[2011] JMCA Crim 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 110/2007

BEFORE: THE HON MR JUSTICE SMITH JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA (Ag)

KEVIN McKENZIE v R

Richard Small and Miss Jeromha Crossbourne instructed by Scott, Bhoorasingh and Bonnick for the applicant

Miss Maxine Ellis for the Crown

18, 19, 21 May 2009 and 29 July 2011

DUKHARAN JA

[1] The applicant was convicted in the High Court Division of the Gun Court at May Pen, Clarendon, of the offences of illegal possession of firearm and wounding with intent on 20 June 2007. On 27 July 2007 he was sentenced to seven years imprisonment at hard labour on each count, with the sentences to run concurrently.

[2] The applicant was refused leave to appeal by a single judge of this court, on the basis that the case against the applicant depended entirely on the reliability of the evidence of identification and the credibility of the complainant. The single judge was

also of the view that the learned trial judge gave full and careful directions on identification and accepted the evidence for the prosecution.

[3] On 18 and 19 May 2009 we heard submissions on behalf of the applicant and reserved our decision until 21 May 2009 when we refused the application and ordered that the sentences were to run from 20 September 2007. We promised then to put our reasons in writing, and this we now do.

The Prosecution's Case

[4] The following is an outline of the evidence on which the prosecution relied. The complainant, Balford Williams, testified that at about midnight on 16 February 2007, he was walking home at Turner's District in Clarendon. On reaching his gate, he was in the process of pulling the gate when he saw the applicant move from an orange tree in his yard and come towards him pointing a gun at him. The applicant used expletives and said, "Yuh nuh know seh mi would a ketch you". The complainant turned to run when he heard an explosion. He was shot in the neck and fell to the ground. He was taken by the police to the Chapleton Hospital and subsequently to the Kingston Public Hospital where he received treatment for the injury. The complainant had known the applicant for over 10 years prior to the incident and used to see him every day. On the night of the incident he said he saw the applicant's face for about 10 seconds and that he was near to a street-light. They were about 3 to 4 feet apart and there was nothing obstructing his view of the applicant. He also recognized the applicant by virtue of him speaking to him.

[5] Constable Devon Wright testified that on 17 February 2007, at about 12:30 am, he was on mobile patrol when he received a report and went to an address in Turner's District where he saw the complainant lying face down in a yard with blood coming from the left side of his face and neck. He took him to the Chapleton Hospital.

[6] Detective Sergeant Fitzroy Porter said that having received information, he visited the home of the complainant on 21 February 2007 where he made observations. He observed a street-light about 4 yards from the gate. He collected a statement from the complainant and as a result he prepared a warrant for the arrest of the applicant. On 2 March 2007 he took the applicant into custody at the Chapleton Police Station where he cautioned him and informed him of the report against him. The applicant said, "Officer, mi nuh know why him waan sen mi goh a prison. Mi deh pon di road, mi stop work about 10:30 pm and mi did down a party down a Miss Dell and I leave about 3:00 am." When arrested and charged and further cautioned, the applicant said, "Mi innocent."

The Defence

[7] The defence was one of alibi. The applicant, in making an unsworn statement, said he was a taxi driver. On the date of the incident he stopped working around 10:30 pm to go to Summerfield at a party at Miss Dell's house. He left the party at about 3:30 am.

[8] Delreta Plunkett gave evidence on behalf of the applicant. She said that on the night of the incident she held a birthday party at Summerfield. The applicant came to

the party at about 10:30 pm and left close to 5:00 am. She said he did not leave the party between 10:30 pm and 5:00 am.

Grounds of Appeal

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

> "1. The learned trial judge failed to properly consider the applicant's defence in that she misdirected herself on vital aspects of the defence.
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> 2. The learned trial Judge misdirected herself on important aspects of the identification evidence.
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> 3. The learned trial Judge erred in failing to adequately address her mind to or appreciate the inadequacies of the identification evidence and the inconsistencies in the complainant's evidence.
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> 4. The misdirections and errors referred to in Grounds 1-3 not only constitute a failure to fairly assess the Defence, but together they also amount to a failure to approach the issue of identification with the necessary care despite the Learned Trial Judge's self-direction on the need to do so."

[10] Ground one dealt with the applicant's defence of alibi. Mr Small submitted that the learned trial judge failed in her duty to accurately review both the evidence and the issues. He submitted that the learned trial judge misdirected herself on the defence when she said that the applicant, in his unsworn statement, did not say when exactly it was that he was at the party. He further submitted that the applicant's assertion that he had stopped working at around 10:30 pm to go to Summerfield at a party at Delreta

Plunkett's house and that he left the party at around 3:30 am was open to one reasonable interpretation. The clear implication of this assertion was that between 10:30 pm and 3:30 am he could not have been at the scene since he had accounted for where he was between those times.

