[2017] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 37/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

MICHAEL BURNETT v R

Norman D Manley for the applicant

Jeremy Taylor for the Crown

6 February and 10 February 2017

MCDONALD-BISHOP JA

[1] On 28 February 2014, after a trial before G Fraser J, sitting without a jury in the High Court Division of the Gun Court in the parish of Clarendon, Michael Burnett, the applicant, was convicted on an indictment containing three counts. The first count charged him with the offence of illegal possession of firearm; the second count charged him with illegal possession of ammunition; and the third count, with the offence of robbery with aggravation.

[2] The combined particulars of the three counts, in summary, are that on 3 December 2011, in the parish of Clarendon, he had in his possession a firearm and

ammunition, not under and in accordance with the terms and conditions of a Firearm User's Licence and being armed with the said firearm and ammunition, he together with another man, robbed Noel Scott of his 9mm taurus pistol, ammunition, a Nokia cellular phone and an undetermined sum of money.

[3] The applicant was sentenced to eight years imprisonment at hard labour on counts one and two and 15 years imprisonment at hard labour on count three. The sentences were ordered to run concurrently.

The application for leave to appeal

[4] The applicant, being aggrieved by his conviction and sentence, filed an application to this court for leave to appeal both his conviction and sentence. The application was considered and refused by a single judge who opined that the issues in the case revolved primarily around identification and credibility and that those issues were adequately dealt with by the learned trial judge. The applicant has renewed his application before this court.

The case at trial

The prosecution's case

[5] The prosecution called six witnesses, however, as enunciated by the learned trial judge herself, the prosecution's case rested primarily on the evidence of the virtual complaint, Mr Noel Scott.

[6] The salient facts pertinent to this appeal, as presented by the prosecution, are that on 3 December 2011, at about 9:25 pm, the complainant was at his business place in Four Paths in the parish of Clarendon. He was standing inside a bar. Whilst there, he saw a man, who later turned out to be one, Tremain Clark, who he did not know before, standing in the corner of the bar. The complainant then noticed the applicant, who he also did not know before, enter the bar. The applicant spoke to the complainant saying, "Howard you fi dead yuh know bwoy" and then brandished a gun and pointed it in his face. He told the complainant that one "Tony Tuff" said that he should take the complainant's gun and kill him. While the applicant spoke to the complainant, he observed that Tremain Clark was still standing in the corner of the bar, and had a 9mm Glock gun.

[7] The applicant subsequently stepped away from the complainant, and Tremain Clark then approached the complainant and took from him, his licensed 9 mm Taurus gun, wallet and Nokia cellular phone. Tremain Clark and the applicant then left together.

[8] The complainant kept the men in sight as they left the bar and went through the gate of the premises. He entered his mini bus that was parked in the compound, drove off after the men and then used his vehicle to hit them to the ground on the main road, as they tried to make their getaway. The men fell in the road. When the complainant saw that the men were not moving, he drove to the Four Paths Police Station where he made a report. He then returned to the section of the roadway where he had hit the

men, having been told that the police were on their way. After waiting at the scene of the accident for the arrival of the police and not seeing them, the complainant returned to the police station. Whilst at the police station, he saw one, Adolphus Swaby, arrive and handed in a gun which was said to be similar to the one described by the complainant, as being in the possession of the applicant. Adolphus Swaby gave his account to the police that he had found the gun near the hand of one of the two men who had been hit down, while they were lying on the scene.

[9] The complainant drove to the May Pen Hospital (which he referred to as the Denbigh Hospital) where he saw both the applicant and Tremain Clark lying on separate beds at a section of the hospital. He pointed both men out to Sergeant Cleveland Reid of the Four Paths Police Station as the two men who had held him up at gun point and robbed him of his property.

[10] Sergeant Reid testified that he participated in having the applicant and Tremain Clark removed from the scene where they were hit down and brought to the May Pen Hospital. He said that at the hospital, he saw the complainant who informed him that the two men who had just been taken to the hospital had robbed him of his licensed firearm.

[11] Constable Fredi Ferguson gave evidence that he was stationed at the Four Paths Police station at the material time, and having received information whilst on patrol in the Four Paths area, he proceeded to the May Pen Hospital. On arriving at the hospital,

he made enquiries and was directed to a room where the applicant and Tremain Clark were seen. He searched both men and removed from the person of Tremain Clark two Nokia cellular phones. He took the phones to the Four Paths Police Station where the complainant, he said, identified them as belonging to him. The complainant was later taken to the hospital where he identified the phones in the presence of the applicant and Tremain Clark.

