

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 73/2011**

**BEFORE: THE HON MR JUSTICE PANTON P  
THE HON MISS JUSTICE PHILLIPS JA  
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)**

**MARLON BLAIR v R**

**Robert Fletcher for the applicant**

**Mrs Paula-Rosanne Archer-Hall for the Crown**

**3 November 2014**

**ORAL JUDGMENT**

**PANTON P**

[1] This is an application for leave to appeal in a matter where the applicant was convicted in the High Court Division of the Gun Court presided over by Straw J, on 23 and 24 August 2011 and sentence was postponed to 31 August when the applicant and another were both sentenced to terms of imprisonment as follows:

- (i) illegal possession of firearm - seven years imprisonment;
- (ii) robbery with aggravation - seven years imprisonment; and
- (iii) assault - two years imprisonment.

The sentences were ordered to run concurrently.

[2] The applicant filed grounds of appeal which, with our permission, were abandoned by Mr Robert Fletcher who appears for him. We also gave permission for a ground to be substituted. It reads:

“The learned trial judge failed to adequately resolve a major discrepancy which arose in the case central to her treatment of both the weak identification evidence and the case of the applicant. This failure denied the applicant a fair and balanced assessment of the case against him.”

[3] The facts on which the prosecution relied at the trial and which were accepted by the learned trial judge were to the effect that at approximately 1:00 am on the date in question, 14 July 2012, the complainant Mr Romaine Hill was walking, as he was entitled to do, on one of our major roads, Old Hope Road, in the parish of Saint Andrew. When he got to the intersection of Old Hope Road and Swallowfield Road he saw five men on the opposite side of the road and they beckoned to him to come to them. Apparently he was not interested in having a meeting with them, so he ran back up the road. Running up the road, he was chased by four of the men and eventually he scaled a fence. Two of the four men who were chasing him jumped the fence thereby ending up on his side of the fence while the other two remained on the other side. He was held at gun point by one of the two men who jumped the fence and was robbed of money and a phone. He was also “boxed”, using regular parlance, by the man who was eventually tried with the applicant before Straw J. Eventually all four men ran. This applicant was one of the two men who did not scale the fence.

[4] Mr Hill gave evidence that he was able to see the persons due to moonlight, street light and also from the building nearby. Shortly after the incident he saw a police vehicle. A man called to the police on Latham Avenue which is near to Old Hope Road. The police patrol car drove on to Old Hope Road and stopped in the vicinity of a shop where two men were seen, one of whom was drinking a beer. While the police officer was in the vicinity of these men, there came the complainant, Mr Hill, shouting to the police officers that he was not to allow the two men to leave because they had just robbed him. Eventually the two men were taken along with the complainant to the Stadium Police Station and they were charged.

[5] The applicant in his defence told Straw J, in an unsworn statement, that he was walking on the right hand side of Old Hope Road heading to his baby mother's house; he was actually on his cell phone and he saw the radio car coming down, the police officers pulled up the car, alighted from the vehicle, pulled firearm pointing at him and said "don't move". He told the officer that he was on his way home and even indicated where his baby mother lived. While he was doing that, the complainant ran towards the radio car and accused him of participating in the robbery.

[6] The learned trial judge gave a detailed analysis of the evidence. The complaint by Mr Fletcher is that the identification is weak and that the application is really brought out of consideration that the risk of mistaken identification in this case is high. He pointed to discrepancy between the officers' evidence and the complainant's evidence in respect of whether the complainant had entered the police car after making his

complaint and had travelled down with the police to the scene where the men were, or as the officer said that the complainant walked down and was not in the car. The learned trial judge in dealing with that aspect of the evidence found that it was nonsensical, to use her terms, in that, she expected that the complainant would have gone in the car and driven down with the police to the scene. This point Mr Fletcher said made the identification highly suspect, in that, it is a situation where there is suggestibility. In the situation, he submitted that the **Turnbull** warning was really perfunctorily dealt with and that the evident weakness in this identification evidence had not been adequately dealt with by the learned trial judge. He pointed to what he said was poor identification prior to the pointing out.

[7] It should be stated that the learned trial judge, notwithstanding her comment in respect of the complainant's evidence on the question of whether he had gone into the police car or not, found that this witness was a witness who was honest and was highly believable. She found that the evidence of lighting that was presented and the evidence of the opportunity to properly see and identify the applicant was good, and that there was sufficient time and the circumstances were such that there is no fear of faulty or mistaken identification.

[8] The prosecution through Mrs Paula Rosanne Archer-Hall pointed to various pages in the transcript where evidence as to lighting was given and also in respect of the summation that the learned trial judge had followed the dictates of **Turnbull**.

[9] Having thoroughly examined the evidence and the summation, we cannot say that the learned trial judge erred in accepting the evidence that was presented as to identification by Mr Hill. We note that there was no question of the police attempting to influence or to assist the complainant in identifying anyone. Indeed, the circumstances were so dynamic that there would have been no room for such influence. We note that Mr Fletcher was not hanging his case on this but rather, was putting the position of the applicant as one where there was the likelihood of the complainant identifying the applicant merely because they were seen in the presence of the police at that crucial time. We have taken that into consideration but we are satisfied that the learned trial judge's finding as to the honesty of the witness rules that out.

[10] In the circumstances, we refuse the application and order that the sentences are to run from 31 August 2011.