[2023] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 100/2017

JOHN MURRAY v R

Mrs Melrose Reid for the appellant

Miss Sophia Rowe and Kemar Setal for the Crown

18 July 2023

Criminal Appeal – Whether offences fall within the jurisdiction of the Gun Court – The Firearms Act, sections 20 and 25

Visual Identification – Absence of an identification parade – Confrontation identification – Failure of the trial judge sitting alone to apply the Turnbull Guidelines – Whether verdict unsatisfactory or unsafe

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] Mr John Murray ('the appellant') was charged on an indictment containing three counts. On count one, he was charged with the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act, and on counts two and three, he was charged with the offence of robbery with aggravation contrary to section 37(1)(a) of the Larceny Act. On 22 August 2017, he was convicted on all counts following a trial in the High Court Division of the Gun Court held in the Circuit Court for the parish of Manchester by a judge sitting without a jury.

[2] The combined particulars of the offences, in summary, were that on 14 February 2016 at about 9:00 pm, the appellant, being in the company of another who was armed with a firearm, robbed a female and a male ('the complainants') of cash and cellular phones. The female was robbed of $13,000.00 and two cellular phones and the male was robbed of $600.00 and one cellular phone. The other assailant was never apprehended.

[3] Based on the evidence led by the prosecution at the trial, the complainants were in Bally Holly district in the parish of Manchester when they were accosted by two men who ordered them to lie on the ground. The complainants complied and the men robbed them and then told them to run. The complainants ran off along the Bally Holly main road where they saw three police officers. They informed the police officers of the robbery and gave them descriptions of the two assailants. The female complainant described one of the assailants as a "rasta man" armed with a machete, and the other as a "short man" who was wearing jeans pants and a t-shirt and armed with a gun (page 23 of the transcript). The male complainant described the appellant as being of brown complexion, with "pull-up, pull-up hair" and wearing a multi-coloured shirt and the colour pants "he had on" (page 44 of the transcript). The short man was said to be masked but the rasta man was not.

[4] The police went in search of the men and during their search, they found the appellant crouched inside a derelict building. One police witness, Sergeant Marlon Grant, testified that he saw the appellant drop a machete right where he was seen crouching in the building and the machete was taken up by the police. He, however, did not mention the finding and retrieval of the machete in his written statement and the machete was never produced in court. None of the items stolen from the complainants were recovered. Sergeant Marlon Grant also did not record the description of the perpetrators given to him by the complainants in his written statement.

[5] The appellant was arrested by the police and taken to the Mandeville Police Station. He was escorted by Sergeant Marlon Grant to the Mandeville Criminal Investigations Branch (CIB) Office where the complainants were present giving their

statements to the police. The appellant was presented to them. The female complainant said to the police, "Yes, this is the man" (page 11 of the transcript). She had not yet completed giving her statement when she saw the appellant. The male complainant also identified the appellant to the police as one of the robbers.

[6] At trial, the female complainant testified that at the time of the robbery, the appellant was standing over her and she saw his face for about three minutes when she lifted her head off the ground. She said nothing was blocking her view and she was aided in her view by a street light that was close by.

[7] The male complainant also testified that he was able to see the face of the appellant during the robbery. He said the appellant, after searching his pocket from behind, turned him over on his back and started searching his front pockets. The appellant told him to shut his eyes and not to look at his face. However, he said he saw the appellant's face for approximately one minute with the aid of the moonlight. He never spoke to the presence of a street light.

[8] The appellant denied that he was involved in the robbery when he was pointed out by the complainants. Two days later, when he was informed of the charges and cautioned by the police, he responded, "A waan plait-up hair man rob them, is not a rasta man" (page 90 of the transcript).

[9] At the close of the prosecution's case, a no-case submission was made, primarily, on the basis that the identification evidence was tenuous; no identification parade was held; and the appellant, who was not known to the complainants prior to the incident, was identified by confrontation when he was brought by the police into the CIB office where the complainants were. At the end of the no-case submission, the learned judge ruled that there was a case to answer. However, the appellant chose to remain silent as was his right.

