

IN THE COURT OF APPEAL OF BELIZE, A.D. 2005
CRIMINAL APPEALS NOS. 10, 11 and 12 OF 2004

BETWEEN

**MARK VEGA
LUIS GABRIEL URBINA
OMAN VELLOS**

Appellants

v.

THE QUEEN

Respondent

BEFORE:

The Hon. Mr. Justice Mottley	-	President
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

**Mark Vega and Luis Gabriel Urbina in person.
Mr. Hubert Elrington for Omar Vellos.
Ms. Cheryl-Lyn Branker-Taitt for Crown.**

20 June and 18 October 2005.

CAREY, JA

1. On the night of 13 June 2002 at about 10:00 p.m. a young woman whom we propose to refer to as JL, was enjoying the night by the

seawall in Corozal Town seated in a newly purchased Blazer SUV with her friend Jacob Rancharan, the owner of the vehicle, when they were accosted by three men. At 2:30 a.m. the following morning, when she finally returned to a relative, both herself and her friend had been subjected to a night of torture and terror which provided the basis of a trial on an indictment for multiple counts of kidnapping, buggery and rape.

2. These appellants were, in the result convicted as follows: all three appellants on counts 1 - 2 which charged kidnapping of JL and Jacob Ramcharam respectively; Mark Vega and Luis Urbina on count 5 which charged rape; Luis Urbina on count 6 which charged buggery and finally Mark Vega on count 7 which charged rape. They were sentenced to various terms of imprisonment. On the kidnapping counts, each appellant received 10 years imprisonment, Vega and Urbina received 13 years' imprisonment on count 5, Urbina was sentenced to 8 years' imprisonment on count 6, the buggery, and Vega on count 7, rape, was ordered to serve 13 years imprisonment.

THE CASE FOR THE PROSECUTION

3. The case depended wholly on identification evidence of the victims of these crimes. We can therefore proceed to examine that evidence. JL stated that on 13 June 2002 at about 10:00 p.m.

while she sat with her boyfriend Jacob Rancharan by the seawall at Corozal, a minivan drove alongside their vehicle and stopped. Three men emerged. One who was armed with a gun, came up to them while the other two went towards the Chevy Blazer. The man who approached them, later identified on an identification parade as Mark Vega, engaged in a conversation with Jacob about his Chevy Blazer. Vega was at that time eight feet away. Jacob was being told that he would have to go to their boss to prove that the vehicle did not belong to their boss. Two of the men held Jacob by each hand, told him he had to go along with them and led him to the minivan. At that time, a man by the van, told them to “bring the girl too”.

4. JL testified as to the lighting in the area. There were, she said, five or six lights along the seawall where they were and she described this lighting as fairly bright. She estimated the time spent in the men's presence by the seawall as ten minutes. These men were all within eight feet of her, but for the one, who actually fetched her to the minivan and whom she subsequently identified as Vellos and referred to in the course of testimony as “the man in the checkered shirt”.
5. The van was driven off, followed by the Chevy Blazer. But not long thereafter, the van was forced to come to a halt because the engine

overheated. Both JL and her boyfriend, were placed in the Chevy Blazer which then sped off. This could be regarded as the end of the first episode – the quiet time. The crime so far committed was kidnapping.

6. The speed of the vehicle prompted Mark Vega, described as “the man with the gun”, to order the driver to pull over. He did. Vega was now the driver, and the former driver assumed the role of gunman. Vega then asked Jacob Rancharan to explain the operation of the musical equipment in the Blazer. As he leaned forward to do so, the man seated beside JL, Omar Vello, used that as an opportunity to put his hand up her skirt. He received a slap from JL for his pains and she expressed her sharp dissent. The driver, Vega, also reprimanded Vello on this conduct. As they continued to drive along, Vello fired three shots in the air and was told by Vega to put away the gun. The vehicle stopped at a “cut-off”, at which point, all four abductors left the vehicle which allowed the witness an opportunity to scrutinize them at close range.
7. Jacob then grappled with the “Hispanic guy” with the gun. This was Urbina. Jacob was able to escape into the night pursued by three of the four men. Vello remained behind and was “right beside her”, which gave her another opportunity to look at him for about five minutes, she thought. When she tried, herself to escape, he

grabbed hold of her and pushed her back into the vehicle. The men who had pursued Jacob all returned and got into the vehicle which was reversed onto the road.

8. After this, Vello – the man in the checkered shirt, who was seated to her right, told her to take off her jewelry. As it took her some time to remove and hand over eight rings, three chains with their pendants and an anklet, she was able to observe his features with the aid of the light from the CD player in the vehicle. He next ordered her to remove her clothing. The driver told her to come in front and as she tried to comply, Vello restrained her. The man seated to her left tried to pull off her clothes; Vello tugged off her blouse and bra and ordered her to remove her skirt and underwear and to sit on him. He undid his zipper and penetrated her by pushing and pulling her onto him. When he was finished, he pushed her off and the man on her left raped and buggered her. During her ordeal, the vehicle was continually in motion. The man who had intercourse vaginally and anally, again raped her. She was then left sitting naked, between these two men.
9. Eventually after they went over a bridge, the man in the checkered shirt, that is, Omar Vello, told the driver that he and another man had had enough for the night. They were dropped off. Before the vehicle was driven off, JL had another opportunity to observe the

face of Vellos as he stood outside the door by which she was seated. At that time, he would have been eight feet away and the head light which 'cleared up the night' allowed her to see him.

