JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 50 OF 2002

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

R.V. NEWTON CLACHER

Valerie Neita-Robertson for the Appellant

Marjorie Moyston for the Crown

July 23, 24 and September 29, 2003

COOKE, J.A. (Ag.)

Apparent simplicity may camouflage underlying complexity. And so it is in this matter. The prosecution's case was straightforward. On the 19th December, 2000, at about 8 p.m. Cedina Grant, a cosmetologist, was standing by a column in Little Premier Plaza in Kingston. She had just left work from one of the shops (No. 20) in the plaza and was awaiting the arrival of her boyfriend. A man came up to her and demanded her bag. This man had a rusty gun and when she, Grant, looked into the eyes of her assailant and saw that "it was serious," she handed over her bag. The robber then headed to the back of the plaza. Apparently, the exit gate at the back was closed and so the robber began to retrace his steps. This

is how the transcript at pages 5 to 7 records the immediate sequence thereafter through the lips of Grant.

"MISS LOBBAN: When you say head to the back of the Plaza.

A. It was taken to the back of the Plaza.

Q. There is a back entrance?

A. Yes, the back gate was closed at that time. I moved up to where the security were.

Q. Hold on a minute. So the back would lead you to Half-way-~~Tree?~~

A. Yes.

Q. Which hand were you holding the bag with?

A. I had the bag in my left hand. I said "Give me my bag, give me my bag."

HIS LORDSHIP: Yes.

MISS GRANT: That is what I said, "Give me my bag," he said I must go away. I turned to Sammy, he has my bag, I need my bag.

HIS LORDSHIP: Yes.

A. Then security move at him and he flash out the gun from his waist.

MISS LOBBAN: Flash out a gun from his waist?

A. Yes, and he fire ...

MISS LOBBAN: You see the direction in which he fired?

A. Direction in which he fired? He fired in the air, that is the direction he fired and then he turn towards me now and I ran in the store.

HIS LORDSHIP: He ran towards you, what he did?

A. Security rush at him and he buss the shot. I was standing this way (indicating) and he turned towards me and then I ran."

The "security" of which Grant speaks were members of Security Service Centre Limited. The personnel of that company who were present were a supervisor, Oral Brass, Owen Williams and Devon Powell. They all gave evidence of which the central thrust was that the appellant was accosted with Grant's bag. The former fired at Owen Williams and a gun battle ensued. The appellant was wounded and cornered in Little Premier Plaza. It was at this stage that the appellant revealed that he was a police officer as he begged for his life. Grant in her evidence said she identified the wounded appellant as the person who robbed her of her bag. She further said that on the night she never at anytime lost sight of him. The bag was recovered. So on the case for the prosecution the

robbery and the apprehension of the robber took place within a short compass of time.

The appellant gave evidence at the trial. At that time he had been a Special Constable for some 1½ years and was stationed at Harmon Barracks. Having returned from his assignment in the morning he returned to Harmon Barracks. There he got permission to retain the firearm which he then had in his custody. He withdrew money from a machine and set off to purchase materials for his "baby mother". He entered Little Premier Plaza when he was confronted by three men with guns in their hands. The record at pages 143 ~~to~~ 147 further recounts the appellant's account of what happened:

> "Q. Did they say anything else to you – well, tell us what happened, they approached you with guns in their hands and said, "Don't move".
>
> A. Said, 'Wey you do wid the lady bag?"
>
> Q. Did you respond?
>
> A. I said, "Bag, which bag? By the way you know who you a talk to, I am a police officer."
>
> Q. And say what?
>
> A. I said, "By the way you know a who you a talk to? Who you think you a talk to? I am a police officer."
>
> MR. WILLIAMS: What happened next?

MR. CLACHER: One of them say if you a police show me you I.D.

MR. WILLIAMS: And you still had your gun on you?

A. Yes, sir.

Q. What happened next?

A. One of them say, if you a police which part you station.

Q. Yes.

A. I said that I was stationed at Harmon Barracks and that I am assigned Beat duty.

Q. What happened next?

A. I told him that I was a Special Constable.

Q. Did you show them your ID?

A. Yes, I show them my identification booklet and in showing them one of them try to grab it away from me.

Q. Yes.

A. He looked pon it and say, "Bwoy you look like this pon the picture? You nuh look like this."

Q. What happened next?

A. I say, "By the way me a police, wey you a question me fah, ge me back me ID."

Q. You said that?

A. Yes, and grab after the ID and one a dem juck me wid the gun and shortly after ...

HIS LORDSHIP: After, he got it?

MR. CLACHER: He didn't get it.

