**[2014] JMCA Crim 43**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 77/2012**

**BEFORE: THE HON MR JUSTICE MORRISON JA**
**THE HON MR JUSTICE DUKHARAN JA**
**THE HON MR JUSTICE BROOKS JA**

**EVON JOHNSON v R**

**Leroy Equiano for the appellant**

**Miss Sanchia Burrell and Ms Melony Taylor-Domville for the Crown**

**2 December 2013 and 24 October 2014**

**DUKHARAN JA**

[1] The appellant was charged on an indictment containing two counts of illegal possession of a firearm and wounding with intent. He pleaded not guilty to both counts. The trial took place in the High Court Division of the Gun Court for the parish of St Elizabeth on 19, 20 and 27 June 2012. He was found guilty on both counts and sentenced to serve concurrent terms of 20 years imprisonment for each offence.

[2] The matter came before a single judge of this court who refused leave to appeal against the conviction. However, leave to appeal against sentence was granted. It was

the view of the single judge that the main issues to be determined were recognition, credibility and alibi, for which the learned trial judge gave adequate directions.

[3] The appellant renewed his application before us. On 2 December 2013, we heard arguments and refused leave to appeal against the conviction. However, the appeal against sentence was allowed. The sentences imposed by the learned trial judge were set aside and the court substituted a sentence of 10 years and 17 years imprisonment for illegal possession of firearm and wounding with intent respectively, with sentences to run concurrently and to run from 27 June 2012. We promised to give our reasons in writing and this we now do.

[4] The relevant facts are that on 13 September 2011, at about 7:00 pm, the complainant Wilbert Stevens, a farmer, who resided in Huntley Castle District in the parish of St Elizabeth, went to a nearby river to catch fish. The complainant said it was full moon and he also had with him a bottle lamp which assisted him in catching fish. Whilst in the river he heard footsteps and he returned to the river bank. He then saw the appellant, whom he recognised, having worked for him in the past. He was able to recognise the appellant from the light of the full moon and his bottle lamp. The complainant called the appellant by name but received no answer. The complainant stated that the appellant, who had been standing with his hands behind his back, then pointed a gun at him. Upon seeing the gun, the complainant turned to run when he heard an explosion. He then realized that he was shot as he felt heat to his side and

saw blood. He was taken to the Black River Hospital and was later transferred to the Mandeville Hospital where he underwent surgery and was admitted for one month.

[5] On 14 September 2011, Detective Sergeant Rowland Drummond received certain information and went to the Black River Hospital. He saw the complainant, who made a report to him. He carried out investigations, and on 3 October 2011, the appellant was taken into custody, arrested and charged for illegal possession of firearm and wounding with intent.

[6] The appellant, who gave evidence, denied that he was present at the river and that he shot the complainant. He said that at the time of the incident he was at his home. In cross-examination he admitted knowing the complainant and that the complainant had worked with him for about four years.

**Grounds of appeal**

[7] Mr Equiano for the appellant, who abandoned the original grounds of appeal, sought and was granted leave to argue three revised grounds which are as follows:

> "(a) There was insufficient evidence to support a conviction for wounding with intent and by extension a conviction for illegal possession of firearm.
>
> (b) The Learned Trial Judge erred by using material that did not form part of the evidence to corroborate evidence given in the trial.
>
> (c) The sentence of the court is manifestly excessive."

[8] On ground (a), Mr Equiano in his oral and written submissions, submitted that it was of paramount importance that the court be satisfied by material evidence that the complainant's injury was as a result of a gunshot wound and that the appellant was responsible for the injury. He submitted further that although the complainant stated that there was bleeding from the wound, there was no independent evidence of blood seen anywhere, nor was there any medical evidence to support the complainant's evidence of a gunshot wound.

[9] Counsel further submitted that if the evidence that the complainant suffered from gunshot wounds failed to meet the requisite standard, then the prosecution would have also failed to prove that the instrument that the complainant said was a gun, was in fact a firearm in relation to section 25(2) of the Firearms Act.

