[2013] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 95/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BARRINGTON TAYLOR v R

Michael Lorne for the appellant

Miss Joan Barnett for the Crown

16 October 2012 and 31 July 2013

HARRIS JA

[1] The appellant, Barrington Taylor, was convicted in the High Court Division of the Gun Court on three counts of an indictment. On count one he was charged with illegal possession of firearm. The charge preferred against him on count two was for illegal possession of ammunition and on count three, he was charged with shooting with intent. He was sentenced to 10 years imprisonment on each count. These sentences were ordered to run concurrently.

[2] Before us was a renewal of his application for leave to appeal against conviction and sentence, a previous application for leave having been refused by a single judge. On 16 October 2012, we heard the application, treated the application as the hearing of the appeal, allowed the appeal, set aside the convictions and sentences and ordered that a judgment and verdict of acquittal be entered. We promised to put our reasons in writing. This we now do.

[3] The factual circumstances of this case are that at about 5:00 pm on 6 December 2006, a police party was on special assignment in the Torrington Park Housing Scheme. Constable Emilio Richards and Constable Collins, who were members of the party, separated from the group and were patrolling on foot in the area. While doing so, Constable Richards said, he observed two shirtless men, armed with firearms, approaching them. Upon Constable Richards giving the command "Police don't move," the men fired at the policemen. Constable Richards said that they returned the fire. Both men fled the scene.

[4] The men, Constable Richards said, were previously known to him, the appellant as Barry and the other man as Skunkle. Before escaping, he said, Skunkle dropped a chrome 9mm Luger semi automatic pistol containing nine live rounds of ammunition. Barry, he stated, was known to him for about two years prior to the incident and he had detained him twice on previous police operations. He had last seen Barry two weeks before the incident, he said. He also related that at the time of incident, he was able to observe the men for 10 seconds, they being 30 feet away.

[5] Constable Richards asserted that, on 21 November 2007, he pointed out the appellant as Barry at the Denham Town Police Station to the investigating officer, Detective Sergeant James Dawes. It was revealed in cross-examination that the statement written by Constable Richards in relation to the incident was dated 10 December 2007 but the year 2007 was erased and the year 2006 substituted. He stated that in writing the date, he had made a mistake. He said that he made a report to Sergeant Dawes immediately after he had given a statement to him.

[6] Sergeant Dawes testified that on 6 December 2006, Constable Richards and Constable Collins attended the Denham Town Police Station where they made reports to him and Constable Richards handed over a five Luger chrome 9mm pistol bearing serial no 31084841 containing nine 9mm cartridges. The firearm and ammunition were placed in envelopes marked "A" and "B" and handed over to the exhibit stores. He said that he prepared a warrant for the arrest of persons known as Barry and Stunkle.

[7] On 12 December 2007, he was given some information by Constable Richards as a result of which he took the firearm to the forensic laboratory. A ballistic certificate was subsequently obtained and a copy was served on the appellant.

[8] He further asserted that on 13 December 2007, he went to the Admiral Town Police Station where he saw a man in custody who gave his name as Barrington Taylor otherwise called Barry. He informed him of the reports made by Constables Richards and Collins against him. When cautioned, he said "Mi did inna custody". Under cross-

examination, Sergeant Dawes stated that checks made by him to ascertain whether the appellant was in custody on 6 December 2006, proved that his assertion was untrue.

[9] The appellant, in an unsworn statement, said that on 6 December 2006, he was at Lot 11, Seaview Gardens, Saint Andrew. After that, he was detained and incarcerated at the Horizon Remand Centre on suspicion of shooting. However, because he had a matter before the Family Court, he was bound over and released.

[10] The original grounds of appeal were abandoned and leave was granted for the appellant to argue seven supplemental grounds. Grounds 6 and 7 are recorded as filed. However, we are of the view that no harm will be done if a summary is made of grounds 1, 2, 3, 4 and 5. The grounds are as follows:

1. The learned trial judge erred in relying heavily on the evidence of Constable Emilio Richards, the sole eyewitness for the Crown whose evidence is suspect, particularly in light of his testimony that it was Stunkle who dropped the gun and ran yet in his statement, he wrote that it was the accused man who "dropped his shine gun".

2. Constable Richards, the sole eyewitness for the Crown, was unable to recall the date on which he wrote his statement, however, when shown to him, he admitted that he had written 10 December 2007 which he changed to 10 December 2006 but said that it was a mistake.

3. The learned judge found the appellant guilty on all three counts of the indictment and upon being reminded that he had said very

little about the warning in respect of the identification, he proceeded to issue a warning.

4. The suspicious evidence of identification is emboldened by the contradictory evidence of Constable Richards and Sergeant James Dawes as to how and where the applicant was identified while in custody.