[12] The applicant was later arrested and charged and upon being cautioned, he made no statement.

The applicant's case

[13] The applicant gave an unsworn statement from the dock. He stated that on the night in question he was at a street dance in Four Paths standing in the roadway. He turned his back to the road, when he felt an impact from behind. He knew nothing after that until he awoke in the May Pen Hospital, where a police was asking him about the robbery. He told the police that he knew nothing about the robbery. The police searched him and found nothing. The police asked him if he knew Tremain Clark and he told the police no. The applicant called no witnesses.

The grounds of appeal

[14] The applicant filed two original grounds of appeal:

"1) Unfair Trial:–That the verdict is unreasonable, having regard to the Evidence

2) That the Sentence is manifestly excessive - That additional Grounds of Appeal will be filed on receipt of the Notes of Evidence"

[15] At the hearing of this application, Mr Manley, appearing for the applicant, was permitted to argue two supplementary grounds in connection to and as an expansion on ground one of the original grounds of appeal, being:

"1. The Learned trial judge failed to fully examine the implications of the quality of the evidence of identification at the hospital, and in particular the cogency of the complainants [sic] evidence of identification having regarded to circumstances under which the complainant identified the [applicant] at the May Pen Hospital.

2. The Learned trial judge failed to explain or reconcile the differing accounts given by the complainant and the Investigating Officer present at the purported identification and as to why the complainant was at the hospital in the first place."

[16] Mr Manley also advised the court that he would abandon the original ground two that the sentences were manifestly excessive. The court agreed with that position for reasons that will be disclosed later. Leave was therefore granted for the applicant to abandon his application for leave to appeal against sentence.

Submissions

[17] Mr Manley, in advancing the arguments in support of the grounds, submitted, inter alia, that no credible explanation was given by the complainant for going to the

hospital; as to how he came to be on the ward that the applicant was on; how he was able to identify the applicant on the ward at the hospital; and why Sergeant Cleveland Reid "coincidentally and by happen stance" met him at the hospital after he had pointed out the applicant. This, learned counsel submitted, amounted to the identification of the applicant "being confirmed by highly speculative circumstantial evidence". He contended that the explanations given by the complainant and Sergeant Reid defy credibility and leave open the question of whether the identification of the applicant at the hospital was done in a "fair, open and honest way" and, in particular, whether it was a sufficient test of the ability of the complainant to describe his assailants.

[18] Learned counsel maintained that the learned trial judge's reference to the identification of the applicant at the hospital as "spontaneous" is not supported by the evidence. Mr Manley argued that "elements of confrontation" arose on the evidence, although it was not specifically raised by the defence during the trial and so it was the duty of the learned trial judge to consider, in particular, whether there was a fair test of the complainant's ability to recognise the applicant at the material time. He added that the burden was on the prosecution to establish that the witness' ability to recognise the applicant who robbed him was fairly tested. This burden, counsel submitted, was not discharged.

[19] In response, on behalf of the Crown, Mr Taylor, relying on the decision in **R v Gilbert** (1964) 7 WIR 53, sought to remind the court that the general principle in instances where it appears that the evidence against a person suspected of committing

an offence depends to a great extent on identification, there is a "distinct duty upon the police to take every care to see that the witness who is going to identify that person is not brought into proximity with him before the identification parade is held".

[20] Mr Taylor however contended, and rightly so, that authorities, such as **R v Trevor Dennis** (1970) 12 JLR 249, have affirmed, that there are exceptions to this general principle depending on the particular circumstances of a case, having regard to such matters as the elements of time and distance between the offence, the description to the police, and the apprehension and identification of the perpetrator. He further noted that evidence of identification by confrontation, is admissible and that its probative value must perforce depend on the circumstances under which the identification was made, including whether or not it was voluntary and spontaneous.

[21] In making his submissions, Mr Taylor pointed out several factual occurrences, which he contended would be useful in finding that the identification of the applicant was correct. They are as follows:

i. At no time did the applicant mention seeing the complainant at the hospital in his unsworn statement. In fact, he only mentioned interacting with the police at the hospital.

ii. The complainant used his motor vehicle to hit the applicant to the ground near to where he had been robbed and Sergeant Reid went to the accident scene and confirmed seeing both men on the ground.

iii. The complainant identified both men within an hour and a half of having hit them down with his motor vehicle.

iv. The complainant went to the hospital and it was there that he met Sergeant Reid. Importantly, there was no evidence of any collusion between the complainant and the Sergeant.

v. The identification was spontaneous and unaided.

vi. The account of the identification by the complainant was cogent and compelling and satisfied the requirements as outlined in **Turnbull and Another** [1977] QB 224. While the complainant may have been inconsistent in relation to his observations, it is clear that it was not a fleeting glance during the course of the robbery and he only lost sight of the men during the times he went to the police station.

