[2010]JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 87/2009

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MR JUSTICE BROOKS JA (Ag)

JOEL COOPER v R

Wentworth Charles for the applicant

Ms Kamar Henry and Mrs Andrea Martin-Swaby for the Crown

5, 6, 7 and 14 May 2010

MORRISON, J.A.

[1] This is an application for leave to appeal against conviction on 4 August 2009 of the offences of illegal possession of firearm and ammunition, after a trial before Paulette Williams J, in the High Court Division of the Gun Court Holden in the parish of Manchester. The applicant was sentenced to seven years imprisonment on count one and to four years imprisonment on count two, both sentences to run concurrently.

[2] On the 7 May 2010, we refused the application for leave to appeal and in light of the fact that the applicant had been on bail we ordered that the sentences should commence with immediate effect. We promised then to put our reasons in writing and this we now do.

[3] The case for the prosecution was that at about 9:00 pm on 12 August 2006, acting on information, Sergeant Garnett Hyde assembled a party of six policemen at the intersection of Park Crescent and Main St in Mandeville in the parish of Manchester. While there, they observed a white Toyota Corolla station wagon reg. no. PB6173 entering the intersection. Sergeant Hyde signalled to the driver of this vehicle to stop, which it did, and then instructed the driver to drive into the premises of the Mandeville Police Station, which was about 25 feet from the intersection. The area was well lit by a bright flood light from the station building which illuminated the entire area in front of the station.

[4] After the vehicle had come to a stop, Sergeant Hyde observed that there were two men, the driver and a passenger, in the front of the car and that both front windows were down. Standing at a distance of about one foot from the car, Sergeant Hyde then noticed that the man sitting in the front passenger seat was "shuffling and behaving in a suspicious way", as a result of which he very quickly moved towards the car, with his

firearm in his right hand, and opened the front passenger door. This is how the sergeant described what happened next:

> "**Q** Okay. What you do when you reach where the car was, what did you do?
>
> **A** I held on to door, the right passenger door, pulled the door.
>
> **Q** Yes?
>
> **A** And order them out of the car when I heard, I saw and heard...
>
> **Q** No, tell us what you saw first?
>
> **A** I saw a chrome object.
>
> **Q** When you saw that chrome object, the first time you saw that chrome object, the very first instance, where did you see it?
>
> **A** In the lap - on the ground, it fell, I heard something fell, I saw it.
>
> **Q** When you saw the object, the first time you saw it where did you see it, the first time?
>
> **A** On the ground of the car.
>
> **Q** You mentioned hearing something?
>
> **A** Yes, sir.
>
> **Q** What did you hear?
>
> **A** I heard something heavy fell on the ground, 'bum.'
>
> **Q** Now, having heard the sound that you said you heard, did you look anywhere?

A On the front seat, on the floor of the front passenger seat where I heard it fell.

Q And when you looked at the floor, did you see anything?

A I saw a gun.

Q At that point what did you do, sir?

A I reach down - the first man was taken out of the car, when persons in the front seat was taken out of the car I reach down and took up the gun."

[5] Sergeant Hyde identified the applicant as the man who was taken from the front passenger seat of the car. In addition to the applicant, three other men were taken from the car by the police, that is, the driver and two men who were taken from the rear seat of the car. All four men were then escorted into the police station by Sergeant Hyde, where he removed the magazine from the firearm and found 13 live 9 mm cartridges inside the magazine and one live 9 mm cartridge inside the breech of the firearm. He then asked each of the men separately whether they were holders of firearm licences, to which the applicant, when he was asked, replied "A nuh fi mi". All four men were arrested and charged for illegal possession of firearm and ammunition.

