[2010] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 32/2008

BEFORE: **THE HON. MR JUSTICE PANTON, P**
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

MARDIO MCKOY v R

Mrs Valerie Neita- Robertson for the applicant

Mrs Caroline Hay and Miss Keisha Prince for the Crown.

26 & 27 October, 18 December 2009 and 21 May 2010

PHILLIPS, J.A.

[1] On 10 March 2008, Mardio McKoy, the applicant was convicted in the High Court Division of the Gun Court, having been charged on an indictment containing 2 counts. The first count was for illegal possession of firearm and the second count was for robbery with aggravation. He was sentenced to 10 years imprisonment at hard labour on count one and 15 years imprisonment at hard labour on count two. It was ordered that the sentences should run concurrently and additionally, that the applicant be subject to two years of supervision.

[2] On 3 March 2009, his application for leave to appeal against conviction and sentence was refused by a single judge, and the applicant renewed his application to the court. The matter was heard in October 2009 and our decision delivered on 18 December 2009. We treated the hearing of the application for leave to appeal against conviction and sentence as the hearing of the appeal. We allowed the appeal, quashed the convictions, set aside the sentences and entered a judgment and verdict of acquittal. We promised to put our reasons in writing and we do so now.

The case for the prosecution

[3] Mr Patrick Thorpe, a transport operator gave evidence that on 27 March 2006 at approximately 8:15 pm he had attended a doctor's office on Passage Fort Drive in St. Catherine with his girlfriend and his son Danday. He drove his Honda CRV motor car to the office and parked immediately outside the office facing the same. On attempting to leave the doctor's office, having just entered his car with his son in his lap, he was "pounced upon" by three men who were armed with guns. The applicant, he said, was one of the men and he carried a black 9mm beretta handgun. The applicant was also one of the two men who were on the right side of the car where he was, and who pulled at the driver's door and requested that he, Mr Thorpe, come out of the vehicle. Mr Thorpe said he hesitated and the man on the left hand side of the car,

who had prevented his girlfriend from closing her door said, "Hey bwoy, how you so stubborn, yuh want mi shoot yuh? Yuh hear mi seh come out of the van?" Mr Thorpe responded. He came out of the car with his young son in his arms. One of the men took away his black razor cellular phone, valued at about $15,000 and then searched him and found his licensed firearm, in his pants waist. One of his assailants said to the other men, "The bwoy a police", and he said the applicant said "Shoot di bwoy", and took from him the firearm valued at $120,000. Mr Thorpe said that he started to bawl, "Mi a nuh police". He said that the applicant repeated two or three times, "Shoot the bwoy, he a police" while he, Mr Thorpe, had his son in his hands. He told the court that he slid his son to his feet and then ran off across the road and left him. But then he saw his son running across the road with vehicles coming, so he stopped the vehicles, grabbed his son and continued running away from the scene with him. Mr Thorpe said he saw the applicant jump around the steering wheel of his vehicle, reverse it and then all of the men left in the vehicle, which was quickly driven away.

[4] Mr Thorpe's evidence was that he was able to observe the men as there was sufficient lighting. There were lights, he said, from the car's headlights, roof and middle lights, and there was light projecting from the doctor's office which was only 5 feet away from where he had parked his car. There were also lights from other vehicles which passed on

the road. He maintained that, "the place was not dark where I cannot see them".

[5] Mr Thorpe said that the two men at his side of the vehicle were beside him, within touching distance, so he could see their faces, their eyes and their noses. He stated that the incident lasted about 4-5 minutes between when he was accosted and when he ran off with his son. He gave evidence that there was nothing to obstruct his vision with regard to the men, even though one of the men (the applicant) was wearing a cap. He was, he said, the shorter of the two who were beside him, and described the cap as a "peak" cap. He demonstrated that the cap rose up in a peak under which "his hair plait up or something". It was not used to disguise his face, as he could see that clearly. He did not take much notice of the third man, who held up his girlfriend but focused on the two, who were by his side throughout the incident; the one who searched him and the other, (the applicant) who said "shoot di bwoy". Mr Thorpe, although he said that he was throughout this unfortunate experience feeling more concerned for his son and his girlfriend than for himself, admitted that he was feeling afraid.