[10] Counsel submitted on ground (b) that the learned trial judge erred by using material that did not form part of the evidence to corroborate evidence given at the trial. The defence having challenged the identification, he submitted, the issue the trial judge would have had to decide was whether there was in fact moonlight (full moon). Counsel further submitted that the prosecution did not adduce any evidence to support this important aspect of their case which should have been corroborated.

[11] Counsel was critical of the learned judge's summation in relation to the issue of the moonlight when he said at pages 82-83 of the summation.

> "He said it was full moon that night, I checked the calendar …. I checked the calendar for the year 2011, for the date the 13th of September, and the full moon was on the 12th of September 2011, and lasted up to the 20th of September, when the half-moon come [sic] into play, that is what the calendar shows. So the 13th was a full moon, and since I am on the full moon issue, this is a very simple farmer, [whose] vocabulary is not one of those of great significance and certain things he would not notice. But when he said there was a full moon, it plays into his credibility, because in fact, he was correct that that night it was a full moon."

Counsel submitted that the learned judge referred to the use of a calendar and used the information from the calendar as factual and corroborative of the complainant's evidence. This, he argued, clearly suggested that it was this information that weighed heavily on his finding that the complainant was credible. The learned judge, he argued, was taking judicial notice of an event after making his enquiries, and in this instance this was not permissible. Counsel cited **Archbold** 2001 edn para 10-71 and **Read v The Bishop of Lincoln** (1892) AC 644.

**Analysis on ground (a)**

[12] We saw no merit in the submissions made by counsel for the appellant and consequently we sought no response from the Crown.

[13] We were of the view that the learned trial judge carefully considered the evidence that was before him. The main issue was one of credibility and it was open to the learned trial judge to find the complainant as a credible witness, that the appellant was properly identified, that he had a gun and that he shot the complainant causing a wound.

[14] The evidence before the learned trial judge was that the appellant pulled his hand from behind him and pointed a gun in the complainant's direction and the complainant heard an explosion. The complainant described the gun as an automatic gun which he saw for three to four seconds. It is clear that the learned trial judge was satisfied that the description of the gun was sufficient as was required by law. It was the evidence of the complainant that after the explosion, he "felt the left side get cold, felt the heat in his belly" and saw "blood coming from his side … and had to tear his shirt so as to attempt to stop the bleeding".

[15] The learned trial judge observed the surgical marks and scars on the complainant where he was shot. The investigating officer also gave evidence that he observed bandages on the complainant while he was in the hospital. The complainant spent over one month in the hospital. There was enough evidence, in our view, and even without medical evidence, to enable the learned trial judge to come to the conclusion that the complainant was shot by the use of a firearm.

[16] On ground (b), it was the response of the Crown that there was enough evidence before the learned trial judge for him to come to the conclusion he arrived at. It was submitted that he carefully examined the circumstances of the identification evidence and found that the complainant had properly recognised the appellant. The issues in the case, counsel submitted, surrounded the correctness of the identification by the virtual complainant as well as his credibility.

[17] Counsel submitted that although the learned judge made reference to the use of a calendar, he also made it clear that he accepted the complainant's evidence and found him to be credible and reliable. Consequently, he also rejected the alibi of the appellant. The learned judge, counsel further submitted, had the benefit of assessing the complainant and observing his demeanour throughout the proceedings. Counsel cited **Andrew Campbell v R** SCCA No 148/2005, delivered on 18 December 2006 and **Freemantle v R** (1994) 45 WIR 312.

[18] On ground (c), counsel for the appellant submitted that the sentences imposed by the learned judge were manifestly excessive in all the circumstances. The usual sentence approved by this court for the use of firearms ranges between 10 and 15 years. Counsel argued that it was only in extraordinary circumstances that the court would go outside of this range.

[19] Counsel submitted that there was nothing in the appellant's antecedents that shows that he is a danger to society. He was an employer, and even for an extended period employed the complainant. There are no compelling reasons, he argued, for a sentence greater than the minimum of 15 years.