[11] Counsel further submitted that the learned trial judge wrongly interpreted the evidence given by Delreta Plunkett. The witness' evidence was that the music started playing at around 6:00 pm, and the party ended at around 4:30 am. She was able to say where the applicant was around midnight because at about 12:05 am she took out a Kenny Rogers CD and the applicant was still there at the time and she danced four tunes with the applicant. Counsel pointed out several areas of the evidence of the witness which the learned trial judge misquoted and misinterpreted. An example is at page 88, lines 5-6 of the transcript when the learned trial judge said, "She said he did not leave the party between 10:00 and 10:30 …" Counsel pointed out that there was no such statement by the witness. The witness said in evidence that the applicant arrived at the party at "about 10-10:30 pm and left about something to 5:00". Counsel further submitted that the learned trial judge's misquotation and misinterpretation of the defence's evidence amounted to a failure to deal adequately with the defence of alibi, and that the cumulative effect of the errors identified deprived the applicant of a proper consideration of his defence. Counsel cited the following cases: **R v Alwyn McBean** (1996) 33 JLR 437, **R v Phillip Gillies** (1992) 29 JLR 167 and **Anthony McCalla v R** SCCA No 145/2002, delivered 19 December 2003.

[12] In response, Miss Ellis for the Crown submitted that the applicant did not indicate at what time he went to the party. He stopped working at 10:30 pm and thereafter he left for Summerfield. The time of his arrival at the party was not stated in his unsworn statement although he indicated the time he left the party. She further submitted that the learned trial judge correctly found that there was inconsistency in the evidence of the defence witness, Delreta Plunkett.

[13] It is clear from the summation that the learned trial judge found inconsistencies and discrepancies between the evidence of Delreta Plunkett and the unsworn statement of the applicant. It is also clear that the learned trial judge gave adequate consideration to the defence of the applicant by giving an analysis of the case for the defence. The learned trial judge looked at Delreta Plunkett's evidence on the critical point of where the applicant was at the material time and found that, "what she came to say seems to be a convenient statement or alibi" (pages 93-94) and then (at page 94) she said, "I reject this alibi. She is either mistaken or not speaking the truth…" The learned trial judge also found that the applicant was not truthful and attached no weight to his unsworn statement. The issue was one of credibility, and the learned trial judge having given full consideration to the defence, rejected the defence of alibi. This ground therefore failed.

Grounds two and three will be dealt with together.

[14] In ground two Mr Small submitted that the learned trial judge misdirected herself on critical aspects of the identification evidence. He said that there was a discrepancy

between the complainant's testimony and what he told the police as to whether he was inside the gate or outside the gate when the incident occurred. The significance of this discrepancy was that it would have affected how far from the streetlight the incident took place. He further submitted that the learned trial judge's treatment did not address the significance of this discrepancy and instead wrongly asserted that the incident took place under the streetlight. The material difference between the evidence given on this point and this misreading and misinterpretation of the evidence, must have had an adverse effect on the learned trial judge's assessment of the critical issue of identification.

[15] Counsel also submitted that the learned trial judge relied on voice identification which was a misdirection as there was no evidence of any special feature to the assailant's voice, either before or during the incident. He said the learned trial judge said that the witness "recognized Kevin McKenzie by virtue of him speaking to him" (page 82 lines 10-11). There was no evidence, he argued, coming from the complainant that he was familiar with the applicant's voice or that it was the voice of the assailant that he used to identify the person. He submitted that the learned trial judge treated this alleged identification by voice as a strength in the prosecution's case when there was no such evidence. This error, he argued, was therefore fundamental, as it went to the root of the basis on which the learned trial judge came to her decision that the applicant had been satisfactorily identified.

[16] In ground three, Miss Crossbourne submitted from the written submissions that it is insufficient for a judge to state the appropriate cautions and warnings in

accordance with the **Turnbull** guidelines without going on to show that those warnings have been applied. She further submitted that it was for the trial judge to assess the identification evidence. In the instant case, it was not enough for the complainant to state that the lighting was sufficient and for the learned trial judge to accept that conclusion without assessing for herself whether the lighting conditions and length of time for observation, as described by the witness, were in fact sufficient. It was further submitted that the learned trial judge accepted the identification evidence without demonstrating an assessment of it when she said at page 95 of the transcript:

> "… I accept the facts as indicated by him in relation to the lighting, that he could see the accused man, that is where vehicles are parked when persons are working on them under this street light, and that when he saw the accused the accused was a distance of three to four feet away from him."