HIS LORDSHIP: And did what?

MR. CLACHER: Juck me wid the gun in a me shoulda.

HIS LORDHSIP: If the witnesses are still here they can come inside.

MR. WILLIAMS: Yes.

A. And then I heard an explosion after that.

Q. You heard an explosion?

A. Yes, sir.
(The Witnesses who had given evidence sit in Court)

Q. After the explosion what happened?

A. I realized I was shot.

Q. Where were you shot?

A. In the shoulder.

Q. You realized that you were shot in the shoulder?

A. I fell to the ground.

Q. You do anything?

A. I pulled out my service revolver

Q. Which hand you used to pull it out?

A. My right hand.

Q. And did you do anything?

A. Yes, I fired one shot in the air.

Q. And having fired a shot in the air, what next happened?

A. I got up and ran off.

Q. Yes, you turn around to look at the judge, don't look at me. You got up and ran off?

A. I ran off and returned the fire.

Q. When you returned the fire what you mean?

MR. CLACHER: At this time the men were firing a barrage of shots at me.

MR. WILLIAMS: These men were firing a barrage of shot at you. When you say return the fire, did you in fact return the fire?

A. (NO ANSWER)

Q. Now, you said – I asked you what you mean when you said they were firing a barrage of shots, did you in fact return the shots, did you return the fire at them?

A. No, sir, I got injured.

Q. You tried to return fire ...

MISS LOBBAN: That is leading

HIS LORDSHIP: Mr. Williams.

MR. WILLIAMS: I am sorry M'Lord. Let me just back up a little. We are at a point of a barrage of shots being fired at you, tell the Court what happened.

A. I got up and I ran off and I was shot again, I was down on the ground.

Q. You were hit again, where?

A. The knee.

Q. And you were down on the ground again and then what happened?

A. That time some people was gathered.

Q. How many times you were hit in all of this?

A. Four times.

Q. Where were you first hit, on your shoulder?

A. In the shoulder, one in the leg, one in the knee and when I was down on the ground they fired a shot, it go through my shoe, the back.

He further said that on that night he had on "a tall brown sleeve shirt with collar and blue jeans".

Arising out of this incident the appellant was indicted in the High Court Division of the Gun Court and found guilty on four counts:

(i) & (iii) Illegal possession of firearm
(ii) Robbery with aggravation
(iv) Shooting with intent

In respect of the counts pertaining to illegal possession of firearm the sentence was one of three years imprisonment. As regards the other two counts the term of imprisonment was five years on each count. All the sentences ~~were to~~ run concurrently. ~~The appellant~~ now challenges the correctness of his convictions. A single judge of this Court granted leave to appeal against the convictions and sentences on Counts (i) and (iii) on the basis that they appear to have been duplicated. The duplication was obvious when it is considered that the offences were part of one transaction. However, when the matter came on for hearing before us, we granted leave to argue the appeal generally. Before the complaints are addressed, it is necessary to set out the focal consideration of the learned trial judge. It is to be found at pages 214 to 215 of the transcript where he said:

> "She said when he had touched her with the firearm she turned around, and to get a much better look, she looked in his eyes, she saw his face, she said that in the period of time she was in his presence before he went, before she ran inside the shop. I have to look at all those

> circumstances to see whether in fact she had sufficient opportunity of identifying who her assailant was and bear in mind that she had said, which I accept, the fact that she never lost sight, she never lost sight of the accused man. It is not a case where some time has passed or she was somewhere else, she never delayed. As how the evidence unfolded, she was set upon, she sees the man she keeps looking at him, she alerted the guard, she points him out to the guard, she sees the commencement of the action between himself and the guards and she says at a point she comes back to see the same man who she said held her up and took away her bag coming out.
>
> These issues about the lighting and all the other things, in my respectful view in relation to this case are of no importance, but even if they were, when one looks at the lighting of the trees, I find that there was sufficiency of opportunity for her to properly identify who her assailant was. I go further to warn myself that persons have come before this court and all throughout the jurisdiction who positively identified persons and as it turned out it is said that a mistake has been made and I caution myself and I bear in mind that, that is before me.
>
> Having done all, I am satisfied that Cedina Grant saw the person who robbed her, saw the accused man, she kept her eyes on him until he was accosted by the security guards when she came out and identified him."