[6] Mr Thorpe made a report to the police the same night at the Caymanas Police Station and the vehicle was recovered two hours later, at White Marl, St. Catherine, having been identified by him. The vehicle,

he said, was "crashed and write-off". The damage extended to the front of the vehicle, the entire front panel, the bonnet, grill, headlight, windscreen and radiator.

[7] In cross examination, Mr Thorpe was questioned specifically about the description that he gave to the police with regard to the men that accosted him that night. He said initially, that the man who searched him was 5'7" tall, with a funny eye and a broad mouth. The other one, (the applicant), he said, was the short one, "with a slight bow leg". The third one, who was on the left side of the car, and was the one who held up his girlfriend, was a "black, black one". He then later admitted in cross-examination that he did not say anything to the police about the complexion of the man with the funny eye and the broad mouth, nor did he mention the slightly "bow leg", in respect of the applicant. He accepted that the description that he gave to the police of the men could fit a lot of people and he finally stated that the description that he gave to the police of the applicant was that he was short, dark and wearing a cap. This statement was given to the police the day after he was held up.

[8] Mr Thorpe also stated that there was no reason why he could not give a more "adequate and detailed description of the persons" who held him up , save that he "was stressed out", and insisted that he was not

mistaken as he had given a "double look". Mr Thorpe also stated in cross-examination that he had given the police a description of the clothing that the applicant had been wearing, which was that he had on a jeans pants, but he also admitted that this information was not in the signed statement that he had given the police the day after the incident.

[9] On 15 July 2006, at the Hunt's Bay Police Station, Mr Thorpe pointed out the applicant on an identification parade.

[10] Detective Corporal Euclin Mendez, attached to the Caymanas Police Station, gave evidence that he was on duty at the said station on the night of 27 March 2006 when Mr Thorpe attended on the station and made a report which caused him to commence investigations into a case of robbery with aggravation and illegal possession of firearm.

[11] He gave evidence that he saw the applicant at the Portmore Police Station, told him about the upcoming identification parade and after the identification parade had been held on 16 July 2006 it was he who had arrested and charged the applicant for illegal possession of firearm and robbery with aggravation, at which time the applicant said, "Officer, a nuh mi, mi nuh have nuh gun".

[12] Under cross-examination, the arresting officer admitted that he had not made any effort to find out how the applicant had been taken into

custody. He said that he had not prepared, nor did he know if a warrant had been prepared and he had not caused a warrant to be prepared for the arrest of the applicant. He further stated that no name had been mentioned in the statement given to the police in this matter so no warrant could have been prepared. He gave evidence that he knew one Detective Corporal Robert Blake attached to the Central Village Police Station and he knew that the Detective had given a statement in relation to this matter, but he had no knowledge whether the Detective had prepared a warrant for the arrest of the applicant, in relation to this matter. He also confirmed that he only learnt of the name of the applicant when he spoke to him in the lock-up some time after he had been taken into custody. Further, prior to that, he said, the applicant's name had never been called in connection with this matter. Detective Corporal Mendez maintained that he did not know if Detective Corporal Blake had executed a warrant on the applicant in relation to this matter, but he understood that he was one of the persons who had gone in search of him, but he did not know if it was in relation to this particular matter.

[13] Detective Corporal Mendez confirmed that he had been the investigating officer in the case from the inception until the file was handed over to the Gun Court, which is why he could confirm that Detective Corporal Blake had written a statement in connection with it.

He also agreed that he had spoken to Detective Corporal Blake after the arrest of the applicant. He also confirmed that the motor vehicle, the subject of the robbery was found shortly after the robbery and that he caused a finger printing exercise to be done the said night. However, although done in 2006, in 2008 he had no results of this finger printing exercise as he had "not yet gotten a response from the crime scene person". He said that "I spoke to them, the last time I spoke to them was in the latter part of 2006, the last time I spoke to him". He went on further to say that," If they had gotten back the result, they would take it to us, straight to us, as they normally do". When asked if he thought it prudent, knowing that the trial was coming up to pursue the results, his answer was in the affirmative. He also agreed that if any finger printing results were found, it could have been important to the trial.

