from a young lady. The latter went to have a swim then came back on the beach and read a book. Then her husband told her, “what is that man doing?” When she looked over they heard screaming, so they ran over to her and she saw a man on top of the lady holding her with his left hand around her throat and punching her in the face and she was screaming and kicking. Her husband shouted, “get off you bastard”. Then the attacker got off and looked up at them for around 4 to 5 seconds and then ran. At that time there were blood all over the girl and she was crying. According to her, he was wearing blue shorts; a pair of trainers and was shirtless. The young lady complained to her that the man had told her that, “I am going to fuck you and I am going to kill you”. After having tried in vain to phone the police she helped the young lady to reach a neighbouring house where the ambulance and the police were called. The ambulance and the police came and the victim had to be carried on a stretcher as she could not walk. Both she and her husband assisted the police to locate the crime scene, they indicate the place of the incident where blood of the victim was still on the sand. She then went to collect her passport and then to the police station to give her statement. Upon walking in the station lobby she saw several persons and when the police asked her whether she can identify anybody in the room as being the attacker she identified the Accused person as the person who had attacked the lady.

[10] The Prosecution also called JB, a 23 year old man who lived at [. . .] Praslin at the material time. He testified that on the 10th of December 2017 at around 3 p.m. he was at the Grand Anse Praslin beach collecting coconut to sell to clients. According to his evidence whilst going towards L'Amitie he saw three persons on the beach: a man and a lady, and a guy sitting at the Gate of Ocean Jewel guest house. He got his coconuts and then came back the same way. He passed by the same persons again and upon reaching Indian Ocean he heard screaming and when he looked back he saw a man running after a black man for a couple of seconds. He went back to see what had happened and he saw two ladies. One of the lady's face was swollen and full of blood. He was asked by the other man as to whether he had beaten up the woman and he denied. Following that he informed them that help can be gotten at a nearby house and he went and gave his statement to the police. At the police station he saw the same man that he saw sitting at the Ocean Jewels Guest house, who was then wearing a t-shirt and he identified the latter as being the person he saw. That person was black, robust, short haired and not tall; had a beard and at that time he was shirtless and wearing blue shorts with black stripes at the side. The witness did a dock identification of this person and indicated him as being the Accused person in open court.

[11] The prosecution closed their case with these evidence. Upon being put to his different rights at the end of the prosecution case, the Accused person chose to testify and call witnesses in support of his case.

The Defence Case

[12] In his testimony the Accused said that at the time of the alleged commission of the offence he was working as a supervisor at a security firm on Praslin. On the 9th of December he went to Praslin with the owner of the firm who had assigned him the job to supervise some other security officers. On the 10th at around 10 a.m. he met up with one of his brothers who was living on Praslin. Together they went to the jetty where his brother drank a beer. After a while he told his brother that he needed to go. It was at that time that he saw corporal Dubel, who according to him was at the time disgruntled with him, who pointed towards his direction. His brother then left him and he went to a plying

field and played on his phone and then he went to his apartment and started to prepare the chicken to cook. There he heard somebody calling him by his nick name, “solda”. He then saw officer Dubel in the stairway with a drawn pistol and a pair of handcuffs and the latter asked him to come down. When he arrived next to Dubel he was arrested for attacking a person on the beach and he was brought to the police station where he was beaten up. The Accused person then testified about the circumstances of his identification at the police station. According to him, when he was at the station a foreign male person passed him and said hello and went on his way. Later the same person asked a woman police officer, “where is he?” The latter nodded in his direction. The foreigner then ask a third male person with bushy hair whether it was really him and upon the third person confirming the foreigner swore at him and he had to be put in cell. He remained there until he was conveyed to Mahe. He denied attacking the Virtual Complainant and said that Dubel implicated him because of personal reasons and the bad blood between the two of them. He insisted that he was not positively identified at the police station.