5. The learned judge failed to deal adequately with the defence of alibi as he failed to warn himself that a false alibi could still contribute to a genuine defence.

6. "The Learned Trial Judged [sic] failed to adequately consider the weaknesses and inconsistencies of the prosecution's case and consequently deprived the Applicant of a fair trail [sic] resulting in a miscarriage of justice".

7. "The verdict against the Applicant is unreasonable and cannot be supported having regard to the evidence."

Submissions

[11] Mr Lorne submitted that the identification of the appellant was questionable and reliance cannot be placed on the evidence of Constable Richards, he argued. Constable Richards had "glimpsed him" [the appellant] for 10 seconds in rather dangerous circumstances and there was no other evidence connecting the appellant to the incident. Further, there was no identification parade and the fact that the appellant was allegedly in custody at the time of the "so called" identification, places the question of an honest identification in issue. In support of this submission, counsel relied on ***Kenneth Evans v R*** [1991] UKPC 30 in which the Privy Council cited with approval

the statement of Lord Widgery CJ in ***R v Turnbull*** [1977] QB 224; [1976] 3 WLR 445; [1976] 3 All ER 549, that a case should be withdrawn from the jury where the evidence of identification is poor, for example, where the case depends upon a fleeting glance.

[12] Constable Richards, he argued, wrote in his statement that Skunkle shot at them but in his evidence he said it was Barry who had done the shooting. This, he submitted, is a serious discrepancy which goes to the root of the Crown's case.

[13] It was also submitted by counsel that the learned judge failed to adequately take into consideration the discrepancies and inconsistencies in the evidence such as: Constable Richards' statement as to who dropped the gun; his evidence in respect of the changing of the date from 2007 to 2006 and his failure to recall the date on which he wrote the statement. Constable Richards' testimony is that he pointed out the appellant to Sergeant Dawes in 2007; Sergeant Dawes said that he had identified the appellant by name and he took out the warrant in 2007, he argued. The appellant was not identified to Sergeant Dawes and a person identifying himself is not enough, he argued. The appellant was arrested in 2007 and there is no evidence to establish how he came to have been in custody, he submitted. The conflicting testimonies of Constable Richards and Sergeant Dawes compounded the unreliability of the purported identification evidence, he submitted.

[14] Counsel further argued that the questionable identification coupled with the fact that the learned judge arrived at a guilty verdict before warning himself of the dangers of visual identification suggest that the significance of the shaky testimony of the

witness was not fully appreciated by him. For this submission he relied on ***R v Locksley Carrol*** (1990) 27 JLR 259 and ***R v George Cameron*** (1989) 26 JLR 453. The learned judge administered the warning after arriving at a verdict and after being prompted by counsel for the Crown but this warning was too late to be of any value, he submitted. The verdict ought not to stand, he argued.

[15] It was also submitted by counsel that although no precise formula is required on a direction for an alibi, the learned judge's directions on that defence were sparse and this deprived the appellant of a fair trial as it was not enough for the learned judge to have simply said that the Crown must disprove the alibi.

[16] Miss Barnett submitted that the learned judge, before convicting, warned himself of the special need for caution and closely examined the circumstances surrounding the identification. No motive had been suggested for the witness to have fabricated his evidence and the learned judge had demonstrated that there could not have been any doubt that the issues in the prosecution's case related to the truthfulness and reliability of the witnesses, she argued. It was a matter of the credibility of the main witness as to fact and a trial judge is best suited to assess the witnesses as they give their evidence and this court is unlikely to disturb a conviction which is dependent on the view to be taken of the reliability of the witnesses, she submitted.

[17] Although counsel for the appellant submitted that the observation was a fleeting glance, on the totality of the evidence of identification, his submission lacked force, she argued. This case fell within the category of recognition cases and even if the

recognition was made under difficult circumstances, she contended, this does not mean that the evidence was incapable of being accepted. The witness knew the appellant, had arrested him on two occasions and further, the witness being a police officer, greater weight could be given to his evidence than that of an ordinary member of the public as he was "likely to have a greater appreciation of the importance of identification", she argued. She cited ***R v Ramsden*** [1991] Crim LR 295 to bolster this submission.

[18] Counsel further submitted that the witness Constable Richards said he saw the appellant at the Denham Town Police Station on 21 November 2007 but Sergeant Dawes said that the appellant was at the Admiral Town Police Station on another date, however, there is nothing to show that Sergeant Dawes did not know the appellant before. He asked the appellant if he was Barry and he agreed that he was. These would not be facts which would go to the root of the identification evidence, she argued.