The Defence

[14] Mardio McKoy gave sworn evidence. His defence was an alibi. He said he lived at 5 Reef Avenue, Harbour View in the parish of Saint Andrew. He repaired car bumpers for Island Car Rentals Limited. He denied holding up anyone on 27 March 2006, with two other men, at gun point or at all, and robbing them. He said at the material time he was in Harbour View where he lived with his cousins and his aunt's baby father. In fact at the material time, he said, he was at Reef Avenue with Miss

Gloria Wilson. He stated that he had been in the Bahamas, he had returned on 24 March 2006 with some sneakers and clothes items for Miss Wilson's son and she had come to his home to collect them. He said he was taken into custody from the said Reef Avenue address, and ultimately taken to the Hunt's Bay Police Station where he was placed on an identification parade. He knew nothing whatsoever about the hold up at Passage Fort.

[15] In cross-examination, he said that Miss Wilson had been sent by her son to collect the items as he was working with his older brother who was a builder. He said that he had gone to the beach in the morning and Miss Wilson reached his home at about 5.00 pm and stayed a long time as she had also come to visit him. He said that later they went to "Chester Fries" in the Harbour View Shopping Centre to eat and thereafter both returned to his home.

[16] Miss Wilson gave evidence that she lived in Windsor Heights, Central Village and she was a full-time minister. She said she had known the applicant for over 18 years. He used to live at Windsor Heights also. He went to school there. She confirmed that she went to the applicant's home on 27 March 2006, at five minutes to 5.00 pm. She told the court that one of her sons Marraine had requested that she collect some things for him. She said that she stayed with the applicant until 9.00 pm. She

stated that she had stayed there that late as her son (the older one) was supposed to pick her up, but at 8.00 pm he had called her to say that he was experiencing car difficulties and could no longer do so. The applicant, she said obtained a taxi for her. She confirmed that they went to a chicken place in the shopping centre in Harbour View. She also stated that she was sure that she went to the applicant's premises on 27 March 2006 as the following day, 28 March 2006, was her son Marraine's birthday. She therefore confirmed that from 5.00 pm to 9.00 pm the applicant was in her continuous presence.

[17] In cross-examination she stated that her son and the applicant had gone to school together. The applicant she said was "always raiding my pot". He was like a son to her. When asked how she felt about the applicant, she stated, "Sometimes I am disappointed with the way they turned out but I love them". Miss Wilson told the court that she "took a bus from Central Village to downtown and then to Harbour View from downtown". When she reached Harbour View, the applicant was there alone and she remained at Reef Avenue from 5.00 pm - 8.00 pm, then she went to the plaza to eat. She confirmed that they talked about the applicant's trip abroad, although she could not recall clearly if he had been to the Bahamas or Bermuda. She said that Marraine did welding with her older son and that they worked in the country. She told the court that she had not spoken to the applicant recently as she was "not even

supposed to be here". When asked how it is that she knew that she was supposed to be there, she said the applicant's lawyer called her and "tell me that I am supposed to be in court today".

Grounds of Appeal

[18] The applicant relied on three supplemental grounds of appeal.

Ground 1

The learned trial judge brought to her assessment of the sworn evidence of the applicant and his witness matters which were highly speculative and at times not in accord with the evidence and in so doing denied the applicant a fair and balanced consideration of his alibi.

(19) Counsel for the applicant challenged certain statements made by the learned trial judge in her assessment of the evidence as speculative and unfair comment.