- [13] The Accused further claim that even his court dock identification by the Virtual Complainant was tainted and he gave an account of what happened prior to his dock identification. He stated as follows;

“The first time that I came the victim was there, I sat outside on the bench at the corridor at the stairs, the lady was at the corner, she was roaming around at the corridor. She passed by me and she had no reaction. Afterwards Sergeant Fred told Mr Bibi that she had passed by me and there was no reaction and Mr Bibi who was next to me went to the victim and told her that I was the one that was in the case with her. And then she came there at the balcony, she tilted, she looked at me and pulled back in fear and then when she came in Court she pointed at me in the box. As I see it I was there as a picture and pointing finger to say that I am the person that did it”.

- [14] The second witness for the Defence was Mrs LA. She is the concubine of the Accused person, they have been together for 10 years. According to her she had planned a trip to Praslin in order to meet up with the Accused person and had bought her ticket. However, she was asked to cancel the trip as he had been arrested for allegedly raping a woman. The Accused had gone there on Friday and she was going to join him on the following Sunday. According to her, her partner was not the kind of person who could

have committed such kind of offences. She did not go over to Praslin to meet him as he was brought to Mahe after the incident.

[15] The second witness was Mr RB. He testified that he is a resident of Praslin and reside at [. . .] and that the Accused person is his older brother. According to him, the Accused person came to where he was residing at around 9 a.m. and stayed there up to around 2p.m. and then he accompanied him back to his place. He has no knowledge as to what his brother did after that. He only got a call from his mother at around 8 p.m., asking him about the whereabouts of his brother. The next day he heard that his brother had been arrested.

Submissions

[16] Both sides made their final submissions in writing.

[17] It is the prosecution's submissions that they have overwhelmingly proven their case beyond a reasonable doubt. It is the Learned Assistant Principal State Counsel's submission that the testimony of the Accused person is but an attempt to hide his presence at the scene of occurrence and his involvement in the case.

[18] On the other hand, the Defence submitted that this case will stand or fall on the accuracy of the identification of the attacker. In that regards the Learned Counsel for the Accused referred to the proceedings of the court where she submitted were many material inconsistencies and reasonable doubts within the evidence of the Virtual Complainant herself and between her evidence and that of other prosecution witnesses when it comes to the identification of the Accused person. As a result she submitted that on the totality of the evidence adduced by the prosecution it failed to prove beyond reasonable doubt that the Accused person was the perpetrator of the offences and he should be acquitted.

Analysis and determination

[19] The prosecution needs to prove that not only were the offences charged committed beyond a reasonable doubt but also that the offences were beyond a reasonable doubt committed by the Accused person. Accordingly, before the court proceeds to consider the

evidence adduced in support of the essential elements of the offences charged it needs to be satisfied on this standard of proof that the Accused person committed them. I would therefore address my mind to this element first before I proceed further. It speaks for itself that if it is not proven by the prosecution that it was the Accused who committed the alleged offences, the Accused person should be acquitted without the necessity for this court to proceed further in its consideration of the facts of the case.

[20] As it is abundantly clear the issue of misidentification or non-identification of the Accused person is the one and only defence put forward by the defence in this case. By putting forth this defence he is saying that it was not him who committed the offences, if ever they were committed. He has raised this defence through his counsel's cross-examination of the witnesses for the prosecution and in his testimony given under oath.

Identification of Accused in Criminal Cases

[21] Lord Widgery C.J. in ***R v Turnbull [1977] QB 224*** had warned of the possibility that a mistaken witness can be a convincing one and a number of such witnesses can all be mistaken and that mistakes in recognition of close relatives and friends are sometimes made. In doing so the Learned Judge gave the following direction, which has remained true to this day:

“When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.”

[22] In ***R v Lang, 57 Cr.App.R.871*** it was also held:

“The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have that quality, the judge should say so.”

[23] A Turnbull direction is generally required in all cases where identification is a substantial issue. Only in the most exceptional circumstances would a conviction based on

uncorroborated identification evidence be sustained in the absence of a Turnbull warning in those cases. Reliance is placed on **Scott v. R. [1989] A.C. 1242** at 1261, PC; **Beckford v. R. 97 Cr. App. R. 409 at 415, PC**; and **R v Hunjan, 68 Cr. App. R. 99 CA**.