[22] Mr Taylor argued further that there is no merit in the grounds of appeal as the circumstances of this case, when examined closely, do not amount to it being one of confrontation identification that would have required any direction from the learned trial judge on that issue.

[23] In making his submissions, Mr Taylor quite helpfully directed the court's attention to the dicta from several authorities treating with the issue of identification of a suspect, to include **Narine Ramroop v R** (1960) 2 WIR 259; **R v Chapman** (1911) 7 Cr App Rep 53; **The State v Mohamed Khalil** (1975) 23 WIR 50; **R v Barrington Maxwell** (1982) 19 JLR 333; **Williams (Noel) v R** (1997) 51 WIR 202; **Brown (Ian) and Isaac (Everett) v The State** (2003) 62 WIR 440 and **R v Brown (Gavaska), Brown (Kevin) and Matthews (Troy)** (2001) 62 WIR 234.

Issue

[24] We have duly taken into account the illuminating submissions made by counsel on both sides, along with the principles distilled from the authorities cited, although we have not detailed them in our findings. We have also thoroughly examined the detailed summation of the learned trial judge in our effort to determine whether there is merit in the grounds of appeal.

[25] Having done so, we are of the view that although the applicant has proffered two grounds of appeal, they can be joined and treated as one, since they both give rise to a single issue for consideration. The single point for consideration, in our view, is whether, the issue of identification of the applicant by confrontation arose on the evidence so that there was the need for the learned trial judge to have properly directed herself in this regard and having failed to do so, had misdirected herself in law, thereby rendering the conviction unsafe.

Reasoning and findings

[26] Mr Manley's attack is clearly concentrated at what transpired at the hospital in relation to the identification of the applicant to the police. This is noteworthy because there is no complaint concerning the quality of the evidence surrounding the initial identification of the applicant at the time of the commission of the offence. There is no question that the quality of the identification was good and that the evidence of identification remained strong up to the end of the case for the applicant. The

applicant's complaint, therefore, is with the method employed by the complainant in identifying him to the police. Mr Manley's argument is that it was improper and unfair. It is necessary to first examine the law relating to the identification by a witness of a suspect to the police, which is well established.

[27] The principles that have been distilled from the various authorities cited by Mr Taylor may be outlined thus:

i. The identification of a suspected person must be carefully conducted.

ii. The usual and proper way is to conduct an identification parade in which the suspect is placed with a sufficient number of other persons similar in gender, appearance and the likes and to have the identifying witness pick out the suspect without assistance.

iii. The object of an identification parade is to make sure the ability of the witness to recognise the suspect has been fairly and adequately tested, and every precaution should be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witness' attention being directed specifically to one suspected person instead of equally to all persons on parade.

(iv) It is quite wrong to suggest to the witness that the prisoner was believed by the authorities to be the offender. Nothing should be done to influence or affect the recollection of the witness and thus destroy the value of the evidence of identity.

(v) Outside of an identification parade, other methods of identification, even if sometimes undesirable, are nevertheless accepted by the court, with sufficient safeguards.

(vi) The courts have deprecated confrontation that is contrived by the police to circumvent the safeguards of the Identification Parade Regulations 1933. Confrontation is where the police confront the identifying witness with the suspect in order to have the witness verify that the suspect was the assailant. The sort of confrontation that is denounced is the tendency for the police to confront a suspected person with the person who is required to identify him in circumstances in which it is possible for the identifying witness to say that he merely came upon him.

[28] In **R v Leroy Hassock** (1977) 15 JLR 135, Melville JA (Ag) stated:

> "Confrontation should be confined to rare and exceptional circumstances, such as those in **R v Dennis** [(1970) 12 JLR 249], where the court would perhaps not be inclined to frown too unkindly on the procedure adopted there. Although it is always difficult to formulate universal rules in these circumstances, where the facts may vary so infinitely, a prudent rule of thumb would seem to be: where the suspect was well known to the witness before, there may be confrontation. That is, the witness may be asked to confirm that the suspect is the proper person to be held. If the witness did not know the suspect before, then the **safe course to adopt would be to hold an identification** parade, with the proper safeguards, unless of course there are exceptional circumstances" (Emphasis added)