[6] At the end of the Crown's case, three of the defendants were discharged on a concession by the prosecution that there was no evidence against them. However, the applicant was called upon to state

his defence and opted to give sworn evidence. He testified that at the material time he had been a mere passenger in the Toyota Corolla, having, in the company of his cousin, Mr Jeffery Barnes, flagged it down on the Bustamante Highway in Clarendon and secured the driver's agreement to take them to Mandeville. He was, he said, seated in the left rear seat of the car behind a fellow passenger who was in the front passenger seat next to the driver, while Mr Barnes was seated beside him in the right rear seat. He told the court of the car having been stopped in Mandeville by the group of about six to seven police officers and of the four occupants of the car having been escorted into the station. But the lighting conditions in the vicinity of where the car was stopped were, he said, "very dark". While they were inside the station a police officer came in with a gun, which he said he had found "at the front passenger seat", and asked the men whose gun it was. According to the applicant, his response was "I don't know anything 'bout' gun, is not my gun".

[7] Mr Barnes, who was one of the three other persons originally charged with the applicant, was called as a witness for the defence. He supported the applicant on where he (the applicant) was seated in the car, as well as with regard to the applicant's answer to the question whose gun it was. He insisted that Sergeant Hyde was not in fact on the scene that night, despite the fact that the applicant himself had said that it was Sergeant

Hyde who had opened the door of the car and had ordered the men out of the car.

[8] Paulette Williams J rejected the evidence of the applicant and his witness. She then turned to the Crown's case, upon the basis of which she concluded that she was satisfied so that she felt sure that the applicant was indeed the person in possession of the gun and ammunition on the night in question. She was particularly impressed by Sergeant Hyde, whose evidence she described more than once in her summing up as "forthright".

[9] The applicant was given leave to argue three grounds of appeal, as follows:

> "(i) The Learned Trial Judge erred in law in holding that the prosecution had established possession in the appellant [sic] beyond a reasonable doubt notwithstanding the surrounding circumstances of Joint occupation of the motor vehicle (taxi) by the other occupants in the dead of the night.
>
> (ii) The Learned Trial Judge erred in law in holding that the appellant [sic] suspicious behaviour supported an inference of individual responsibility for the firearm and ammunition which was found on the floor of the (taxi) motor vehicle.
>
> (iii) The Learned Trial Judge erred in law when she failed to adequately warn herself on the dangers inherent in the evidence of identification of the appellant [sic]as the passenger that was seated in the front of the (Taxi) Motor Vehicle."

[10] Mr Wentworth Charles, who appeared for the applicant in this court as he had in the court below, argued grounds (i) and (ii) together. He observed, without really saying what significance he attributed to this, that Sergeant Hyde had given a statement in the matter a month after the incident. His primary submission on these grounds was that the trial judge had drawn inferences from "a combination of inconsistent evidence and opinion of Sergeant Hyde as to the circumstances leading to the discovery of the firearm" in the car. In support of this submission, he drew to our attention a number of pieces of evidence which, he contended, raised questions as to where it was in the car that the gun was supposed to have been first seen, which demonstrated that Sergeant Hyde's evidence was self-contradictory and speculative.

[11] Thus, Mr Charles pointed out, the sergeant having given evidence in chief in the terms set out at para. 3 above, said this when he was cross examined:

> **"Q** At no time did you see the gun held by any of the men in the car?
>
> **A** No, sir.
>
> **Q** You only saw it on the floor?
>
> **A** After hearing the object fell.
>
> **Q** You saw it on the floor?

A Yes, sir.

Q So, you didn't see it in the lap of any of the passengers, yes or no?

A It was in the lap of Joel Cooper. When he start jittering that's when it fell from the lap.

Q You know I asked you whether you saw it in the lap of any of the passengers?

A It was in the lap of Joel Cooper.

Q You saw it in lap of any of men?

A Yes, sir, I saw it in Joel Cooper's lap.

Q You appreciate the difference, Mr. Hyde, between seeing something in a passenger's lap and seeing something on the floor of the taxi car that you stopped, do you appreciate that difference?

A I saw the shine object in the lap.

Q Let me rephrase it. Do you appreciate the difference between seeing something in a passengers lap and seeing an object on the floor of where the passenger is seated, do you appreciate the difference, is there a difference?

A Not much of a difference. I saw the object."