[20] There was the issue as to why Miss Wilson, a mother of two young men should have to travel by bus, indeed take two buses to Harbour View to pick up clothing items and shoes for her son who was working with his brother in the country, who had a car and who was slated to pick her up from the Reef Avenue, Harbour View address. There was the issue as to why the items were being picked up on that day, the Monday, when the applicant had returned to the island from the Friday; why was it that the applicant did not know that it was Marraine's birthday, or about the call from the older brother indicating that he could no longer pick up his mother due to car difficulties. Also, why did Miss Wilson say that she was

disappointed with her son and the applicant, particularly the latter as he was a repairer of motor vehicles at a reputable car company? Also, ought the discussion at the home of the applicant for over four hours have related to witnessing to these boys with whom she was disappointed? Was there some other reason why Miss Wilson was constantly being asked to speak up? Does her statement that she should not have been at court have some reference to her church rules, when she had no difficulty taking the oath?

[21] We find that the learned trial judge's comments on the evidence were reasonable and fair and we find that save and except her reference to there being no mention that the sons were Sabbath keepers, as an explanation as to why the sneakers and items of clothing had not been collected before the Monday, 27 March 2006 which in the circumstances, may have been unnecessary, were otherwise quite unexceptionable.

[22] The learned trial judge stated in her summing up that even if, as she did, she rejected the evidence of the applicant and his witness as untrue, and formed the view that the defence of alibi was a deliberate attempt to deceive the court into believing that he had not been correctly identified as the man who robbed Mr Thorpe, and even if she was of the view that the evidence of the applicant and his witness strengthened the

prosecution's case, she was still obliged to revisit the case to see if the prosecution had discharged its burden of proving that the applicant had indeed been correctly identified. We therefore found that this ground had no merit.

Ground 2

The consideration of the identification evidence by the learned trial judge was insufficient.

[23] Counsel for the applicant challenged the judge's treatment of the identification evidence in that, she did not consider "the possible weaknesses in the circumstances and conditions under which the identification was purported to have been made".

[24] In our view the learned trial judge adequately warned herself of the special need for caution before acting on the evidence of visual identification. She addressed all the issues set out in the **Turnbull** guidelines. She considered the duration of the incident, the opportunity for observation and recollection and the reason why the complainant would have focused on his assailants, especially the one who had stated repeatedly "Shoot di bwoy!". Although the learned trial judge had accurately recorded the evidence of Mr Thorpe, stating that the applicant's face was one that "he would never forget" and that "he would not miss", she had also noted the description which Mr Thorpe had given in evidence of the applicant, (as set out in paragraph 7 herein),

which was initially that the applicant was shorter with a slightly bow leg but which he later accepted (based on the information given to the police) that he was "short, wearing a cap and dark". The learned trial judge also noted Mr Thorpe's evidence, as stated previously, that the applicant was wearing jeans pants but this information had also not been given to the police, as previously stated, nor was there any mention in that statement of his impression of the "hair under the cap". The learned trial judge noted that the reason Mr Thorpe gave for these omissions was that he only answered what he had been asked. In these circumstances, however, the learned trial judge stated in her summing up that she does not subscribe to the theory that all the details of the event come to the fore of one's recollection immediately or shortly after its occurrence, because it is often on later reflection, in calmer moments that more details are recalled. She further stated that this does not mean a witness is lying because having given a matter further thought other details are recalled.

[25] In our view, this opinion may be quite acceptable given a particular set of circumstances. However, where as in this case, the applicant was unknown to the witness, and the witness' description to the police of his assailant being one of "short, wearing a cap and dark" with no further description nor name given, not even an alias, it cannot be said that such a statement as made by the learned trial judge could be justified. One

ought to be very careful when information pertinent to one's description is added at the trial, and it then becomes very important that the evidence is clear with regard to how the purported suspect is taken into custody, even if later identified on an identification parade. Unfortunately, there is no evidence of this in this case, which also makes the failure to disclose certain relevant information to the defence which ought to have been available, provide more than a reasonable doubt that the trial of the applicant was unfair. We find there is therefore merit in this latter specific aspect of ground two.

Ground 3

The sentence was manifestly excessive.

[26] No arguments were proffered on this ground.

Ground 4

That the failure to disclose the statement of Detective Corporal Robert Blake who arrested the appellant on a warrant, severely impeded the ability of Defence Counsel to investigate the integrity of the identification issue, and also impeded his ability to assess his instructions.