[24] On the other hand, identification by two or more witnesses; DNA or finger print evidence, which links the accused to the offence; collapsed alibi evidence; lies told by a defendant, which are deliberate and relate to the same issue; correct identification by a witness of other participants in the offence and similar fact; and multiple offences committed by the same person may amount to evidence capable of supporting the identification (see paragraphs 14-22 to 14-23 Archbold 2009, *Criminal Pleading Evidence and Practice*). This was essentially the case where identification was a substantial issue and corroboration required. When it comes to recognition evidence, in **R v Bentley [1991] Crim. L. R. 620, CA**, Lord Lane C.J. observed that recognition evidence could not be regarded as trouble free. Many people had experienced seeing someone in the street whom they knew, only to discover they were wrong. A witness who says that, “I could have sworn it was you”, may later find that he was mistaken even in recognition.

[25] It is trite law that evidence of identification must be approached with caution. The reason is set out in the well-known case of **S v Mthethwa 1972 (3) SA 766**, in which Holmes JA held:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.”

[26] The decision in **Muvuma Kambanje Situna –vs- The People (1982) ZR 115** is also instructive on this point. In the said case, it was held that, “*If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the*

accused and the offence which would render mistaken identification too much of a coincidence.”

[27] In **S v Mehlape 1963 (2) SA 29 (A)** at 32A-F it was said:

“It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification.”

[28] In this case the Virtual Complainant made a dock identification of the Accused person. The same took place with regards to the other eye witnesses, who allegedly saw the commission of the offences. It is settled law that dock (also known as “in court”) identification is where a witness identifies the defendant in a court room or in the dock as being the perpetrator they saw at the scene of crime. It is generally regarded as the most problematic of all forms of visual identification. It is also of little probative value when made by a person who has no prior knowledge of the defendant because at the trial circumstances may compel the witness to identify the defendant at the dock.

[29] At common law dock identification is usually permitted once evidence of a prior out of court identification (usually by way of an identification parade) has been admitted. The identification is used to reinforce the prior identification, which serves as the primary means of identification.

[30] In the case of **Terrell Nailly v The Queen [2012] UK PC 12**, the Privy Council stated, inter alia, as follows regarding dock identification:

“When considering the admissibility, and the strength, of identification evidence, it is often necessary to consider separately the circumstances in which the witness saw the accused and the circumstances in which he later identified him . . . The decision whether to admit dock identification evidence is one for the trial judge, to be exercised in the light of all the circumstances. Ultimately the question is one of fairness . . . ”

[31] In the case of **Dave Rose and ors vs R, SCA 6; 15,16 of 2014**, a dock identifications of the Accused persons were permitted to be carried out by the trial court, the only other

identification evidence consisted of identification of the Accused person on a CCTV camera footage at a location away from the crime scene. In coming to its determination Justice Fernando referred to the case of **R v Tricoglus (1976) 65 Cr App Rep 16** it was held: *“It has all the disadvantages of a confrontation, and compounds them by being still more suggestive”*.

[32] In *Archbold 2009, 14-42* it is stated:

“The identification of a defendant for the first time in the dock is both an undesirable practice: see R V Cartwright, 10 Cr. App. R. 219, CCA; and a serious irregularity: see R V Edwards (2006) 150 S. J. 570 PC. In the South African case of Maradu 1994 (2) SACR 410 (W) the court held that the danger of a dock identification is the same as that created by a leading question in examination-in-chief, which is normally inadmissible: it suggests the answer desired. Commenting on the disadvantages of dock identification it was said in the Zimbabwean case of Mutsiziri 1997 (1) ZLR 6 “Everything about the atmosphere of the court proceedings points to the accused and to him alone, as the person who is to be identified by the witness”.”

[33] In the local case of **Moustache v R (2015) SCCA 42** it was said about dock identification:

“It is generally regarded as the most problematic of all forms of visual identification. It is also of little probative value when made by a person who has no prior knowledge of the defendant because the trial circumstances may compel the witness to identify the defendant at the dock.”

