[2019] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 38/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

KEMAR SHIELDS v R

Norman Manley and Miss Rebecca Neil for the appellant

Mrs Sharon Milwood-Moore for the Crown.

3 and 17 June 2019

MORRISON P

[1] On 13 September 2013, after a trial before Gayle J ('the judge') sitting without a jury in the Clarendon Circuit Court, the appellant was convicted for the offences of illegal possession of firearm (count 1) and shooting with intent (count 2). On 10 April 2014, the judge sentenced the appellant to 10 years' imprisonment on count 1 and 15 years' imprisonment on count 2, at the same time ordering that both sentences should run concurrently. With the leave of a single judge of this court, this is the appellant's appeal against his conviction and sentence.

[2] Having heard the appeal on 3 June 2019, we made the following order on 6 June 2019:

1. The appeal is allowed.

2. The appellant's conviction is quashed and the sentences are set aside.

3. Judgment and verdict of acquittal entered.

[3] These are the reasons for our decision.

[4] At his trial, the appellant gave evidence in which he contended that he had been wrongly identified by the two police officers who purported to identify him as the person who had shot at them on the day in question. He also set up an alibi. The main issues at the trial therefore had to do with the credibility of the witnesses and the reliability of their identification of the appellant. The issues which arise in this appeal are whether the identification evidence was sufficient to support the appellant's conviction and whether the judge's directions to himself as to how to approach that evidence were adequate in all the circumstances of the case.

[5] The case for the prosecution at trial was presented through the evidence of Detective Inspector Orville Smith, Corporal Omar Lobban (who were Detective Sergeant Smith and Constable Lobban respectively at the material time), Constable Pete Samuels, Sergeant Kevin Brown and Detective Sergeant Balvey Thomas. The general outline of the case was as follows.

[6] At about 2:45 pm on 17 June 2010, Detective Inspector Smith, Corporal Lobban and Constable Samuels were on patrol in an unmarked police vehicle in the vicinity of

Hayes in the parish of Clarendon. Detective Inspector Smith was the driver. The police officers were acting on certain information which had been received at their base at the May Police Station. They were dressed in civilian clothes, but Detective Inspector Smith was also wearing a red and blue/black vest with the word 'Police' marked on it. As they approached the area, a Toyota Corolla motor car was seen in a stationary position on the opposite side of the road facing them. There were three men standing outside the vehicle, leaning against its rear section and appearing to be engaged in conversation. A fourth man was seen sitting inside the Toyota Corolla in the driver's seat. Inspector Smith stopped the police vehicle and, together with the two constables, alighted, shouting "Police, don't move". The Toyota immediately sped off. The three men looked in the direction of the police car, pulled handguns from their waists, pointed them in the direction of the police officers and opened fire. Throwing themselves to the ground, the police officers returned the fire. The three men ran off into the bushes adjacent to the road, still firing shots at the police officers. The police officers gave chase, but the men branched off in different directions in the bushes and made good their escape.

[7] A subsequent search of the area extended to a nearby cane-field, where a man was found on the ground. It appeared that he had received gunshot wounds to his upper body. The police officers recognised him as one of the three men who had been seen standing at the rear of the Toyota Corolla and who had fired on them. Lying on the ground beside the injured man was a brown semi-automatic pistol. He was taken to the Lionel Town Hospital, where he was pronounced dead on arrival.

[8] Detective Inspector Smith had never seen any of the three men before. He was therefore of no assistance on the question of identification. However, he did say that one of the men had been dressed in a green shirt and short black pants.

[9] Under cross-examination by counsel for the appellant, he said that neither he nor any of his colleagues picked up any spent shells after the incident. None of them had suffered any gunshot injury and no report was made afterwards of any damage to the unmarked police vehicle which he had driven to Hayes that afternoon. He did not know whether any ballistics certificate had been prepared in respect of the firearm which was found lying beside the man who was found lying on the ground in the bushes, though he did point out that it was the responsibility of the investigating officer to obtain one.

[10] Both Corporal Lobban and Constable Samuels identified the appellant as one of the three men who had removed guns from their waists and shot at the police party on the afternoon of 17 June 2010.

[11] Corporal Lobban testified that he had known the appellant, who was a police constable stationed at the Hayes Police Station, for over three years. He would usually see the appellant at the Hayes Police Station whenever he took prisoners there to be charged. His estimate was that he would see the appellant and speak to him on work related matters once per week. He had last seen the appellant about a month before 17 June 2010. On 17 June 2010, as the police vehicle approached the group of three men standing to the rear of the Toyota, he recognised the appellant, who was dressed in a green shirt and black short pants and was standing "to the rear, to the right of the

[Toyota]". When Detective Inspector Smith stopped the police vehicle, the group of three men was about seven metres away. Less than a minute elapsed between the time when the police vehicle came to a stop and the officers alighted from it. Corporal Lobban's estimate of the length of the time during which he was able to observe the appellant's face was "about three seconds".