[12] There was thus a clear contradiction in the sergeant's evidence, Mr Charles submitted, with regard to where the firearm was when he first saw it, in the applicant's lap or on the floor of the car. So much so, counsel

further pointed out, that the learned judge herself then sought to clarify the position:

"**WITNESS**:	I saw the object.
HER LADYSHIP:	When did you see that, sir?
THE WITNESS:	I saw the shine thing in his lap, your Honour, when it fell in the car, that's when I realize that it was a gun.
HER LADYSHIP:	When did you see the object, because the evidence so far is that you saw it on the ground.
WITNESS:	I saw the shine object in his lap.
HER LADYSHIP:	When?
A:	As I opened the door to take him out of the car.
HER LADYSHIP:	Yes?
WITNESS:	When it fell to the ground.
HER LADYSHIP:	Okay.
HER LADYSHIP:	Yes Mr. Charles?"

[13] As a result of the "inherent contradiction" in Sergeant Hyde's testimony as to where he saw the firearm, Mr Charles accordingly concluded, the credibility of Sergeant Hyde was "demolished". He also urged us to say that ***R v Alphanso Robinson*** (1991) 28 JLR 236, which had been relied upon by the Crown at the trial and which the judge had prayed in aid in her summing up, was distinguishable.

[14] With regard to ground (iii), Mr Charles' complaint was that the trial judge's treatment of the question of identification, which she had correctly stated to be one of the issues in the case, was inadequate, given that this was a case that depended substantially on the correctness of Sergeant Hyde's identification of the applicant as the person who was in the front seat of the car. In support of this submission, he referred us to ***Turnbull v R*** [1977] QB 224, ***Beckford & Others v R*** (1993) 97 Cr App R 409 and ***Fuller v The State*** (1995) 52 WIR 424.

[15] In response to Mr Charles' submissions on grounds (i) and (ii), Mrs Martin-Swaby for the Crown, on the other hand, relied on ***Alphanso Robinson***, the facts of which she submitted were similar to the facts of the instant case. She submitted that the evidence of Sergeant Hyde was not contradictory and that in the light of that evidence there was sufficient evidence to ground possession of the firearm and ammunition in the applicant. As regards ground (iii), she submitted that the likelihood of mistaken identification was substantially diminished in this case because of the circumstances in which the firearm had been found and the applicant taken into custody. In such circumstances, she submitted further, the critical issue for determination by the judge was credibility and a full ***Turnbull*** warning was only required in a case which depended solely or primarily on identification evidence.

[16] In ***Alphanso Robinson***, the applicant was convicted of illegal possession of a firearm and ammunition. The case for the prosecution was that two police officers were travelling in an unmarked car when they saw a car, in which the applicant was an occupant along with three others. The officers drove alongside the car and ordered the driver to stop. One of the officers then saw the applicant, who was sitting on the rear passenger seat, move his hands as if to drop something on the floor of the car. When the car came to a stop and the left rear door was opened the gun and ammunition were found. The applicant denied possession and that he was seated on the rear seat of the car. The trial judge dismissed a no case submission which was put forward on the ground that there was no evidence from which it could be inferred that the applicant was in possession of the firearm and ammunition. On appeal from the subsequent conviction, this court held that one is in possession in law of whatever to one's knowledge is physically in one's custody or under one's physical control. The fact that there was movement of the applicant's hands consistent with dropping something, that the firearm was seen lying on the floor unconcealed and that it was seen immediately on his alighting from the car could contribute to a finding that the applicant was in possession of the firearm. In these circumstances, it was held that the submission of no case had therefore been properly rejected.

[17] We agree with Mrs Martin-Swaby that there is no real basis upon which ***Alphanso Robinson*** can be distinguished from the instant case. There was evidence in this case, as in ***Alphanso Robinson***, of suspicious behaviour on the part of the applicant. The sound "bum" described by Sergeant Hyde was consistent with an object having fallen to the floor, the firearm was found on the floor of the car directly in front of the seat in which the applicant was seated, it was unconcealed and openly visible, so that it was seen immediately upon the applicant being taken from the front passenger seat of the car. As Morgan JA observed of the very similar circumstances in ***Alphanso Robinson*** (at page 238), "all of this evidence could contribute to a finding that [the applicant] knew the firearm was there; that he was in control of it and was in possession".