That the failure to disclose the Statement along with the failure to produce the fingerprint results was a fundamental flaw in the conduct of the trial that resulted in the appellant not receiving a fair trial.

[27] Counsel for the applicant submitted that the identification issue was critical to an assessment and analysis of the case and as a consequence questions as to the identification process were crucial and important.

There is no dispute that a statement was taken from Detective Corporal Robert Blake in this matter and that the statement was not disclosed to the defence.

[28] It was the allegation of the Crown that all three assailants left the scene in the complainant's motor vehicle. It was also the allegation of the Crown on the complainant's evidence, that the applicant drove the car. The car was located severely damaged, 2 hours later, and as stated in evidence by the investigating officer Detective Corporal Mendez, a finger printing exercise was undertaken that same night. There is no dispute that no results of that fingerprinting exercise were disclosed to the defence, and none were produced to the court. This is unacceptable conduct on the part of the prosecution.

[29] In the Privy Council case of **R v Richard Hall** [1997] UKPC 63 Lord Hutton in delivering the judgment of the Board referred to the failure of the prosecution to disclose a copy of a particular statement to the defence or even the contents thereof until after the Court of Appeal had delivered its judgment. Lord Hutton referred to the case of **R v Ward** (1993) 1 W.L.R 619 and the judgment of Glidewell LJ. who in delivering the judgment of the Court of Appeal, had this to say:

> "We would adopt the words of Lawton L.J. in **R. v Hennessey** (1978) 68 Cr. App R. 419 at 426 where he said that the courts must:

> 'Keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution'."

Lord Hutton then continued:

> "That statement reflects the position in 1974 no less than today. We would emphasize that all relevant evidence of help to an accused is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led."

[30] In our view, there was a duty on the prosecution to disclose the statement of Detective Corporal Robert Blake as the circumstances under which the applicant was taken into custody could have assisted the defence in the planning of the defence and preparation of more effective cross-examination of the police witnesses, the objective being always the fair conduct of the trial.

[31] In **Linton Berry v R** (1992) 41 WIR 244, Lord Lowry referred to a judgment of the Supreme Court of Canada in **R v Stinchcombe** (1991) (unreported 7 November) which, in his view, suggested that a much

wider view has been taken of the prosecution's duty of disclosure of documents to the defence, namely, "that the Crown has a legal duty to disclose all relevant information to the defence on the basis that "the fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done".

[32] With regard to the results of the fingerprinting exercise, it is this court's view that the failure to pursue these results had the possible effect of serious prejudice to the defence. The results of the exercise could have had the effect of entirely exonerating the applicant. It was the duty of the prosecution to have secured the evidence, bearing in mind that it was the evidence of the complainant that the applicant was driving the motor vehicle as it left the scene and the vehicle was discovered very soon after the incident. The police in participating in the investigation were obviously of the view that obtaining and producing the fingerprint results could have proven useful. The following exchange took place, at page 72 of the transcript, between the learned trial judge, counsel for the applicant and Detective Corporal Mendez.

> "Her Ladyship… What is the answer, sir? You didn't think it prudent knowing that the matter was coming up for trial to pursue the results from these people?
> A: Yes, Ma'am…

Mitchell: Tell me this, you consider that the finger-printing results, if any were found, would have been important in this, wouldn't you?
A : If any was found ?
Q: Yes.
A: Yes, sir."

It was prudent and incumbent on the prosecution to have made every effort to ensure that the results were provided and disclosed to the defence and produced to the court. In this case, there has been no explanation for the absence of the results. In fact, the evidence discloses that the police showed no interest in even seeking to obtain the results. The absence of the results in light of the very vague description of the assailants given to the police, under very difficult circumstances with no information as to how the applicant was taken into custody, all together provide reasonable grounds for concluding that the applicant was not given a fair trial and the convictions and sentences must be quashed. We have also observed that the learned trial judge made no finding whatsoever with regard to the failure to disclose the statement of Detective Corporal Blake and or the failure to obtain and disclose the results of the fingerprinting exercise.

[33] The foregoing are our reasons for allowing the appeal.