[34] The minority decision in this case applying these principle found that the Appellants were total strangers to the witnesses; that the Appellants do not have any clearly visible physical features as could be seen when arraigned before us when this case came up for hearing; and could not be distinguished from the many other persons you see walking on the streets. It also bore in mind that the incident had taken place very quickly as per witness testimony and that the witnesses were in a state of shock when the incident took place. For this reason the court stated that a prudent prosecutor should bear these factors in mind when leading the evidence of witnesses in a case of this nature and that a Trial Judge should ensure that the witnesses are not mistaken in their dock identification of the accused before convicting them and went on to allow the appeal against convictions.

[35] In this case I consider, after having tested the credibility of the witnesses that the following are what I consider to be credible evidence of identification in this case.

By the Virtual Complainant

[36] She saw a man come from a bush, walked past her and disappeared in another bush. She went to lie on the beach, she then saw someone, who she would say was the person that she had seen earlier over her with his zipper open. This man told her to undress as he wanted to have sex with her. When she refused he strangled her and beat her with his fist on her face for a few minutes, saying he was going to kill her. She managed to scream and, upon seeing the couple, the man ran away. According to her, the man was muscular, had a shaved head and a shaved face and was dark brown. Under cross-examination she said that the attacker was wearing blue shorts, without any shirt. There was no identification parade done in an attempt for this witness to pick up the suspect from a line-up of similar individuals. The Virtual Complainant only came to identify her assailant in a dock identification.

By Mr and Mrs G

[37] According to the Mr G, when the Virtual Complainant was being attacked, he and his wife were about 15 metres away and he was able to see the attacker. According to him, the Accused was wearing blue shorts, had a pair of white and green trainers; he was stocky and about 25 years old. He saw the same man sitting in a corner of the police station later the same day. The witness did a dock identification of the accused as being the attacker. Under cross-examination he said that upon shouting at the attacker the latter turned and looked him in the eyes. He goes further to testify that when he was chasing the man he could see his face and, being pressed on this improbability, he said that he saw him from his side, that he looked back several times and that he also fell down in the mangrove and he looked at him more than once. No attempt was made for this witness to identify the accused in an identification parade.

[38] Mrs G supported her husband contention that they saw a man beating the virtual complainant and that her husband chased the Accused away. Before he ran away he

looked at both of them. He was shirtless, wearing a pair of trainers and blue shorts. According to her, when they went to the police station later in the day they saw the attacker sitting at the station wearing a white t-shirt and he identified him when the police asked them whether he could be seen at the station. There was no attempt to hold an identification parade so that those two witnesses could pick up the Accused person in the parade.

Caporal Dubel

[39] Caporal Dubel is not an eyewitness, however, he testified that he arrested the accused shortly after, wearing blue trousers. However, in his search of the accused premises he found black trousers. He said that he noticed scratches on the accused body but he could not recall where. Medical evidence was led regarding the injuries of the Accused.

[40] The blue and the black trousers were not produced in evidence by the Prosecution and hence not specifically identified by witnesses.

JB

[41] JB claimed to have seen the suspect. According to him, he was black, robust, and not too tall, his hair was not too long, and he had a beard. He noticed the attack happening. He insisted that the man was wearing blue shorts with black stripes, though, in his witness statement he had said that it was black with white stripes. The witness claims that later he saw the same man at the police station wearing a different coloured shorts and a t-shirt.

[42] Because of the ever-present possibility of honest mistakes being made, evidence of identification has to be treated with caution. This is clearly established in the series of case law above cited. Due to the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as: lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification

parades, if any; and, of course, the familiarity of the witness to the suspect, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities.

[43] The court must, therefore, consider the reliability of the identification made by the Complainant by considering any internal weaknesses within her testimony and internal weaknesses of testimonies of other Prosecution identification witnesses and further consider the contradictions between their evidence (if any); and if I am to accept or reject their evidence to give reasons why.