From this passage of the summation it is manifest that the learned trial judge placed very great reliance on the veracity and credibility of Cedina Grant. It does seem somewhat curious that he accepted that "she never lost sight of the accused man" when earlier in the summing up at page 196 he said this:

"Having formed the view that he was serious and the gun at her side she handed him the bag. She said she was drifting back away from him at this time, he head to the back of the plaza and she said that in that area was a gate, the gate was closed. Now, this is rather interesting, this bit of evidence, because when you go to that gate Counsel is putting that out of sight of the virtual complainant, Miss Grant could not have seen from where she stood, from where she was accosted; that if the man who assaulted her, in fact robbed her had proceeded to that gate he would have been out of sight. She is going through all of that to say that she never lost sight of him, but in fact when one looks at it objectively she probably would have lost sight of the man. In any event she never went around there."

Ground 1 as filed was in these terms:

"A. That the Learned Trial Judge failed to adequately identify, examine, and analyse the several issues relating to identification as is required having regard to guidelines laid in **R vs Turnbull**, in that:

(i) he failed to identify the specific areas of weakness in the evidence relating to identification and furthermore, he failed to assess, the effects of those weaknesses,

(ii) he failed to identify the many inconsistencies and discrepancies in the evidence relating to identification and to demonstrate how he resolve (sic) them in coming to his determination of guilt.

That this failure by the Learned Trial Judge's (sic) amounts to a mis-direction in law, thereby rendering the verdicts of guilty unsafe."

The burden of this ground is A (ii) *supra*.

Dress of Robber

On page 36 of the transcript Cedina Grant made it unequivocally clear that her assailant had on a short-sleeve T-shirt with "polo neck". Owen Williams in his evidence-in-chief said at page 71 that the appellant was in a dark green short-sleeve ganzie. However, he admitted that in his police statement he said that the appellant was dressed in "dark tall sleeve shirt and pants". The evidence of the appellant was that he had on a "tall sleeve brown shirt". The learned trial judge recognized that a significant issue had been joined. In his summing up at pages 207-208 he said in reviewing the evidence of Owen Williams:

> " HIS LORDSHIP:
>
> ... And he went on to say, and this is an area that defence really moved into, he said that he was in a short sleeve ganzie, he said that the man had on a dark green shirt, black pants and black hat. I see dark peak cap and dark short sleeve. Then he was shown his statement which states that it was a tall sleeve shirt and not short sleeve shirt as the witness said also, he said when it was shown to him, I was not lying when I said that he had on a short sleeve shirt, he did not give any explanation as to how it was tall sleeve came into the statement which he would have given immediately after. The Defence Counsel is saying that my client was in tall sleeve the person who robbed the virtual complainant was in short sleeve, clearly it can't be the same man. It is straight, was this material to the extent that it affects the entire evidence of the witness, bearing in mind that this is the evidence we have before us, is the evidence in this court. I take note."

This issue of the attire of the appellant was most relevant as whether the person apprehended by the security guards was indeed the person who robbed Grant. The whole incident took place within a short span of time. It was all in one location. The appellant, to repeat, said he had on a tall sleeve shirt. In these circumstances it was incumbent upon the learned trial judge to come to some resolution. Merely to "take note" did not discharge his judicial responsibility.

Did Cedina Grant identify the appellant on the night of the robbery?

A necessary starting point is to reproduce from the record at pages 30 to 31 part of the cross-examination of Grant.

"Q. But the statement you gave the night of the incident, the night of the incident was given at the station was it?

A. If it was at the station that night?

Q. Yes.

A. Yes, sir.

Q. And I am suggesting that in that statement ma'am, nowhere did you ever say that you identified the man who robbed you. In fact, what you said, you "... would be able to identify him if I see him again." You gave a description of this man and said that "If I see him again I would be able to identify him."

Nowhere in your statement did you say that you identified anyone, you said, "If I see him again ..." you would be able to identify him.

MR. WILLIAMS: Am I correct that in that statement you gave to the police the night of the incident what you said was that, "If I see him again I would be able to identify him"?

MISS GRANT: Yes, sir.

Q. And I am saying secondly, that nowhere in that statement did you say that you identified that man that night at any time.

A. I identify him.

Q. I am suggesting to you that you did not.

HIS LORDSHIP: The Counsel is suggesting to you that the evidence you gave to the police did not say anything about your identifying the man, the evidence in that statement says that you can identify the man.

A. I don't remember Your Honour.

HIS LORDSHIP: And the second thing that the Counsel is putting to you is that in fact you didn't identify him that night at all.

A. Yes, sir, I identify him, yes Your Honour

MR. WILLIAMS: And I am suggesting to you ma'am, that if you had in fact identified him that night that you would have said so in your statement.

MISS LOBBAN: M'Lord, I think that is an argumentative question having regard to what she answered before. He is suggesting a possible reason I think to the previous question, that is argument that the counsel can put at the appropriate time.