**Analysis on ground (b) and (c)**

[20] The main issues in this case were identification, particularly recognition, credibility and alibi. The learned trial judge, in his summation, rightly directed himself that in a case which depended heavily on the correctness of the identification of an accused person, special care must be taken in assessing the evidence of identification.

He warned himself that even when a witness purported to recognise someone he knew, he must remind himself that mistaken recognition of close relatives and friends is sometimes made. He also reminded himself of the danger of accepting the evidence of a sole eye-witness without corroboration.

[21] It is quite clear that the learned judge carefully assessed the circumstances under which the identification of the appellant was made and the relevant history between the parties. This was demonstrated through the learned judge's consideration of the complainant's claim that the appellant was standing about 7-8 feet away from him when he first saw him on the night in question. He also pointed to the approximate 90 seconds for which the complainant observed the appellant before he was shot. It was also pointed out by the learned judge that the parties knew each other for about 10 years and that the complainant had worked for the appellant for about four years in the past, facts which were not contested by the appellant. The learned judge therefore paid due regard to the **Turnbull** guidelines (**R v Turnbull** 1977 QB 224) as he took into account evidence as to distance, lighting, time, how long the complainant had the appellant under observation and how long the parties were known to each other.

[22] The learned judge reminded himself that in assessing a witness' credibility, he should observe the witness' demeanour and body language to help him determine the truthfulness or untruthfulness of his testimony. He clearly stated that he found the

complainant credible and reliable, and did not believe the alibi which was put forward by the appellant.

[23] In **Andrew Campbell v R**, the prosecution alleged that the appellant, at about 10:00 pm, armed with a firearm, shot and injured the complainant as he sat on a wall. The identification having being made by moonlight, it was argued on behalf of the appellant that there was no corroborative evidence in proof of moonshine that night. The court took the view that the learned trial judge gave himself the necessary identification warning and that it was not necessary to provide scientific evidence that it was a night on which the moon was out. As Panton JA stated, the case clearly depended on the credibility and reliability of the witnesses who gave evidence before the learned trial judge. The learned trial judge made it abundantly clear that he believed the complainant and did not believe the appellant and his witnesses.

[24] In **Charles Salesman v R** [2010] JMCA Crim 31, McIntosh JA stated that:

> "As the tribunal of fact, it was entirely a matter for the trial judge to assess the evidence and to decide who or what he believed. There was cogent evidence before him on which he could and clearly did rely and it is not the function of this court to substitute any findings of fact for those arrived at by the trial judge, especially without the benefit of the opportunity which he had to see and to assess the witnesses as they testified."

In the instant case, the same conclusion can be drawn as the record indicated that the learned judge considered the **Turnbull** guidelines, as earlier outlined, and similarly had the benefit of observing the conduct and attitude of the complainant as he gave his

testimony. There is therefore no basis for this court to interfere with the learned judge's conclusion on the credibility of the complainant.

[25] We are of the view however, that the learned judge stepped outside his purview by referencing the calendar to corroborate the complainant's evidence that there was a full moon on the night in question. By doing so, he was incorrectly taking judicial notice of the matter. However, while the nature of this corroboration was undesirable, it is clear that the learned judge sufficiently addressed the relevant principles and facts of the case in arriving at his decision. It is therefore a case where the proviso should be applied as there was no injustice to the appellant. Accordingly, we saw no merit in counsel's contention that insufficient and incorrect evidence was used in convicting the appellant.

[26] On the issue of sentence, we agreed with counsel for the appellant that it was manifestly excessive. We were of the view that the sentences imposed by the learned judge were outside the range of sentences normally imposed for such offences: see **Kirk Mitchell v R** [2011] JMCA Crim 1 and **Andrew Mitchell v R** [2012] JMCA Crim 1. We therefore reduced the sentences as stated in paragraph [3] above.

[27] It is for the foregoing reasons we refused leave to appeal against the conviction and allowed the appeal against the sentence.