[10] The appellant was found guilty on all three counts and, on 30 October 2017, he was sentenced to five years' imprisonment at hard labour for the offence of illegal

possession of firearm and seven years' imprisonment at hard labour on the two counts of robbery with aggravation. The sentences were ordered to run concurrently.

[11] On 19 December 2017, the appellant filed an application for permission to appeal against his convictions and sentences on the grounds of (1) "misidentity of the witness"; (2) lack of evidence; (3) unfair trial; and (4) miscarriage of justice.

[12] The appellant's application was considered by a single judge of this court who granted permission for the appellant to appeal against his convictions and sentences. The learned single judge observed that the issues that arose for consideration at the trial were with respect to identification, credibility, and joint enterprise. She noted that although the learned judge recounted the evidence of the prosecution's witnesses, he gave no directions pertaining to the relevant issues. The learned single judge also noted that whilst the sentences do not appear to be excessive, the learned judge had failed to indicate how those sentences were arrived at in accordance with the settled guidelines expressed in **Meisha Clement v R** [2016] JMCA Crim 26.

[13] At the hearing of the appeal, the appellant, through his counsel, Mrs Reid, was granted leave to abandon the original grounds of appeal and to argue, instead, the following supplemental grounds of appeal:

> "1. The Learned Trial Judge (LTJ) lacked jurisdiction to have tried the appellant for the offence of Robbery with Aggravation in the Gun Court Division of the High Court [sic].
>
> 2. The LTJ should have upheld the No Case Submission instead he allowed the case to go to his Jury mind, and wrongfully convicted the Appellant.
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> 3. The LTJ accepted the Crown's case carte blanche and failed to address in his submission the legal issues that arose in the case, instead he regurgitated the evidence of the complainants/ victims, and convicted the Appellant.
>
> 4. The LTJ failed to address the matter of jurisdiction in his summation, thus lacked the awareness that he had no

> jurisdiction to have heard the Robbery with Aggravation charge."

[14] During the course of oral arguments, Mrs Reid indicated that the appellant was abandoning his appeal against sentence because (1) "although the learned sentencing judge did not comply with the principles of sentencing, the sentences cannot be said to be manifestly excessive"; and (2) by virtue of section 178 of the Correctional Institution (Adult Correctional Centre) Rule 1991, the appellant has 'technically' served his sentence and would have been released on 22 November 2022 had he not filed an appeal.

[15] The court agrees with the assessment of Mrs Reid that the sentences imposed on the appellant cannot be said to be manifestly excessive. The court, therefore, accepts the appellant's decision not to pursue the appeal against his sentences. Accordingly, the appeal concerns conviction only.

[16] From the supplementary grounds of appeal, the following issues arise for determination by this court:

(a) whether the learned judge lacked jurisdiction to have tried the appellant for the offence of robbery with aggravation in the High Court Division of the Gun Court (supplemental grounds 1 and 4); and

(b) whether the learned judge failed to properly identify and deal with the legal issues that arose from the evidence and thus erred in not upholding the no-case submission and ultimately finding the appellant guilty on all counts (grounds 2 and 3).

Issue (a): Whether the learned judge lacked jurisdiction to have tried the appellant for the offence of robbery with aggravation in the High Court Division of the Gun Court (supplemental grounds 1 and 4)

[17] Mrs Reid, on behalf of the appellant, argued that the offence of robbery with aggravation is not included in the offences triable in the Gun Court as this offence is not

one of the "any other offences" specified in the schedule to the Gun Court Act as falling within the jurisdiction of the High Court Division of the Gun Court by virtue of section 5(2)(b) of the Gun Court Act. Accordingly, she submitted, the offence of robbery with aggravation is excluded from the jurisdiction of the Gun Court.

[18] Counsel contended that "the foundation for any matter triable in the High Court Division of the Gun Court must be that the person used the firearm in the commission of the offence *vide* section 25(2) of the Firearms Act, and the adjunct or associated charge must be in accordance with the First Schedule of the Firearms Act. If all that is established, then the charge must be by virtue of section 25(2) of the Firearms Act".

[19] The position taken by Mrs Reid was strongly opposed by counsel for the Crown who maintained that it was within the jurisdiction of the learned judge to have tried the appellant for the offence of robbery with aggravation.