[12] Constable Samuels also testified that he recognised the appellant as someone whom he had known before 17 June 2010. He said that he knew the appellant from both the Hayes and the May Pen Police Stations, though he was not able to say for how long before the incident he had known him. He would usually see the appellant at the May Pen Police Station, "like twice a week the most", sometimes escorting prisoners and at other times when he did not know what he would be doing. However, he "didn't keep track how long I know him or how often I see him". And, as regards the Hayes Police Station, he only saw the appellant there "occasionally … like once or twice every two weeks or so". He had never spoken to the appellant, nor could he remember the last time he had seen him before the incident.

[13] Constable Samuels testified that when he first saw the appellant standing at the back of the Toyota on 17 June 2010, the appellant was about seven metres away and was dressed in a green shirt and black short pants. His estimate of the time which elapsed between his first sighting of the appellant and the appellant pulling a firearm from his waist was that it was "less than five seconds". He gave no description of the appellant in his subsequent statement to the police, but this was, he said, because he knew him.

[14] Sergeant Kevin Brown was the sub-officer in charge of the Hayes Police Station at the material time. As sub-officer in charge, he was responsible for the overall management of the police personnel under his immediate supervision. The appellant fell into that category. Sergeant Brown testified that, in relation to absences from work due to illness, the usual procedure was that, where a member of the force reported sick, he or she was required to submit an application for sick leave along with a medical certificate within a certain period of time. If no medical report is submitted, an entry would be made in the station diary to that effect and the information would be forwarded to the general office for reporting purposes.

[15] On 12 June 2010, Sergeant Brown was advised that the appellant had reported sick. Two days later, on 14 June 2010, Sergeant Brown was further advised that the appellant had again reported sick. A check of the information captured in the station diary revealed no indication of the number of days of sick leave that the appellant was on, nor had any no medical report been received in relation to his absence from work from 12-14 June 2010. The appellant remained absent from work after that and Sergeant Brown's attempts to contact him, through telephone calls and personal visits to his home, proved futile. Despite the fact that a medical report was eventually submitted to cover the period 12-14 June 2010, the appellant's continued absence from work after that remained unexplained.

[16] Detective Sergeant Balvey Thomas was the arresting officer. His evidence was that he took over the investigation of the shooting incident from the original investigating

officer, Detective Sergeant Sanko, who had since left the police force and was now serving in another jurisdiction. As a result of a ruling from the Director of Public Prosecutions, the appellant was arrested and charged with illegal possession of firearm and shooting with intent. Upon his arrest, the appellant said, "Mi noh have nutten fi seh".

[17] That was the case for the Crown, at the end of which counsel for the appellant submitted unsuccessfully that there was no case to answer. The appellant then opted to give evidence in his defence. He categorically denied being one of the three men who allegedly fired shots at the police officers at Hayes on 17 June 2010. He testified that, in the afternoon of that day, he went to May Pen to meet with Miss Tamoya Donaldson, whom he described as "my girlfriend at the time".

[18] Under cross-examination, the appellant said that he had taken sick leave from about 12 June 2010. He had initially applied for seven days, then for a further period of about five days (though he could not remember the exact amount). In this regard, he insisted that he had furnished the necessary medical report. As at the date he gave evidence at the trial, he had not returned to work.

[19] Miss Donaldson gave evidence in support of the appellant's alibi. She confirmed meeting him in May Pen on the afternoon of 17 June 2010. She told the court that after they had had lunch together in Independence Park, they travelled by taxi to her cousin's house in Mocho, also in Clarendon, where they spent a week together. After their time together in Mocho, she had not seen the appellant again.

[20] On this evidence, as we have indicated, the appellant was convicted of the offences of illegal possession of firearm and shooting with intent.

[21] Unfortunately, the sentencing exercise was postponed for several months as a result of the judge having been scheduled to proceed on vacation leave immediately after the verdict was given. The appellant's antecedent report revealed that he was 29 years old and had been a member of the Jamaica Constabulary Force for eight years up to the time of his arrest. A single man with two dependent children, he had no previous convictions recorded against his name. The appellant's Social Enquiry Report, which we have not seen, was clearly favourable, in that the judge described it as "a good Report, a very good Report".