HIS LORDSHIP: Yes."

This extract contains an admission by Grant that in the statement she gave to the police on the night of the incident she did say, "If I see him again I would be able to identify him." This is the witness who swore that she identified the appellant on the scene. Her admission as to what was in her statement was a material inconsistency which was relevant to the assessment of her credibility. This is how the learned trial judge at page 201 stated it:

> "She gave her statement, she said she did not tell the police that, 'If I see him again I would be able to identify him. I don't remember if my statement said I identified the man' but it was suggested to her because in your evidence in chief it come out when the police came in the shop and took her out, she came out there and identified the man and her bag.

> It was suggested to her that in her statement she said that she would be able to identify him if she saw him again. She said she can't remember if the statement she gave to the police had said that. It was suggested to her that it did. She said perhaps it was there but she has never done so."

In his treatment of this part of the evidence the learned trial judge appears not to have recalled the admission made by Grant. This resulted in the failure to deal with an important aspect of the case – especially as the learned trial judge had placed such confidence in the testimony of Grant. If she identified the appellant at the scene why did she say in her police statement, "If I see him again I would be able to identify him?" There had to be a resolution of this inconsistency and there was none.

Did the appellant have Cedina Grant's bag?

A foundation plank of the prosecution's case was that the robber was cornered soon thereafter with Grant's bag. However there were conflicts in the evidence as to:

a) how the appellant carried the bag;

b) what was said to the appellant; and

c) how the bag was recovered.

In respect of (a) Cedina Grant said the appellant had the bag in his hand. Owen Williams and Oral Brass had the appellant carrying it over his shoulder whereas Devon Powell said the bag was by the waist.

As to (b) Owen Williams said to the appellant: "Security don't move, gi the lady him bag." Oral Brass supported Williams in this regard. Brass was

confronted with his police statement where he admitted he had said : "He (Williams) then asked the man where is the woman's bag?" This coincides with the appellant's evidence that he was asked, "Wey you do with the lady bag?"

In relation to (c) Williams in his evidence said that the appellant dropped the bag and one of his colleagues took it up. In his police statement, which Williams agreed, he said that he had taken the bag from the appellant. Williams' explanation for the inconsistency was:

> "On that night I was very nervous and maybe I was nervous and think maybe I could oversee and sign because being there and that situation my brain was not clicking, my brain was lock."

The cumulative effect of these conflicts, bearing in mind that the appellant's possession of the bag must have been of telling effect, required consideration. In so far as the learned trial judge addressed these issues he said at page 210:

> "I find as a fact that the Defendant when checked was asked about the bag, did in fact react in the manner, in the way it is said that he did. He was cross-examined at great length, said that he saw a black hand bag, about thirty people were there. And Mr. Powell came and in keeping, in line with the others said the man pulled a firearm and fired, a bag was under his arm. I don't think that discrepancy is significant, whether it is over the shoulder, under the arm or in his hand, it is immaterial. He dropped the bag, ran up the corridor firing shots, the security guards chased after him, ran down on him;..."

It does appear that the learned trial judge did not appreciate the significance of the conflicts within the context of the case. This non-appreciation has resulted in a mis-direction in law. There is merit in respect of Ground 1 of this appeal. The learned trial judge has not demonstrated that he sufficiently identified the salient issues and applied the proper judicial approach. See **R v Alex Simpson**; **R v McKenzie Powell** SCCA Nos. 151/88 and 71/89, delivered on the 5th February, 1992 (unreported).

Grounds 2, 3 and 4 were not pursued and no mention will be made of them. Ground 5 is in these terms:

> "That the Learned ~~Trial Judge failed~~ to give himself the proper directions as to propensity and likelihood of having committed the offence as outlined in **R vs Aziz** when assessing the evidence as to the Appellant's good character.
>
> That this non-direction amounts to a misdirecton for which the conviction should be set aside and the conviction quashed."

Special Inspector Cecil Anglin gave evidence as to the good character of the appellant. Anglin had been the immediate supervisor of the appellant for some five months at Harmon Barracks, the base of the latter. Anglin's assessment of the character of the appellant can be regarded as glowing. He used the epithet "impeccable" to describe the general behaviour of the appellant. Thus the evidence as to the good character of the appellant had to be taken into consideration by the learned trial judge in determining whether or not the prosecution had

discharged its burden of proof. It was therefore incumbent on the learned trial judge to demonstrate that he applied the correct legal principles in the consideration of the totality of the evidence which was before the court, which, of course, included the evidence as to the good character of the appellant.