It was submitted that the learned trial judge relied on visibility being good when directly under the streetlight and that she misinterpreted the evidence and wrongly placed the assailant directly under the streetlight. At no time did the complainant say that the applicant was under the streetlight. It was further submitted that the complainant could not have had more than two or three seconds to view his assailant, and even though it would have been a case of recognition, this was an identification under difficult circumstances. The learned trial judge failed to adequately address her mind to the difficult circumstances under which the recognition was said to have been made that she failed to consider all the circumstances and the likely impact they would have on the complainant's ability to properly identify the assailant. She referred us to **R v**

Locksley Carroll (1990) 27 JLR 259 and **R v Carlton Taylor** SCCA No 57/1999 delivered 20 December 2001.

[17] In response to grounds two and three, Miss Ellis submitted that the learned trial judge analysed the evidence of identification, giving herself the required warning and found the identification reliable. As regards the lighting, the learned trial judge accepted the complainant's evidence as being truthful and credible. Counsel also submitted that nowhere in the summation did the learned judge mention the issue of voice identification. The judge in reviewing the evidence was clearly dealing with the length of time and opportunity the complainant had to recognize the applicant and make a correct identification.

[18] The central issue in this case was one of identification and the learned trial judge was duty bound to consider the **Turnbull** guidelines. This she did, analysing every aspect of the identification evidence given by the complainant. On the issue of lighting, the learned trial judge was satisfied as to the adequacy of the lighting. There was a streetlight and according to the complainant, defective motor vehicles were often repaired under that streetlight. The complainant testified that he was at the gate and the applicant was 3 to 4 feet away from him and the streetlight was estimated in court to be about 11 to 15 feet away from the gate.

[19] The complaint that the learned trial judge relied on voice identification is without merit. It is clear that the use of the words "by virtue of him speaking to him" could not by itself translate into voice identification. The complainant said the applicant used

certain words to him. This is someone the complainant said he had known for over 10 years and would see every day. The learned trial judge correctly identified the critical issue as visual identification and her finding was based on this and not the reliance on voice identification to which she made no reference in her summation.

[20] It is clear that the learned trial judge was cognizant that this was a case of recognition and gave herself the requisite warning. The complainant said that he saw the applicant's face for about 10 seconds and he was about 3 to 4 feet away. In **Jerome Tucker and Linton Thompson v Regina** SCCA Nos. 77 and 78/1995, a decision of this court delivered on 26 February 1996, it was held that a period of eight seconds was sufficient time for observation so that an accurate identification could be later made. This was a recognition case in which the witness had known the applicant for four years. The length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence.

[21] The learned trial judge said at page 95 of the transcript:

> "I am satisfied that Balford Williams was a truthful witness. I thought he gave his evidence in a very credible and straightforward manner and I find him to be a witness of truth. In addition, I am satisfied so that I feel sure that he had the opportunity to make and did make correct and true identification of the accused man. I find that he had ample opportunity to make the identification and I accept the facts as indicated by him in relation to the lighting, that he could see the accused man, that is where vehicles are parked when persons are working on them under this street light … when he saw the accused the accused was a distance of three to four feet away from him. Nothing was blocking his view of his face … This is a man he knew well, he had seen him everyday …"

It can be seen from the above passage that the learned trial judge, after a careful analysis of the evidence, demonstrated in her findings that she found the witness to be a truthful and credible witness. These were findings of fact by the learned trial judge.

[22] For the foregoing reasons, we found grounds two and three to be without merit.

[23] On ground four, counsel in his oral and written submissions, submitted that the learned trial judge's mistreatment of the alibi defence is in reality an illustration of her failure to approach the defence with the requisite care that the cases have established for the assessment of identification evidence. He further submitted that the two issues of identification and alibi are inextricably linked and any lack of care in the assessment of the alibi is bound to have an effect on the assessment of the identification.

[24] It is quite clear that both issues above were addressed by the learned trial judge. The learned trial judge said at page 94 of the transcript:

> "… I also do not attach any weight to the accused man's unsworn statement. I do not believe that he was speaking the truth."

The learned trial judge dealt at length with the evidence of the applicant's witness Delreta Plunkett. Ground four was found to be without merit.

[25] Accordingly, as stated, we refused the application for leave to appeal with the sentences to commence from 20 September 2007.