[20] According to section 20(5)(c) of the Firearms Act:

> "20.– (5) In any prosecution for an offence under this section –
>
> (c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section **shall be deemed to be in possession of a firearm in contravention of this section**." (Emphasis added)

[21] For its part, section 25(1) of the Firearms Act states that:

> "25.– (1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit **or to aid the commission of a felony** or to resist or prevent the lawful apprehension or detention of himself or some other person, shall be guilty of an offence against this sub-section." (Emphasis added)

[22] The offence of robbery with aggravation contrary to section 37(1) of the Larceny Act is a felony. In the circumstances of this case, it is proof of the commission of this felony, with the aid of a firearm, that would invoke the statutory fiction created by section 20(5)(c) of the Firearms Act. By virtue of that provision, the appellant would have been deemed to be in possession of a firearm in contravention of section 20(1)(b) of the Firearms Act. Accordingly, the offence of robbery with aggravation cannot be divorced from the offence of illegal possession of firearm, in circumstances where the prosecution successfully invoked the statutory fiction created by section 20(5)(c) of the Firearms Act in order to ground the conviction of the appellant for the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act.

[23] It was in similar circumstances that this court in **Stevon Reece v R** [2014] JMCA Crim 56 stated:

> "[41] For the prosecution to have succeeded in prosecuting the applicant for illegal possession of firearm under section 20(1)(b), as charged, they would have had to prove, not only that the object in the possession of the applicant was, at minimum, an imitation firearm, but also that the applicant made use of it, or attempted to make use of it with intent to commit or to aid the commission of the robbery with aggravation.
>
> …
>
> [43] **It follows that the prosecution, of necessity, would have had to successfully invoke the statutory fiction created by section 20(5)(c) in order to ground a conviction for the section 20(1)(b) offence for which the applicant was charged. To do so, there would have had to be proof beyond a reasonable doubt that he had committed the robbery with aggravation as charged**." (Emphasis added)

[24] Accordingly, the court agrees with the position of the Crown on this issue. We find that the learned judge had the jurisdiction to try the appellant for the offence of robbery

with aggravation in the High Court Division of the Gun Court. The grounds challenging the trial and conviction of the appellant in the Gun Court are, therefore, without merit.

Issue (b): Whether the learned judge failed to properly identify and deal with the legal issues that arose from the evidence and thus erred in not upholding the no-case submission and, ultimately, finding the appellant guilty on all counts (grounds 2 and 3)

[25] Mrs Reid argued that the identification evidence was so poor that the learned judge ought to have upheld the no-case submission instead of allowing the case to go to his jury mind. Mrs Reid took issue, in particular, with the lighting at the time of the robbery and the fact that no identification parade was held despite the fact that the appellant was not known to the complainants. She contended that the appellant was, instead, identified by confrontation when he was taken to the Mandeville CIB Office. Counsel submitted that based on settled authorities, if the quality of the identification was poor at the end of the prosecution's case, then the learned judge should have withdrawn the case from his jury mind.

[26] Counsel further argued that, even after allowing the case to go to his jury mind, the learned judge failed to sufficiently examine the weaknesses of the identification evidence and failed to warn himself in accordance with the guidelines laid down in **R v Turnbull and others** [1976] 3 All ER 549 ('The Turnbull guidelines'). She submitted that a judge sitting alone has no less a responsibility to warn himself of the dangers of improper or weak visual identification. Counsel contended that the learned judge "in his summation simply regurgitated the evidence led by the prosecution" and failed to demonstrate by what means he was satisfied with the identification of the appellant as one of the two assailants.

[27] Mrs Reid submitted further that when the case is looked at in its entirety, the learned judge ought to have considered the absence of an identification parade in keeping with the principles established in the case of **Aurelio Pop v R** [2003] 62 WIR 18.

[28] The Crown, belatedly, accepted that the identification was not good and that even if the identification was not an observation in terms of a fleeting glance, it was definitely a longer observation made in difficult circumstances, which would have hampered the correctness of the identification of the appellant. It is now trite that where visual identification is in issue, a trial judge must observe the Turnbull guidelines, which include this statement:

> "…When in the judgment of the trial judge, the quality of the identification evidence is poor, as when it depends solely on a fleeting glance or a longer observation made in difficult circumstances, the situation was very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification…".