[29] The dicta of this court in **R v Brown (Gavaska) and others** also provides some further guidance as to the circumstances in which confrontation identification would be acceptable. Smith JA stated:

> "In an identification case in Jamaica, where the suspect is well known to the identifying witness, confrontation for the purpose of identification is permissible, except where the suspect asks for an identification parade. In order to ensure fairness, any such confrontation should be conducted as follows: (i) before the confrontation takes place, the identification officer must tell the witness that the person he saw may, or may not, be the person he is about to confront and that if he cannot make a positive identification he should say so; (ii) before the confrontation takes place, the suspect or his attorney at law must be provided with details of the first description of the suspect given by any witness who is to attend the confrontation; (iii) the confrontation should take place in the presence of the suspect's attorney at law, unless this would cause unreasonable delay; and (iv) the suspect should be confronted independently by each witness, who should be asked 'Is this the person?'...."

[30] In the instant case, there was no identification parade and nothing done in keeping with the procedure prescribed in **R v Brown (Gavaska) and others** and so, the crucial question is whether the absence of such approved methods of identification should vitiate the conviction, in the absence of directions from the judge on the issue of confrontation. Indeed, Mr Manley's concern raises the question as to the other ways in which the witness' ability to identify his assailant could have been honestly, fairly and properly tested outside of a formal identification parade, in the circumstances of this case.

[31] We have considered it necessary in the light of the authorities and counsel's submissions to carefully examine the evidence, primarily, as it relates to the identification of the applicant at the hospital. It is clearly seen from the complainant's account of what took place at the hospital that he had travelled to the hospital with a friend and not with Sergeant Reid. On arriving at the hospital, he observed the applicant in a room with Tremain Clark through a glass section of a door that led to that section of the hospital. The applicant was in the presence of about seven men, including porters. He called Sergeant Reid's attention to the applicant. Of importance is that it was after his own independent observation that he called the police and pointed out the applicant as one of his assailants.

[32] Sergeant Reid's evidence confirms the complainant's evidence, that the complainant was the one who pointed out the applicant to him. He stated that while he was at the out-patient section of the hospital he was called outside by the complainant;

"[he] opened the out-patient door and the complainant told [him] that...the two men that I just took to the hospital were the said two men who had robbed him".

[33] Nowhere in the account of either the complainant or Sergeant Reid is there any evidence of the police confronting the applicant with the complainant. The police officer's attention was actually directed to the applicant by the complainant without any prompting or assistance whatsoever.

[34] Mr Manley's argument that there was a discrepancy between the evidence of the complainant and Sergeant Reid, as to what transpired at the time of the identification at the hospital, is rejected. The only difference is how the witnesses described where the men were when they were pointed out. Sergeant Reid said he was in the outpatient department when he was called outside by the complainant while the complainant said that he was looking into a 'ward' through a glass in a door but he did not know what kind of ward it was but he saw the men on beds. The portion of Sergeant Reid's evidence that he said that the witness told him that the men he 'just took to the hospital', which is emphasised by Mr Manley, is of no moment to establish a discrepancy, because Sergeant Reid was not stating verbatim what the complainant had said to him.

[35] Both witnesses were consistent that it was the complainant who had called Sergeant Reid in order to direct his attention to the men and not the other way around. There was therefore no need for the learned trial judge to have highlighted and seek to

resolve any discrepancy on those aspects of the evidence, so that her failure to do so would amount to misdirection.

[36] Even more importantly, there was absolutely no evidence that Sergeant Reid spoke to the complainant prior to him pointing out the applicant at the hospital. There is no evidence that the complainant had seen the men when they were brought in by the police. Mr Manley spoke about the entry of the police to the hospital with sirens blaring as a possible way of directing the witness' attention to the men, but all this is speculative. The facts do not lend support to any argument of there having been a prior arrangement between the police and the complainant for the complainant to identify the applicant. There was nothing to point to any under-handedness with the witness being at the hospital at the same time as the police.

[37] Mr Manley also submitted that there was no explanation from the complainant as to his reason for turning up at the hospital after the men were taken there. These questions, however, were never asked of the witness and no suggestions were put to him at the trial concerning such matters. He was never afforded the opportunity to respond to the matters now being raised by Mr Manley. The facts of the case may seem strange or uncommon but what is clear, is that this complainant was rather proactive and evidently adamant in having his case investigated and his assailants arrested. He had the fortitude and the tenacity to go the extra mile to ensure his assailants were caught. The evidence points to a witness who had a deep interest in the outcome of his case. That could well have been prompted by the fact that it was his firearm that

was taken. So, given his behaviour that night, there is nothing unusual about his evidence that of his own volition he went to the hospital to look for the men. Given the fact that he was never challenged at the trial as to the circumstances attendant on his identification of the applicant at the hospital, his credibility cannot now be impugned on appeal on the basis of mere speculation as Mr Manley is asking this court to do.