10. The assailants had now dwindled in number, but JL's ordeal was not yet over. When they drove off, she was then seated next to the driver. Another man referred to as the "Hispanic" person was also in the vehicle. The driver then unzipped his pants and forced her to perform fellatio on him. She complied, as she said, out of fear. He then stopped the vehicle and told her to get down. As she dismounted, he was able to have intercourse with her. The "Hispanic guy" then grabbed her and took her to the front of the vehicle where he buggered her, despite her protestations and screams of pain. He was totally indifferent to the torture he was inflicting on her. She was then told to get back into the vehicle which was driven off.
11. They continued through villages she did not know. Eventually they stopped to get gas. She was left in the vehicle with the driver who made a long phone call, which she estimated at five minutes. It gave her a chance to observe him from a close range. When the Hispanic man returned, she was in the back of the vehicle. They drove to a pimento house where they stopped and the driver removed the keys and went off to have a conversation with a

woman. The driver returned, drove to a dirt road, stopped the vehicle and came out. He then asked her if she was coming with him or staying with the “Hispanic guy”. She elected to go with “the driver”. Both walked away until they came to a football field on which were bleachers. The “driver” sat on the bleacher and placed the gun by his side.

12. At this time, JL said, she feared for her life. He made her execute a pirouette before him, at the end of which, she pleaded for her life. She held his face between her hands and told him that she knew he was a good person and would send her home to her children. The reply courteous was that he wanted to have sex with her again. She told him that she wanted to go home, she was in pain and her mother would be worried. He allowed her to call her mother on her phone which he must have taken from her at some time in the course of the night. She duly called her mother.
13. After that, he took her by the arm, laid her back on the bleachers and ordered her to sit on him and in this way penetrated her once again. Before she left however, she saw the ‘Hispanic guy’ came with a speaker on his back. They then walked away across a street and at that time, he told her she could go. Her ordeal for the night was over. She ran, called her sister to come and get her and also reported her experience to her sister. By the time she reached her

sister's house, it was 2:30 a.m. She had been in the company of one or other of her abductors for much of the night.

14. On 18 June 2002, she attended at an identification parade where she identified Mark Vega as the man she referred to in her testimony as "the driver". He, it was, who made her perform fellatio on him and who raped her by the bleachers.

On 14 August 2002, at an identification parade, she identified Luis Gabriel Urbina as the "Hispanic guy" as the man who raped her anally, whom she saw carrying the speaker on his back, and the man who fired the gun in the air.

On 15 May 2003, she identified at an identification parade, Omar Vellos as the man in "the checkered shirt" who had raped her in the back seat of the Chevy Blazer.

15. Jacob Rancharan was with JL on the night of 13 June 2002 by the seawall when they were approached by some armed men. He confirmed the evidence of JL up to the time he was able to make his escape. At an identification parade held 18 June 2002, he pointed out Mark Vega as the man "with the gun" by the seawall.
16. The Crown's case depended on the uncorroborated visual identification evidence of JL and to a limited extent on that of her friend Jacob Rancharan with respect to the appellant Vega. The

prosecution adduced detailed evidence of the opportunities for identification afforded the victim JL, the lighting available at different places and times, the proximity of observers and the assailants on different occasions, and the duration of time estimated by the witness for observation. For that reason, we have rehearsed the identification evidence in some detail.

DEFENCE

17. The appellants put forward alibi in defence of the charges.

THE APPEALS

18. As would occasion no surprise, the grounds of appeal challenged the identification evidence. Two of the appellants were unrepresented and said that no description of either had been provided by the victims and that the identification parades were unfair. Some six grounds were advanced on behalf of the appellant Omar Vellos, four of which touched and concerned “errors” which it was claimed, the trial judge had made in relation to the identification evidence and on the question of the fairness of the parades on which Vellos was identified.
19. The issues which accordingly fall to be considered are common to all the appellants and consequently we propose to deal with them together. At all events, the unrepresented appellants adopted the

arguments deployed on behalf of Omar Vellos. It is worthy of note as well that no arguments were advanced which bore on the directions of the trial judge. Essentially, we are therefore concerned with the quality of the identification.

20. GROUND 1: The complaint was that the trial judge erred in that he allowed the virtual complainants to identify Vellos as one of the attackers in the absence of evidence that they could correctly identify their attackers.

GROUND 2: stated as follows:- “The learned trial judge erred in law when he permitted weak and unsupported evidence of visual identification to go to the jury without any supporting evidence”.