Lord Widgery CJ further gave this warning:

> "A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe."

[29] We are also guided by the pronouncements of this court in **R v Locksley Carrol** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 39/1989, judgment delivered 25 June 1990. In that case, this court provided comprehensive guidance regarding the duty of a trial judge sitting alone in the High Court Division of the Gun Court in dealing with a visual identification case. Rowe P stated:

> "…the Privy Council in two cases, Scott and Others v. The Queen [1989] 2 W.L.R. 924 and Junior Reid and Others v. The Queen [1989] 3 W.L.R. 771 have laid it down that visual identification evidence does fall within a special class of evidence and is to be given special and specific treatment by the trial judge in a trial before a jury. The trial judge is required to give a clear warning of the danger of a mistaken identification, explain the reasons for such a warning and advise the jury to heed the warning when considering their verdict. Scott's case (supra) and Junior Reid's case (supra) are binding upon this Court. **This Court considered these**

> **Privy Council decisions in R. George Cameron [1989] S.C.C.A. 77/88 (unreported) a case of a judge sitting alone in the Gun Court and we said concerning a judge's summation:**
>
> > '**What is impermissible is inscrutable silence. What is of critical importance here is not so much the judge's knowledge of the law but his application. Even if there is a presumption in his favour regarding the former there is none as to the latter**.'
>
> **We do not read this passage as meaning that this Court will be prepared to infer that the trial judge had in his mind the applicable principles of law relating to visual identification evidence in any given case**…
>
> We hold that given the development of the law on visual identification evidence since the decision in R. v. Dacres (supra) in 1980, **judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold, that there should be no difference in trial by judge and jury and trial by judge alone**." (Emphasis added)

[30] Even though both witnesses testified to having seen the face of the appellant, the learned judge had a duty to demonstrate that he had applied the Turnbull guidelines to the evidence he found proved. The Turnbull guidelines have established the need for caution even when more than one witness purportedly identified the same perpetrator. In this regard, the guidelines require trial judges to warn juries (and, by extension, themselves when sitting alone) that more than one witness can also be mistaken. Upon reading the learned judge's reasons for his decision against the backdrop of the Turnbull guidelines, the court is not at all assisted as to his thought processes concerning the weaknesses and dangers inherent in the identification evidence. We endorse the learned single judge's observation in her ruling that the learned judge merely recounted the evidence without analysing it within the framework of the applicable law.

[31] Concerning the identification of the appellant at the Mandeville CIB Office, counsel for the Crown tried to convince the court that the identification was not by confrontation as it was unaided and not prompted by the police. We would agree with the Crown that, on the face of it, there is nothing to say that the police gave any explicit prompting to the witnesses. However, given that the appellant was brought directly to the Mandeville CIB Office, where the complainants were present and giving their statements to the police, the court cannot say definitively that the identification was not contrived. Therefore, the court cannot overlook the fact that there was an issue of confrontation identification, as pointed out by Mrs Reid, that ought to have attracted the attention of the learned judge for careful scrutiny in his examination of the prosecution's case.

[32] In **Michael Burnett v R** [2017] JMCA Crim 11 at para. [27], this court, after a review of some earlier authorities, delineated some relevant principles governing the question of identification by confrontation. The court particularly noted at sub-paras. [27] (v) and (vi):

> "(v) Outside of an identification parade, other methods of identification, even if sometimes undesirable, are nevertheless accepted by the court, **with sufficient safeguards**.
>
> (vi) The courts have deprecated confrontation that is contrived by the police to circumvent the safeguards of the Identification Parade Regulations 1933. **Confrontation is where the police confront the identifying witness with the suspect in order to have the witness verify that the suspect was the assailant. The sort of confrontation that is denounced is the tendency for the police to confront a suspected person with the person who is required to identify him in circumstances in which it is possible for the identifying witness to say that he merely came upon him.**" (Emphasis added)

[33] In **R v Brown (Gavaska), Brown (Kevin) and Matthews (Troy)** (2001) 62 WIR 234, this court earlier provided clear guidance regarding the circumstances in which confrontation identification would be acceptable. Smith JA stated on behalf of the court:

> "In an identification case in Jamaica, where the suspect is well known to the identifying witness, confrontation for the purpose of identification is permissible, except where the suspect asks for an identification parade. In order to ensure fairness, any such confrontation should be conducted as follows: (i) before the confrontation takes place, the identification officer must tell the witness that the person he saw may, or may not, be the person he is about to confront and that if he cannot make a positive identification he should say so; (ii) before the confrontation takes place, the suspect or his attorney at law must be provided with details of the first description of the suspect given by any witness who is to attend the confrontation; (iii) the confrontation should take place in the presence of the suspect's attorney at law, unless this would cause unreasonable delay; and (iv) the suspect should be confronted independently by each witness, who should be asked 'Is this the person?'...."

[34] As can be seen, confrontation for the purpose of identification is permissible in certain circumstances, even if, generally speaking, it may be undesirable. Therefore, the issue of confrontation, in and of itself, might not have been fatal to the conviction of the appellant, but the learned judge was required to consider whether the safeguards established by the authorities were present in the circumstances surrounding the identification. He was also required to adequately warn himself in keeping with the applicable law regarding the dangers of identification by confrontation and the absence of an identification parade.

[35] The case law clearly states that an accused person can derive certain benefits from an identification parade. In **Aurelio Pop v R**, the Judicial Committee of the Privy Council noted that:

> "[9] …The fact that no identification parade had been held and that Adolphus identified the appellant when he was in the dock did not make his evidence on the point inadmissible. **It meant, however, that in his directions to the jury the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should**

> **have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care**; *R v Graham* [1994] Crim LR 212 and *Williams (Noel) v R* [1997] 51 WLR 202." (Emphasis added)

[36] In this case, the appellant was not known to the witnesses. Therefore, it would have been prudent for the police to test the correctness of the witnesses' purported identification of the appellant as one of the perpetrators by holding an identification parade. This having not been done, the appellant was deprived of the potential advantage of not being pointed out on an identification parade. The judge, therefore, ought to have carefully examined the identification evidence before him by demonstrably bearing these deficiencies in mind and warning himself of the dangers of identification without a parade and the potential advantage of an inconclusive parade to the appellant.

[37] Therefore, in concluding that the appellant was guilty, the learned judge failed to demonstrate in clear language that he had the requisite caution in mind and the reasons for the need for caution regarding the evidence of visual identification, the confrontation of the appellant with the complainants at the police station and the resultant absence of an identification parade.

[38] There was also a critical discrepancy in the complainants' evidence regarding the source and adequacy of the lighting at the material time. The learned judge failed to demonstrate how he treated with that material discrepancy as to whether the lighting source was a street light, as stated by the female complainant, or moonlight, as stated by the male complainant. He also failed to demonstrate how he treated with material omissions that arose in the evidence of the police witnesses regarding the description given to them by the complainants before the apprehension of the appellant and the alleged finding and retrieval of the machete when the appellant was apprehended. These were all matters that would have impacted the assessment of the credibility and reliability of the prosecution's witnesses, but the learned judge was silent on his evaluation and

resolution of them. He had a compelling duty to demonstrate how he resolved the inconsistencies, discrepancies and omissions that arose in the prosecution's case, but he failed to discharge that duty.

[39] Having considered the relevant authorities, the evidence presented by the prosecution and the learned judge's reasoning, we find merit in the submissions of Mrs Reid that the learned judge failed to direct himself properly, as he was required to do and, thus, erred in coming to a finding that the appellant was guilty of the offences charged. We also find the belated concession of the Crown on this point to be rightly made.

[40] The failure of the learned judge to demonstrably apply the relevant law to the evidence before him is fatal to the appellant's conviction as it could amount to a serious miscarriage of justice. In the circumstances, we conclude that the verdicts are unsatisfactory and unsafe, so the convictions cannot be upheld.

[41] The appeal succeeds.

[42] Accordingly, the order of the court is as follows:

1. The appeal is allowed.

2. The convictions are quashed, and the sentences set aside.

3. Judgment and verdict of acquittal entered on all counts.