[38] We find that it was open to the learned trial judge to find, as a fact, that the prosecution witnesses spoke the truth as to how the complainant came to be present at the hospital and how the applicant was subsequently identified to the police. Once the learned trial judge accepted that evidence as true, it was a question of fact for her and this court could only interfere if it is found that she was palpably wrong in coming to her finding on the question of whether the identification was proper.

[39] In looking at the summation of the learned trial judge, we do observe that she made no mention of the word confrontation and this is understandable, because nowhere on the facts as presented, did confrontation arise as an issue that merited special attention and warning from the learned trial judge. What she did say was:

> "It does not bring anything more to the table the absence of any identification parade being held [it] also does not bring anything more to the table having regard to the circumstances of this **spontaneous** or **proported** [sic] **spontaneous identification** applied by Mr. Scott.
>
> ...I am satisfied so that I feel sure that the identification purportedly made by Mr. Scott is correct and that this accused man was one of the two men that **he saw in the**

> **shop, in the bar on the night in question**." (Emphasis added)

[40] It is clear from the learned trial judge's summation, that she did consider the method of identification of the applicant and gave thought to the necessity or desirability of an identification parade as the preferred method of identification. She found, however, that the absence of such a parade did not affect the case, as she puts it, "it does not bring anything more to the table", having regard to the "spontaneous or [purported] spontaneous identification applied" by the complainant. She clearly had at the back of her mind a distinction to be made between an uninfluenced, spontaneous identification and one contrived, prompted, influenced, or aided and abetted by the police, which is deprecated by the court. Her choice of the word "spontaneous" does serve to reveal her thought process on the matter. She noted the peculiarity of the identification method employed and found it to be satisfactory.

[41] The fact that the learned trial judge therefore found the identification at the hospital to have been spontaneous meant she accepted the complainant and Sergeant Cleveland Reid as witnesses of truth when they spoke to how the applicant was identified. There was nothing to challenge the honesty and fairness of that identification. The learned trial judge therefore cannot be faulted in saying that the absence of an identification parade did not adversely affect the case. It would have served no useful purpose in the circumstances.

[42] It is to be noted further, that the leaned trial judge, in concluding that the applicant was properly identified, also took into account the other instances when the complainant would have had the opportunity to observe the applicant. Those instances were (i) at the bar and (ii) when he observed the applicant on the roadway (after he hit him with his motor vehicle). The complainant would have observed the applicant within the context of a continuous incident that unfolded within a relatively short span of time.

[43] We are therefore propelled to find, on the strength of the relevant authorities, and in the light of the unusual circumstances of this case, that the identification of the appellant at the hospital was proper. It could not have been tested in any other way as contended by Mr Manley in the light of its clear spontaneity. The fairness and honesty of the identification was never compromised.

[44] We conclude, therefore, that the learned trial judge adequately and correctly instructed herself on matters of both law and fact and so her ultimate finding, as to the guilt of the applicant on all three counts on the indictment on which he was charged, is unassailable. There is no merit in the grounds of appeal. Accordingly, the application for leave to appeal conviction is refused.

Sentence

[45] The applicant had also made an application to appeal his sentence, which was abandoned. Mr Manley candidly conceded that given the antecedent history of the applicant, which involves a previous conviction for an offence against the person, he

could not properly urge on the court that the sentence of 15 years imposed for robbery with aggravation or any of the other sentences were manifestly excessive.

[46] Mr Manley's concession was appropriately made as we found that the sentences were well in keeping with the range of sentences for these offences for an offender like the applicant, with a previous conviction for an offence against the person.

[47] The only comment that we would wish to make is that the learned trial judge had erroneously stated that there is a statutory minimum of 15 years for the offence of robbery with aggravation given the use of the firearm. There is no statutory minimum under the Larceny Act, which provides the maximum penalty of 21 years for robbery with aggravation. The statutory minimum of 15 years would apply to an offence committed under section 25 of the Firearms Act. The applicant was not charged pursuant to that section. However, notwithstanding that error on the part of the learned trial judge, there is no basis on which to disturb the sentences imposed.

Disposal

[50] Accordingly, the order of the court is as follows:

(i) The application for leave to appeal conviction and sentence is refused.

(ii) The sentences are to be reckoned as having commenced on 9 April 2014.