What these grounds amounted to, is that the trial judge should have withdrawn the case from the jury because the evidence was weak. It is now settled law that where the evidence of identification is poor there is a duty on the trial judge to withdraw the case from the jury. **R v. Turnbull [1976] 2 ALL ER 548.** As we understood Mr. Elrington’s skeleton arguments, there was some deficiency in the identification evidence because neither of the victims gave any description of the attackers. According to counsel, this appellant has a deformed or disfigured right ear, which stands out, but when JL was asked to described him she did not advert to this obvious disfigurement.

21. The witness, it is true, did not mention any disfigurement. The appellant did in his unsworn statement refer to a “scar” on his lip received at age 3 years and a “scar” on his right ear from an incident when he was seven years old. His counsel at trial in the course of his address translated “scar” to a “piece of it is absent”. Mr. Elrington interpreted that as disfigurement or a deformed ear. But with respect, that is a point properly to be made before a jury and that was done. It is plain that the jury did not think there was anything in the point when it was brought to their attention. The fact that a victim is unable to give a description is not, we have no doubt, fatal to the prosecution’s case. It does not mean that even if the victim is unable to articulate a description, that the victim has forgotten the features of the attackers and thus unable to identify the attacker at a properly held identification parade. Indeed, it is true to say that experience at criminal trials, shows that the police often receive information from anonymous sources as to the perpetrators of a crime and it is too plain for words that such sources will not find their way into the witness box. The jury, hearkening to the cautionary words of the trial judge will scrupulously examine the circumstances of the identification to see if they feel sure to convict.
22. One of the features of the case on which the jury must have focused was the lighting conditions available for observation by the

victims. The evidence discloses that the brightest lighting condition was by the seawall where there were a number of street lights, one of which was by the Blazer. But thereafter, the lighting from any standpoint was far from ideal. Such lighting was the glow from the CD player in the Blazer, reflected light, that is the glow from its headlights when Vellos was standing outside the vehicle before he parted company with his fellows, and the light from lamps around the ball park in relation to the incident there, the final sexual assault on her by Mark Vega.

23. Mr. Elrington argued very strongly that the lighting was altogether inadequate as demonstrated by the fact that JL was unable to note any distinguishing features on Vellos who had a disfigured right ear, and that he was tall.

24. We think that in considering the strengths and weaknesses of the identification evidence, the fact of the lighting conditions would be a weakness. But there were other factors which also were relevant and could not be ignored. Counsel did not attempt to factor them in the mix. The evidence showed that JL was in the company of Vellos for in excess of four hours and the others for a significant period. At the various stops which were made, she related the opportunities to observe them, albeit in poor lighting conditions. No less significant, is the fact that they were in close proximity. She

sat between Urbina and Vega, naked, after each had ravished her. She held Vega's face in her hand on the bleachers for some time. She had a conversation with him.

25. What was her psychological state? We think that could be judged from the fact that she could have a conversation, use the phone and send love for her children. This, we would venture to think, showed someone in command of herself. This was scarcely a sign of a terrified woman. The trial judge, we note, did not think that evidence was relevant. In our opinion, it was relevant to show her state of mind and enabled the jury to assess whether she could give accurate and credible evidence.
26. In so far as the evidence of Jacob Rancharan was concerned, he identified Mark Vega. The lighting which would have enabled him to do so, came from the lights by the seawall. He had a conversation with these men about his ownership of the Blazer and he was in close proximity to Vega.
27. With respect to the identification parades, Vega was identified shortly after the incident, viz, five days, Urbina, some two months later, while the parade for Vellos was nearly one year later. No submissions were made by Mr. Elrington in respect of the time lapse. Rather counsel said the parade was not fair because the other persons on parades were neither similar to them in height nor

complexion. He called witnesses to support this and it was then submitted that the prosecution did not call evidence in rebuttal. It is enough to state that this amounted to a conflict in the evidence which it was for the jury to resolve. By its verdict, the jury did not accept the defence version. For our part, we are not persuaded that there was any unfairness. The prosecution led evidence that the persons selected were, so far as possible, of similar height, colour and station in life. In our opinion, to call two other persons who formed part of the parade and whom it was not demonstrated were dissimilar to the appellant, does not go far enough to answer the allegation of unfairness, especially if the jury accept the word of the officer in charge of the parade. It is to be noted that a Justice of the Peace was present at the parade held for Vello. There was in our view nothing in the allegation of unfairness.

28. We are accordingly driven to conclude that the identification evidence adduced was clear that this was not a "fleeting glance" situation. The witnesses had more than ample time at close quarters albeit in less than ideal lighting conditions to observe their abductors. The trial judge was right not to have withdrawn the case from the jury at any time in the trial. We entirely agree with that decision.
29. That conclusion answers the complaint by Mr. Elrington that the trial judge erred in law in leaving the case to the jury when the

prosecution had not discharged its burden of negating the defence of alibi put by the defendant of Omar Vellos.

30. It was for all these reasons that we dismissed these appeals and affirmed the convictions and sentences.

MOTTLEY P

CAREY JA

MORRISON JA