

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 204/2006**

**BEFORE: THE HON MR JUSTICE COOKE JA  
THE HON MR JUSTICE HARRISON JA  
THE HON MR JUSTICE DUKHARAN JA**

**DWAYNE FRATER v R**

**Everton Bird for the applicant**

**Miss Natalie Brooks for the Crown**

**26 October 2009 and 9 December 2011**

**DUKHARAN JA**

[1] On 17 November 2006 the applicant was convicted and sentenced in the High Court Division of the Gun Court in Kingston, for the offences of illegal possession of a firearm and robbery with aggravation. He was sentenced to five years and nine years imprisonment at hard labour respectively, with sentences to run concurrently.

[2] On 26 October 2009, we heard submissions on behalf of the applicant when we granted the application for leave to appeal and treated the hearing of the application as the hearing of the appeal. We allowed the appeal, quashed the convictions, set aside

the sentences and a judgment and verdict of acquittal was entered. We promised then to put our reasons in writing and this we now do. We apologise for the delay.

### **The Prosecution's Case**

[3] The following is an outline of the evidence on which the prosecution relied.

[4] On 9 July 2004, at about 2:20 pm, the complainant, Stephen Campbell, a constable in the Jamaica Constabulary Force, was at home in St Catherine in his living room watching television. He was not alone. His granduncle was also in the house. The complainant said he heard a pulling of the grille on the verandah and when he looked out the window he saw a man of dark complexion, slim built and about 5 feet 10 inches tall. On reaching the front door of the living room this man pulled a .38 revolver out of his waist and said to the complainant, "Don't move else mi a go shot you." The complainant said this man is the applicant. The applicant pulled him to a section of the living room and a second person entered from the verandah. The applicant then asked the complainant where the money was while pointing a firearm in his face. The other man, in the meantime, searched the house and entered the bedroom of the complainant. The complainant said the other man spent about an hour in the bedroom. The applicant then pushed the complainant who fell to the ground and both men left the premises. The police were called and a report made. The house was ransacked and the complainant said he missed \$14,000.00 in cash and a Motorola cellular phone.

[5] The complainant said when the applicant entered his house, he had not known him before. He was able to see his face for about 10 minutes and he was directly in front of him. The incident, he said, lasted between 10 and 15 minutes.

[6] On 2 August 2004 at about 2:00 pm, the complainant was on his way to Kingston, travelling in a coaster bus when he saw the conductor whom he recognized as the man who had pointed a firearm at him, and who along with the other man had robbed him of his money and cellular phone. He came off the bus in Kingston and returned to Spanish Town. He made a report at the Spanish Town Police Station, by giving a description of the conductor as well as the registration plates of the bus. He, along with other policemen, went to the town centre to await the return of the bus, but it was not seen.

[7] On 6 August 2004, at about 4:00 pm, the complainant was on duty at the Spanish Town Police Station when Woman Constable Nicole Parchment brought the applicant, whom the complainant pointed out as the person who at gunpoint had robbed him at his house.

[8] Woman Constable Parchment said, on 6 August 2004, she and other police personnel received information and at about 3:00 pm she was standing at the intersection of Burke Road and Young Street in Spanish Town when she saw a blue and white coaster bus fitting the description given in the information that she had received earlier. She stopped the bus, went inside and saw a man fitting the description. She accosted this man who was the applicant and informed him that he was a suspect in a

case of robbery. He was apprehended and taken to the Spanish Town Police Station where he was pointed out by the complainant as one of the men who had robbed him.

[9] Constable Harrocks Darnells testified that on 9 July 2004 he received a report from the complainant and as a result went to where the incident took place. On 6 August 2004 he was at the Spanish Town Police Station when the applicant was handed over to him by Woman Constable Parchment. The complainant then pointed out the applicant in his presence. When arrested and cautioned, the applicant said, "Mi nuh rob nobody."

### **The Defence's Case**

[10] The applicant gave sworn evidence. He stated that in August 2004 he was a bus conductor. On 5 August 2004 he was working on a bus from town (Kingston) to Spanish Town. When the bus reached the bus park in Spanish Town he got off to get refreshments. He said he saw three police officers who took a man off the bus saying they wanted to talk to the "ductor" (conductor). The applicant told them that he was the conductor for the bus. He was told that a policeman wanted him "down by the police station". He enquired as to why he was wanted. The officer told him that he could not tell him. He said he called his mother by phone. They both went along to the station with a police officer. They went to the CIB room when Constable Darnells asked him what he was there for. The applicant said he did not know. He heard one of the officers say, "A him do the robbery a Kitson Town." He said Constable Darnells said that he was going to take him to an identification parade. He was subsequently taken

to the lock up and then to the Half Way Tree Police Station to face an identification parade. He said no parade was held as no witness turned up. He was kept in custody for a long period, when eventually, he was taken to court where he heard that he was charged for robbery and illegal possession of firearm.

[11] The applicant said that Woman Constable Parchment never took him to the police station and neither did the complainant at the station identify him as the person who robbed him on 9 July 2004. The applicant denied going to the house of the complainant and robbing him. He said on 9 July 2004 he was working as a conductor on a bus from 5:00 am to 10:00 pm. He did not take a break as he would buy lunch and eat it on the bus.