[22] Although the appellant originally sought leave to appeal against conviction and sentence, no complaint was made before us as to sentence. It is therefore not necessary to say anything further about it, save that the sentences of 10 years' imprisonment for illegal possession of firearm and 15 years for shooting with intent, which the judge imposed, were both entirely in keeping with the usual range of sentences imposed in like cases. In the case of the sentence for shooting with intent, in any event, the judge correctly considered himself bound – as we are - by section 25 of the Firearms Act, which prescribes a minimum sentence of 15 years' imprisonment for use of a firearm with intent to commit a felony.

[23] As regards conviction, the appellant originally filed the following four grounds in support of his application for leave to appeal:

"1) Misidentity [sic] by the Witness

2) Unfair trial

3) Lack of evidence

4) Miscarriage of Justice."

[24] The application for leave to appeal was considered on paper and granted by a single judge of appeal on 21 January 2019.

[25] When the matter came on for hearing before us, Mr Manley for the appellant condensed the grounds into a single, compendious submission, which may be summarised as follows: the judge erred by failing to examine closely the circumstances in which the identification of each witness came to be made and, by that means, to do any proper analysis of the quality of identification evidence led by the prosecution.

[26] Mrs Milwood-Moore for the prosecution, who had also appeared at the trial, acknowledged that the judge's analysis of the identification evidence lacked depth. She submitted, however, that the evidence given by Corporal Lobban and Constable Samuels was sufficiently strong to justify the appellant's conviction and that it ought not therefore to be disturbed.

[27] The judge correctly stated the principal issues in the case as identification and credibility. Observing that the appellant relied on an alibi, the judge also made it clear that by doing so the appellant assumed no burden to prove his innocence and that it was for the prosecution to satisfy the court so that it could be sure of his guilt before convicting

him. The judge also treated the appellant as having put his good character in issue and accordingly gave him the benefit of the standard good character direction relating to both his propensity to offend in general and his credibility on oath.

[28] Specifically as regards the question of identification, the judge – again correctly – took the case to be one of recognition, given the evidence of both Corporal Lobban and Constable Samuels that the appellant was known to them before as a police colleague. Against this background, the judge directed himself as follows[1]:

> "This case against the accused man depends wholly, to a large extent, to [sic] the correctness of the identification of this accused man. Where the accused man alleges that a mistake has been made or they are telling lies and he presents an alibi, he is saying that the Prosecution witnesses are mistaken, who are all police officers, are lying against him; he wasn't there. Because of this, I must warn myself of the special need for caution when it comes to identification evidence or under reliance of identification evidence, because it is possible for an honest witness to make or to be mistaken or to make mistaken identification. And even a convincing witness can be mistaken.
>
> I must remind myself that it is easier to identify somebody who you knew before than a person that you are seeing for the first time. Also, that it takes less time to identify or to recognize a person who you knew before than one who you did not know before.
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> However, I must bear in mind that even in recognition cases where persons are known to each other before and for a long time and are sometime friends and co-workers and family members, mistake could still be made. So I must look carefully at the circumstances under which this identification, in particular recognition, was made. I must look at the distance,

[1] Transcript, pages 283-285

> the time the witnesses were able to view this person. Was something obstructing these witnesses view of the person? When was the last time they saw this accused man? How often these witnesses would have seen the accused? And whether it was day or night? If the witnesses knew any family members of the accused man. Those are the things I must look at when it comes to identification and recognition.
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> As to the question of alibi, as has been raised by the accused along with his witness, the accused man has no burden to prove his alibi. It is for the Prosecution to disprove that alibi."

[29] Though they could hardly be described as expansive, these directions on identification were, in our view, in general compliance with the well-known guidance given in **R v Turnbull**[2] and invariably applied by this court. So, the judge correctly warned himself that where, as in this case, the case against the defendant depended wholly or substantially on the correctness of one disputed identification evidence, there was a special need for caution before convicting in reliance on the correctness of that identification. The judge also warned himself of the possibility that an honest witness might nevertheless be mistaken and that a mistaken witness can be a convincing one. And the judge also reminded himself that, although recognition might be more reliable than identification of a stranger, mistakes in recognition of friends and co-workers and family members are sometimes made.

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[2] [1977] QB 224

[30] Next, after observing that "the body language will determine the credibility of the witnesses"[3], the judge then proceeded to rehearse - in fair detail, albeit uncritically – the evidence given by each witness in the case. Then, almost at the end of this exercise, after summarising the evidence of Miss Donaldson, the appellant's alibi witness, the judge allowed himself the comment that, while she had spoken of them lunching together in Independence Park in May Pen and then going off together to Mocho for a week, the appellant himself had made no mention of this at all in his evidence.

