JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 158/2008

BEFORE: **THE HON. MRS JUSTICE HARRIS, J.A.**
THE HON. MR JUSTICE DUKHARAN, J.A.
THE HON. MRS JUSTICE McINTOSH, J.A.

PATRICK FORRESTER v R

Mr Linton Gordon for the applicant

Miss Sanchia Burrell for the Crown

8 & 26 November 2010

HARRIS, J.A.

[1] The applicant, Patrick Forrester, was on 9 December 2008 convicted in the Western Regional Gun Court on an indictment containing two counts. On count one, he was charged with illegal possession of firearm and on count two, he was charged with shooting with intent. He was sentenced to a term of 8 years imprisonment on count one and 10 years imprisonment on count two. It was ordered that the sentences should run concurrently.

[2] The prosecution's case essentially rested on the evidence of Mr Kelvin Kelly who stated that at about 12:30 on the morning of 12 May 2008, he was in the storeroom of a bar which he operates at 2 Barnett Street, Montego Bay. While there he heard his wife, who was in the bar, shout. This caused him to open the storeroom door and look inside the bar. There, he saw a man, who he said was the applicant, emerging from the bartender's area of the bar. He then left the storeroom, entered the bar and picked up a stool which he used to hit the applicant twice. He attempted to hit the applicant on a third occasion, at which time, the applicant took a firearm from a plastic bag and fired it at him. He said his wife had also hit the applicant with a small stool. The applicant then made good his escape.

[3] Mr Kelly said that the bar was very well illuminated by electrical lighting. There was a light immediately over the counter, another at the customer's side of the bar, one to the left of the bar and one above a shelf. It was further disclosed by him that on the occasions on which he hit the applicant, he was facing him and that he was able to observe him for three minutes. The applicant, he said, walked backwards after he inflicted the first blow, and when he was about to hit him on the third occasion, they were one and half feet apart.

[4] About three months after the incident, Mr Kelly said he saw the applicant walking along Barnett Street. At that time, he Mr Kelly, saw

Inspector Lattore to whom he spoke. The inspector accompanied him over to the opposite side of the road where he pointed out the applicant to him.

[5] Mr Kelly's wife, Mrs Suzette Kelly, was put up for cross-examination. She said that when her husband came out of the storeroom, the assailant's back was turned towards him but when he heard Mr Kelly's voice he turned around. She further stated that when her husband came into the bar, he grabbed a stool. The applicant, she said, drew a gun and shot at Mr Kelly who attempted to hit him with the stool. He fired a shot at Mr Kelly, put back the gun in a plastic bag and ran away.

[6] Inspector Spencer Lattore testified that at about 8:45 on the night of 16 August 2008 he was on enquiries in the Barnett Street area when he was approached by Mr Kelly who spoke to him, as a result of which he accompanied Mr Kelly across the street where Mr Kelly pointed out the applicant to him as the man who came to his business place and shot at him. He went on to say that when apprehended, the applicant, under caution said, "Ah nuh mi shot after Mr Kelly."

[7] Detective Corporal Derval Alexander stated that he went to the bar where Mr Kelly made a report to him and showed him a bullet on the floor, following which he commenced investigations. He said the bar was well lit.

[8] On 17 August 2008, he went to the lock-up at the police station where he saw the applicant and informed him of the report which was made against him. He said that the applicant said, "Mi no know nutten bout that sah." He told the applicant that an identification parade would be held but this did not materialize. On 2 October 2008, the applicant was arrested and charged. When cautioned he said, "Officer me no know nutten bout that sah me no guilty".

[9] The applicant gave sworn testimony. He said he was 52 years old and a labourer residing at Burnt Ground in Hanover. He denied that he was involved in the incident and insisted that the witnesses had told a grave lie on him. He said he was seeing Mr Kelly for the first time when he was arrested. It was asserted by him that he had never been charged with any offence. He declared that he was a very popular person, one who was well-known in Montego Bay and he could not have robbed anyone knowing that he had to walk through that town daily.

[10] The original as well as four supplemental grounds of appeal filed by the applicant were abandoned. He, however, sought and obtained leave to argue eight further supplemental grounds which are as follows:

Ground 1

> "The Learned Trial Judge failed to advise herself properly on all the factors that she is required to

take into consideration in interpreting the identification evidence that was adduced."