[12] The applicant called one witness in Cordell Brown. He said that he was a bus driver. On 9 July 2004 he said that between 5:30 am and 7:00 pm, the applicant was working on the bus he was driving. At no time during that period was the applicant out of his presence as he would eat lunch on the bus. He said that at about 7:30pm he "let him off" at Dela-Vega City in Spanish Town.

### **Grounds of Appeal**

[13] Mr Bird sought and obtained leave to argue the following supplemental grounds of appeal:

- "1. The learned trial judge erred on the facts and was wrong in law in arriving at the finding that the evidence of the prosecution [sic] witnesses touching the issue of identification was unassailable, as the

quality of the identification was poor and unacceptable.

2. The learned trial judge was in error and the verdict was thereby flawed and cannot be supported as a result of the fact that the tribunal found the witnesses for the prosecution to be truthful without having examined, on the record, the issue of their credibility based upon the evidence adduced by them.
3. The learned trial judge demonstrated a high degree of bias against the defendant and in favour of the prosecution by the tribunal's failure to make any or any sufficient reference to, or comment on, obvious weaknesses in the prosecution [sic] case and the manner in which the prosecuting counsel conducted it, accompanied by a failure to consider or to give due consideration to the case for the defence without explaining why such evidence was unworthy of the tribunal's attention or consideration.
4. The learned trial judge misdirected herself on the applicable law and was wrong on the facts in rejecting the submission of no case to answer made by defence counsel.
5. During the course of the trial and in the summation the learned trial judge proceeded on the basis of serious errors of law and misinterpretation of the facts alleged resulting in an irreparably flawed verdict and a miscarriage of justice.
6. No verifiable evidence was adduced by the prosecution in proof of the allegation that an incident of robbery took place as alleged by Constable Stephen Campbell."

[14] On grounds one and two, Mr Bird submitted that the identification evidence was poor as there were obvious weaknesses in the prosecution's case. The complainant, he said, gave evidence which was inconsistent, in that, he said that the other man spent an hour in the bedroom then came out. When asked how long the incident lasted from

the time the men entered the house until he saw them running up the road, the complainant said that it lasted between 10 and 15 minutes. He further submitted that the learned trial judge proceeded to pronounce the identification evidence unassailable without making any reference to this conflict of evidence.

[15] It was the contention of Mr Bird that the complainant gave no description of his alleged assailant to the investigating officer Constable Darnells. Woman Constable Parchment, who allegedly apprehended the applicant, gave no evidence of the licence number of the bus. He further submitted that Woman Constable Parchment picked out the applicant from a number of persons on a bus, of which no description was given, except to say it was a blue and white coaster bus.

[16] Mr Bird also referred to the uncertainty of the complainant when he stated in evidence that when the conductor started to collect his fare he noticed that he had seen him somewhere before. He said, "When I recall, I could remember that he was the man that had robbed me ... one of the men that had robbed me ... he was one of the robbers."

[17] Miss Brooks for the Crown conceded that there was some element of doubt and that there was no evidence that the man the complainant saw on the bus was the same man he saw on 6 August 2004 at the police station.

[18] The main issues the learned trial judge had to determine were the correctness of the identification of the applicant and the credibility of the witnesses.

[19] On the issue of identification, the learned trial judge was duty bound to warn herself of the dangers under the "usual **Turnbull** caution". Her failure to do so would be fatal to the conviction. Although the learned trial judge did warn herself under the **Turnbull** guidelines, she failed to analyse the strengths and weaknesses of the evidence of the identification of the applicant. The complainant said that on 2 August 2004 while on the bus from Spanish Town to Kingston ... when the conductor started to collect his fares he noticed that he had seen "this 'ductor' somewhere before." He also said "When I recall, I could remember that he was the man that had robbed me." The learned trial judge never dealt with this aspect of the identification that there could have been some element of doubt.

[20] The learned trial judge said at pages 210-211 of the transcript:

"I find that wherever discrepancies or other things are, they have not affected the veracity of the witnesses."

It is clear that there were a number of discrepancies which the learned trial judge failed to analyse and should have reconciled. When the complainant gave evidence, he said the other man spent about an hour in the bedroom but when asked how long the incident lasted he said between 10 and 15 minutes when they left. The complainant said that he made a report at the Spanish Town Police Station. When the station diary was produced he was not the complainant, but another person who was at the house when the incident took place. At page 209, line 5 of the transcript the learned trial judge referred to a finding that the complainant identified the applicant on 6 August



2004 without referring to the conflict in the evidence of the complainant and that of Constables Darnells and Parchment as to where in the Spanish Town Police Station the complainant pointed out the applicant as his assailant.

[21] Based on the weaknesses in the identification of the applicant and the learned trial judge's failure to analyse these weaknesses as well as the conflict in the evidence of the prosecution's witnesses, it would be unsafe to uphold the convictions. Ground One therefore succeeded. In relation to the other grounds, it would be unnecessary to discuss the merits, based on our finding in ground one.

[22] Accordingly, as stated, we allowed the appeal, quashed the convictions, set aside the sentences and entered a judgment and verdict of acquittal.