[31] And lastly, having repeated that the main issues in the case were credibility and identification, the judge went on to say this[4]:

> "As I said, the main issue in this case is that of credibility and identification. I have seen the witnesses who gave testimony although police officers who spoke to the issue one could not do any identification. It is Samuels and Lobban who speaks [sic] to the identification, that they knew Mr. Shields before. The other officer, Mr. Smith, only spoke of the incident that took place and describes the car and tells the licence number, which was given by one of the other ones.
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> I find that Mr. Samuels and Mr. Lobban are witnesses of truth, likewise Mr. Smith who spoke of the incident. I find that Mr. Shields engaged the police with these other persons in a shoot-out and that both witnesses, one seeing him for 30 seconds and the other for five minutes, is somebody who he knew before - - five seconds, somebody that he knew before was one of their colleagues. Yes.
>
> They were under fire but police officers are trained to observe carefully. I find that these two witnesses are witnesses of truth, Lobban, Smith and Samuels. And I wonder why didn't

[3] Transcript, page 286
[4] Transcript, page 305-306

> Mr. Shields turn up for work or communicated, he went without any decision at all. I reject his alibi.
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> The geographical area of Dawkins Pen, the main road to May Pen, it is not a wide area. Taxis travel throughout and as such I find him guilty on both counts of this indictment."

[32] As will be seen, the judge's final words on the matter related purely to the issue of credibility. Mr Manley's complaint is that, despite warning himself in adequate terms of the need to examine carefully the circumstances of the identification of the appellant, the judge did not do so.

[33] We agree with Mr Manley. Despite the fact that this was plainly a recognition case, and despite the fact that, as Crown Counsel pointed out, both identifying witnesses testified to having recognised the appellant before the shooting actually started, there can be no doubt that the identification of the appellant was made in challenging circumstances. First, there was the fact that neither of the two identifying witnesses got any closer to their assailants than the seven metres of which they spoke. And second, there was the fact that neither witness had the appellant under observation for longer than "about three seconds", in one case, and "less than five seconds" in the other. On their account, given the fact that both witnesses immediately threw themselves to the ground the moment the shooting started, returning the fire, there was clearly no other opportunity for them to have made any closer – or longer – observation of the person whom they identified as the appellant.

[34] There were also other factors, such as the absence of any evidence of spent shells or any form of ballistic analysis, both of the firearm recovered from the body of the man found in the bushes and of the firearms which were said to be in the possession of the police officers. Such evidence would have been of importance in assessing the overall credibility of the account of the incident given by the three police officers.

[35] In our view, all of these matters demanded careful discussion and analysis by the judge in order that the working of his mind might be demonstrated to the parties in the case and, hardly least, to this court. For, as Wright JA observed in the oft-cited case of **R v George Cameron**[5], "[t]he judge must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind".

[36] It further seems to us that there is yet another issue, which relates to the judge's treatment of the appellant's alibi. It is true, as we have already observed, that the judge made the point that, by putting up an alibi, the appellant did not assume any duty of proving his innocence. Where however, as was the case here, the judge rejected the alibi, the **Turnbull** guidelines also obliged him[6] to warn himself that –

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly

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[5] (1989) 26 JLR 453,457
[6] **Turnbull**, page 230

> fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that was where the identifying witness says he was."

[37] The judge did not follow this guidance in this case. The undoubted strength of the prosecution's case was, of course, the fact that, on the evidence of the two identifying witnesses, the appellant was previously known to them. However, it was the judge's duty to balance that strength against the weaknesses in the identification evidence, some of which we have set out above. In so doing, the judge was required to demonstrate by his analysis how he came to the conclusion that the evidence identifying of the appellant was reliable, as a separate matter from whether it was credible. In lieu of undertaking this task, the judge was content to fall back on the old shibboleth that "police officers are trained to observe carefully". While this may well be true, it certainly does not, in our view, relieve a trial judge dealing with the issue of identification of the need for careful analysis in assessing the quality of the evidence applying standard **Turnbull** criteria.

[38] We therefore considered that the verdict of guilty in the circumstances of this case could not be allowed to stand. While it did seem to us that, on the face of it, the evidence in this case was such that a properly directed jury could have convicted the appellant, we did not think that this is a fit case for ordering a retrial, given the fact that the events at

issue in the case took place in 2010 and the trial was completed in 2014. It is for these reasons, therefore, that we allowed the appeal, quashed the appellant's conviction, set aside the sentences and entered a judgment and verdict of acquittal.