[44] In so doing, I find that there are inherent weaknesses in the evidence of the Virtual Complainant. She is new to the Republic of Seychelles; totally unfamiliar with the physical characteristic of people here. Though, she saw her attacker for some minutes, this happened during a very traumatic occasion and she was in a state of shock. She would also have had only glances of her assailant. She further did not identify the accused by recognition at the police station. She did so a couple of weeks after in the court in a dock identification. This identification could have carried some weight had she identified the accused person prior to in a confrontation or identification parade, however none of these happened. The possibility of forming an assumption that the accused in the dock should have been the person who attacked her, to my mind, was real. Here I also pause to examine the evidence of the Accused when he said that there was an attempt by the investigation officer to assist the Virtual Complainant in identifying him outside the court, prior to the latter testifying. After scrutinising issues relating to credibility, I choose to believe the Accused person that an effort was put into place by the police to reinforce the chance of his positive identification by the Virtual Complainant in court. For these reasons I find that the identification evince of MBN to be wanting and I disregard it.

[45] Regarding TG. I find that they did have an ample opportunity to see the attacker, especially before he gave chase to him. However, upon scrutinising the evidence of the chase, I find that he could not have seen the face of the person who he was chasing.

Nonetheless, the attack occurred 15 metres away from Mr TG. He had no prior knowledge of the former. The situation was mobile with the identifier and the person to be identified in constant movements. I therefore find that there is a reasonable possibility that he is making an honest mistake regarding the accused identity. The same applies to Mrs SG, who only saw the attacker from afar. In respect of the identification of he accused in the police station, I attached little weight to this evidence, the chance that the witnesses, still in the heat of the emotional trauma, would fail to identify a police suspect in a police station are slim. Especially when such identification is prompted by the police themselves.

[46] As to JB. His evidence is contradicted by his witness statement regarding the colour of the short being worn by the Attacker. Moreover, the markings on the short of the Accused persons differs to that of other witnesses. Whilst his evidence is that it was a blue short with white stripes the others said that it was blue. His only explanation was that the police had made a mistake in writing his statement. I consider his identification evidence wholly unreliable.

[47] In this case the identification parade was of crucial importance. The police had the time and opportunity to carry out such a parade. They did not do so, and instead resorted to police station confrontation between witnesses and the suspect, such kind of evidence is inherently unreliable for the reasons I have given. For the rules of a proper identification parade the courts has of many similar jurisdictions as ours have developed them based on the principle of fairness, one in point are the 18 Rules developed in the South African case of **Vukile Tanatu v/s State, SCJ 2004/036**. Though I will be quick to add that such a form of identification itself has its weaknesses. As held **R v Kola2 SCACR 530**, Schreiner JA held as follows in this regard:

“But an identification parade though it ought to be a most important aid to the administration of justice may become a grave source of danger if it creates an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall-mark of such a test

if in fact the hall-mark is spurious. Of course an identification parade is not necessarily useless because it is imperfect. In some respects the quality of the parade must necessarily be a question of degree.”

[48] As to dock identification, as I have highlighted, it is the most unreliable form of identification in the absence of familiarity between the accused and his identifier. It is for these reasons that it had been said in **Edwards v The Queen [2006] UKPC 29** that, “*The dock identification of an accused for the first time during the course of the trial itself has long been considered an unfair and unsatisfactory procedure*”. In *Cross & Tapper on Evidence 12th edition, p 709* it is stated: “*The least satisfactory method of all is to ask the witness to identify the man in the dock as the criminal*”. In **R v Tricoglus (1976) 65 Cr App Rep 16** it was held: “*It has all the disadvantages of a confrontation, and compounds them by being still more suggestive*”. In *Archbold 2009, 14-42* it is stated that “*The identification of a defendant for the first time in the dock is both an undesirable practice: see R V Cartwright, 10 Cr. App. R. 219, CCA.*

[49] Hence, for reasons given in this judgment, I attached little weight to the evidence of identification of the accused in the dock by the prosecution witnesses. This decision may have been substantially different had there been a spontaneous; reliable and strong out of court identification of him out of court, which would have made the dock identification but a mere formality.

[50] In my final determination I accordingly find that the Prosecution has failed to adduce evidence to prove beyond a reasonable doubt that the Accused was the person that committed the offences charged. I accordingly acquit the accused of those offences. All conditions of bail imposed on him would also lapse.

Signed, dated and delivered at Ile du Port on the 27 day of July 2020

Govinden J.