Ground 2

"The evidence of Kelvin Kelly which the Learned Trial Judge relied on for a proper identification of the accused is unreliable, in conflict with the evidence of Suzette Kelly and created or ought to have created enough doubt in the mind of the Judge to arrive at a verdict of not guilty."

Ground 3

"The learned Trial Judge in her summation misinterpreted the evidence as it relates to the cap that it was alleged was on the head of the person who committed the crime when she stated that Mr Kelly's evidence was that the assailant wore the cap the usual way the pee-cap (sic) is worn and that he saw him from his face right down."

Ground 4

"Having accepted the witness Kelvin Kelly's estimate of 3 minutes as unrealistic and having accepted that Mr Kelly is someone who has the ability to estimate, the Judge should have concluded that she cannot (sic) rely on the estimate, given by Mr Kelly."

Ground 5

"That the Learned Trial Judge erroneously made a finding that the accused lied to the Court by saying that the first time he saw Mr Kelly was when he came to Court (p64-pp1-3) See p57 pp6 when this was never said by the Accused."

Ground 6

> "The Learned Trial Judge unfairly intervened and questioned the accused man in a way not to seek clarification of any issues but to test the creditability of the accused. The Learned Trial Judge then proceeded to wrongly conclude from this that the Accused was a liar. Further, the Learned Trial Judge failed to advise herself that the good character of the Accuse can point to his being a credible and believable."

Ground 7

> "That the Learned Trial Judge wrongly placed reliance on her findings that the Accused has a very distinctive face when none of the witnesses in the case gave any such evidence."

Ground 8

> "That the sentence of ten (10) years is excessive having regards to the unblemished record of the Accused and having regard to the age of the Accused."

Grounds 1, 2, 3, 4, 5, 6 and 7 will be addressed simultaneously.

[11] Mr Gordon submitted that the evidence of identification was weak and the learned trial judge failed to address her jury mind to all the requirements of **R v Turnbull** [1976] 3 All ER 549. She made a fatal error, he argued, when she relied on what she found to be a unique facial feature of the applicant, to support her conclusion that Mr Kelly would have properly identified the applicant, despite the fact that none of the witnesses spoke of the applicant having any distinctive feature. He

further argued that the learned trial judge also erred in finding the applicant to be a liar when she stated that he said that he was seeing Mr Kelly for the first time in court, when he made no such assertion.

[12] It was also contended by him that the learned trial judge accepted that there was a conflict between Mr and Mrs Kelly's evidence as to the length of time within which each said he or she could have viewed the face of the applicant and she rejected Mr Kelly's evidence that he could have observed him for three minutes. In light of these findings, together with all other weaknesses in the evidence, he argued, the issues ought to have been resolved in favour of the applicant.

[13] Miss Burrell argued that the learned trial judge demonstrated that she had appreciated that the issue of visual identification was central to the prosecution's case. She illustrated a clear understanding as to what was required to be proved by the Crown and proceeded with respect to the evidence before her, she argued. It was her further submission that the applicant's complaint concerning the learned trial judge's findings with respect to the conflicts in the evidence of the witnesses and her dissatisfaction with the time frame within which Mr Kelly said he could have viewed the applicant, is without merit. The learned trial judge, she argued, saw the witnesses and having observed their demeanour, it would have been her prerogative to decide what evidence she should accept or reject. She submitted, however, that there being a deficiency

in the Crown's case as to the unique appearance of the applicant, the learned trial judge was compelled to have made mention of the applicant's distinctive feature but this, she argued, could be seen as an omission in the Crown's case.

[14] The prosecution's case was substantially dependent on the correctness of the identification of the person who was present in Mr Kelly's bar on the night of the incident. It has been disputed by the applicant that he was at the bar. The heart of his complaint is that the learned trial judge failed to adhere to the **Turnbull** principles by not fully paying due regard to the circumstances surrounding the evidence of identification and that she had taken irrelevant material into consideration.

[15] The trial judge had before her evidence from Mr Kelly and Corporal Alexander that the bar was fully illuminated on the night of the incident. There was evidence from Mr Kelly that the assailant and himself were facing each other when he, Mr Kelly, confronted him and that he was able to observe the applicant, albeit for three minutes. He disclosed that he was a foot and a half from his assailant when he attempted to hit him on a third occasion.