In his summation in respect of character evidence the record at page 195, reveals:

> "The accused called an Inspector to give character evidence on his behalf. Now where evidence of general character is not available, the accused will nevertheless try to prove it but where some reasonable doubt exists as to his guilt then care has to be exercised as there is a presumption of innocence and proof (sic) of character should be taken into consideration with all the other facts and circumstances in the plaintiff's (sic) evidence contradicting anything that has been brought on the other side."

This passage cannot be said to be blessed with clarity. Certainly, if it is to be construed that the relevance of good character only obtains "where some reasonable doubt exists as to his guilt" then such a proposition is quite untenable. This is so because evidence of good character is part of the totality of the evidence which is for the tribunal of fact - **Handbridge** [1993] Criminal L.R. 287. That this may have been a misconception by the learned trial judge is illustrated by a comment by him on page 195 of the record which states:

> "The defence was just relying solely on the evidence from the accused."

Surely, the defence was also relying on the good character of the then accused. That comment would tend to suggest that the learned trial judge did not accord the evidence of the appellant's good character any probative significance. In the same passage (ante) the learned trial judge said "proof (sic) of character should be taken into consideration with all the other facts and circumstances." However, the passage is silent as to the principles which should inform this consideration.

The judicial approach to the issue of character evidence while not beset by turbulent waters has not been characterised by smooth sailing. Hence in **R.v. Aziz** [1995] 3 WLR 53, Lord Steyn in his speech at page 60 (a-c) said:

> "Lord Taylor of Gosforth C.J. started his judgment by saying that the issues debated in ***Reg. v. Vye*** [1993] 1 W.L.R. 471 would at one time not have been regarded as arguable. I would add that in recent years there has been a veritable sea-change in judicial thinking in regard to the proper way in which a judge should direct a jury on the good character of a defendant. It has long been recognized that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious. The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character

> because it is evidence of probative significance. Leaving it entirely to the discretion of trial judges to decide whether to give directions on good character led to inconsistency and to repeated appeals. Hence there has been a shift from discretion to rules of practice. And ***Vye*** was the culmination of this development."

It is accepted that the "two limbs" that is, one as to credibility and the other as to propensity, together are integral and complementary parts of the approach to character evidence. This is not to say that a trial judge is bound to give what can now be regarded as standard directions in every case in which evidence of good character arises. Reference is again made to the speech of Lord Steyn at page 62 of **Aziz**, c-d:

> "A good starting point is that a judge should never be compelled to give meaningless or absurd directions. And cases occur from time to time where a defendant, who has no previous convictions, is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged in the indictment. A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with ***Vye*** in a case where the defendant's claim to good character is spurious. I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give directions in accordance with ***Vye.*** I am reinforced in thinking that this is the right conclusion by the fact that after ***Vye*** the Court of Appeal in two separate cases ruled that such a residual discretion exists: ***Reg. v. H.*** [1994] Crim. L.R. 205 and ***Reg. v. Zoppola-Barraza*** [1994] Crim. L.R. 833.

> That brings me to the nature of the discretion. Discretions range from the open-textured discretionary powers to narrowly circumscribed discretionary powers. The residual discretion of a trial judge to dispense with character directions in respect of a defendant of good character is of the more limited variety. Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with ***Vye* [1993]** 1 W.L.R. 471 and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with ***Vye***, the judge may in his discretion dispense with them.
>
> Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which must be left to the good sense of trial judges. It is worth adding, however, that whenever a trial judge proposes to give a direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions."

The following guiding principles may be stated:

(1) Evidence of good character is of probative significance.

(2) Evidence of good character is relevant to the credibility of the accused as well as to the likelihood that such accused would commit the offence in question.

(3) Regard must be had to evidence of the good character of the accused unless such evidence can be characterised as "spurious".

The approach of the learned trial judge in his treatment of the good character evidence given on behalf of the appellant was deficient as the guiding principles set out above were ignored. It cannot be said that the good character evidence was "spurious". The learned trial judge did not appreciate the evidential significance of the evidence of Inspector Anglin – that it was part of the totality of the evidence before him. He did not address his mind as to the criteria to be employed in the assessment of the appellant's good character before arriving at the verdict of guilty. He did not consider the impact of the good character of the appellant as a factor relevant to the credibility of the appellant's evidence, nor did he consider, in view of the good character of the appellant, the likelihood of him committing the offences charged. These inadequacies have resulted in the appellant not having had a fair trial. The omission to have a proper regard to the evidence of good character is a material irregularity.

In conclusion, the appeal is allowed. The convictions are quashed. The sentences are set aside, and verdicts of acquittal entered.