[18] The trial judge, after a full consideration of the circumstances in which Sergeant Hyde testified that the firearm was found, accepted him as a forthright and truthful witness. In our view, she was fully entitled on the evidence to reconcile the so-called "contradictions" in Sergeant Hyde's evidence in the way in which she did, that is to say, that he saw a shine object in the applicant's lap and heard something drop, looked at the area where he heard the thing drop and then recognised it to be a firearm. Having heard all the evidence, she considered that the case put forward by the defence was not credible and then, turning to the Crown's case, concluded as follows:

> "I believe the [officer] was forthright. He heard something drop, looked at the area where he heard the thing dropped and then recognize it to be a gun. I find that the officer was being forthright when he gave his evidence in the manner that he gave it and was not seeking to implicate the accused man whom he never knew before. When I review the evidence I am satisfied so that I feel sure as required by criminal standards that in the circumstances this accused man was indeed the person in possession of that firearm and ammunition on the night of the 12th of the August, 2008. I, accordingly, find Mr. Cooper guilty on these two counts of the indictment for these offences."

[19] For these reasons, therefore, we consider that grounds (i) and (ii) cannot succeed.

[20] And neither, it seems to us, can ground (iii). The authorities to which Mr Charles referred us are now entirely uncontroversial and we accept, as we must, that the law is that whenever the case against an accused person depends wholly or substantially on the correctness of the visual identification of the accused, which the defence alleges to be mistaken, "the judge should warn the jury of the special need for caution before convicting the accused on the correctness of the identification" (***Turnbull***, per Lord Widgery CJ at 228). But, as Lord Lowry also observed in ***Beckford v R***, a case in which the strictness of the general rule was reiterated and applied on an appeal from this court, "no rule is absolutely universal" (page 415). In the subsequent case of ***Shand v R*** [1996] 1 All ER 511, yet

another appeal from Jamaica turning on the question of identification, Lord Slynn observed (at pages 515-6) that, although cases in which a ***Turnbull*** warning might be completely dispensed with would be wholly exceptional, even where credibility was the sole line of defence, in such cases the required warning might be in terms more brief and appropriate to the facts of the case actually being tried than would be acceptable in a case which the real challenge was to the accuracy of the identification. In this regard, it is accepted that no precise form of words need be used, as long as the essential elements of the warning are appropriately pointed out to the jury.

[21] This is the background against which, in our view, the learned trial judge's consideration of the question of identification falls to be assessed in this case. In the first place, as regards the lighting, the judge noted that there was an issue in the case as to whether the area where the car was stopped was "very dark", as the applicant maintained, or was "well 'lited'", as Sergeant Hyde had said. On this, the judge preferred the sergeant's evidence and considered that such an area, "in the vicinity of the police station, in a major town such as Mandeville, would be well-lit". She then went on to consider the question of identification more generally in the following terms:

> "It was suggested to the officer that Mr. Cooper was not in the front of the car. He was not in the

> front passenger seat, but, Mr. Hyde insisted that there is where he saw Mr. Cooper. It was suggested to him that he made a grave mistake when he said it was Mr. Cooper who was sitting there. The officer insisted that he was sure that it was Mr. Cooper sitting there. So, the issue of identification seems to have arisen at this point and, therefore, I remind myself that I need to approach the evidence carefully. There is no evidence before the Court as to the time that the officer had to observe who it was. There is no evidence before the court as to anything impeding the officer's observation of who it was. The circumstances are that the officer said he was able to approach the car, open the door, find the object, see who was sitting there has been presented to the Court in circumstances as I have outlined, the bare evidence has been presented."

[22] It seems to us that in this passage the judge clearly had in mind the extent (albeit limited) to which it might be said that the applicant's challenge to Sergeant Hyde as to where he was sitting in the car raised an issue of the reliability of visual identification. In these circumstances, we are of the view that her treatment of the issue was entirely appropriate, given her recognition of the fact that the major issue in the case was one of credibility.

[23] For all these reasons, the application for leave to appeal was refused. In light of the fact that the applicant had been on bail, it was ordered that the sentences were to commence from 7 May 2010.