[16] An examination of the summation of the learned trial judge reveals that she gave herself the appropriate warning as mandated by the

Turnbull principles. She assessed the Kellys' evidence, pointing out the conflict as to the length of time each had to view the assailant. She rejected Mrs Kelly's evidence by regarding her evidence as to her ability to observe the assailant as a fleeting glance. She also expressed some discomfort as to the three-minute period within which Mr Kelly stated he had observed his assailant. In her capacity as the tribunal of fact, it would have been open to her to decide whose evidence she accepted. She, however, made a very grave error by taking into account the applicant's facial features when there was no evidence given by any of the witnesses as to the applicant's appearance. Nor was there any evidence that the Kellys had given any description of their assailant to the police. It is obvious that the learned trial judge used her observation of the applicant to bolster her conclusion that he had been correctly identified. This was highly prejudicial. It clearly would have militated against the applicant, and would have affected the safety of his conviction.

[17] The complaint of the applicant that the learned trial judge misinterpreted the evidence, by finding that he lied when she stated that he declared that he was seeing the complainant for the first time in court, is of some substance. It is perfectly true that the learned trial judge had misquoted the evidence. It was the applicant's evidence that the first time he saw Mr Kelly was at the time of his arrest. The learned trial judge's finding that the applicant was a liar because he asserted that he had

seen Mr Kelly for the first time in court must be seen as casting a negative view on his credibility.

[18] It was a further complaint of the applicant that the learned trial judge misquoted the evidence in dealing with the cap. This complaint is devoid of merit. The learned trial judge did not misquote the evidence in this regard. Mr Kelly testified that the applicant was wearing a cap with a peak and that it did not prevent him from viewing the face of the applicant. The learned trial judge made reference to the cap only to satisfy herself as to whether it would have operated as an obstruction against Mr Kelly being able to observe his assailant.

[19] We will now give consideration to ground 6. The applicant's further contention that the learned trial judge intervened in the trial by asking the applicant questions to test his credibility is misconceived. It cannot be denied that she asked the applicant some questions. However, as rightly submitted by Miss Burrell, the questions asked by the learned trial judge were essentially to seek clarification as to the applicant's knowledge of Montego Bay. A judge is entitled to make such inquiry as is necessary to clarify an issue. It cannot be said that the learned trial judge had descended into the arena or that the questioning of the applicant by the judge was unfair.

[20] A further complaint is that the learned trial judge failed to consider the good character of the applicant. This complaint is not without merit. The applicant gave evidence that he had never been convicted for an offence. He also stated that he was well known in Montego Bay and would not rob anyone.

[21] In a case where there is evidence of the good character of an accused, he is entitled to the benefit of a good character direction by the judge. In **R v Vye** [1993] 3 All ER 241 at 248 the standard direction is stated to be as follows:

> "(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements."

Since **Vye** the law in this area has been revisited and refined in a number of cases: see **R v Aziz** [1995] 3 All ER 149; **Thompson v R** (1998) 52 WIR 203; and **Teeluck & Anor v The State of Trinidad and Tobago** (2005) 66 WIR 319.

[22] The applicant denied that he was present at the bar. He gave evidence of his good character. This ought to have been taken into account by the learned trial judge and she ought to have given herself directions as to credibility and propensity. If she had done so, this of course, would certainly have been of some value as it would have been

capable of having some effect on the outcome of the trial. It could be that if the learned trial judge had directed herself on the evidence of his good character, she might have viewed the evidence in a different light.

[23] It will not be necessary to consider the remaining ground as this relates to sentence.

[24] It is evident that the learned trial judge had erred in the manner in which she dealt with some aspects of the evidence and that she had taken an extraneous matter into consideration. The defects were significant and clearly, the convictions cannot stand. Although the convictions ought to be quashed and the sentences set aside, it is our view that the Crown has a strong case. Accordingly, the interests of justice demand that there should be a retrial.

[25] The application for leave to appeal is treated as the hearing of the appeal. The convictions are quashed. The sentences are set aside and a new trial is ordered.