[19] Counsel further argued that no special formula is required for the direction on alibi and although the direction was economical, it was adequate as the learned judge assessed it against the appellant saying that he was in custody. The learned judge, she submitted, demonstrated his awareness of the law in this area and adverted his mind to it. The case of ***Oniel Roberts and Christopher Wiltshire v R*** SCCA Nos 37 and 38/2000, delivered 15 November 2001, was cited by counsel in support of this submission.

[20] She argued that the witness gave an explanation for the changes in the date of his statement and it was not important for the learned judge to resolve when the statement was written. What was of importance, she contended, was for him to have assessed the evidence of identification and the credibility of the witness.

Identification

[21] The crucial issue in this case is visual identification. It is well established that where the prosecution's case depends wholly or largely on the correctness of the visual identification of an accused, a judge must give a warning as laid down by Lord Widgery CJ in ***R v Turnbull***. This requires the judge to inform the jury of: (i) the special need for caution before reliance is placed upon the uncorroborated evidence of visual identification; and (ii) the reason for such caution, which is that, an honest witness can be mistaken. Lord Widgery also pronounced that the judge is obliged to focus the jury's attention on the circumstances surrounding the identification. He has, however, expressly pointed out that there is no prescribed verbal formula to be used by a trial judge in administering the warning.

[22] In ***R v Whylie*** (1977) 25 WIR 430, at page 432, Rowe JA (Ag) succinctly acknowledged the ***Turnbull*** principle in the following terms:

> "Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken."

[23] A judge sitting alone is not relieved of the obligation to fully advise himself of the warning. In ***R v Locksley Carroll*** Rowe P, stated that:

> "Judges sitting alone in the High 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."

[24] The requisite warning is no less significant where the case is one of recognition. However, it is important that in addition to the requirement for special caution, a judge must inform the jury that it is easy for an honest witness to make a mistake on the purported recognition of a person who is previously known to the witness. It follows that the judge must show that he addressed his mind to the possibility of a mistake being made in the identification of an accused.

[25] The prosecution, in the instant case, relied solely on the identifying witness Constable Richards. This identification took place in daylight at a distance of 30 feet and the shooter was seen for 10 seconds. The viewing of an assailant for 10 seconds, by the policeman, cannot be said to be one of which Lord Widgery CJ, in ***R v Oakwell*** [1978] 1 WLR 32, spoke as being intended to include the "ghastly risk run in cases of fleeting encounters". This was clearly not a case of a fleeting glance nor identification made in difficult circumstances. However, the question which now arises is whether the learned judge had fully complied with the ***Turnbull*** warning, despite his acknowledgment that the prosecution's case rested solely on visual identification. In dealing with the warning he said:

> "The issue here in this case is the usual issue of identification and the issue of visual identification is one which occupies this court and which this court must give serious consideration to. And in that regard this court will warn itself of the dangers inherent in convicting on evidence of visual identification. This court takes into consideration all matters relevant to the identification of the accused and of the assailants of the two police officers, Collins and the virtual complainant Richards."

[26] As can be observed, the learned judge warned himself that the evidence of identification must be approached with caution. He, however, failed to remind himself of the reason for the warning, namely, that an honest witness may be mistaken. Although it was not necessary for him to have expressed this in any precise term, he ought, none-the-less, to have specifically indicated that he had averted his mind to the second limb of the warning. His failure to do so is a serious error. The omission leads us to conclude that the learned judge had not fully treated with the requisite warning. After delivering his verdict pronouncing that the appellant was guilty, counsel for the prosecution reminded him of the second limb of the warning at which time he corrected his error. However, this was far too late as he had already made a decision in that the appellant was guilty. His subsequent consideration and correction of this aspect of the warning could not cure the deficiency.

Inconsistencies and Discrepancies

[27] There is no doubt that there were major inconsistencies and discrepancies in the evidence presented by the prosecution. In dealing with the inconsistencies between Constable Richards' statement and his evidence as to which of the two men had dropped the gun, the learned judge concluded that it did not matter who had dropped

the gun as the issue was whether both men were present at the scene firing at the police officers. However, the question which remained unanswered was whether the person who Constable Richards identified as Barry was one of those persons who shot at the police that day.

[28] There was a conspicuously striking discrepancy between the accounts given by Sergeant Dawes and Constable Richards as to the manner in which the appellant was brought to Sergeant Dawes' attention by way of his being identified while in custody. Miss Barnett submitted that there was uncontradictory evidence that the appellant was pointed out. Contrary to her submission, this has not been confirmed by the evidence**.** Constable Richards claimed to have pointed him out to Sergeant Dawes at the Denham Town Police Station on 21 November 2007, yet as reported by Sergeant Dawes, he saw the appellant at the Admiral Town Police Station on 13 December 2007, who gave his name as Barrington Taylor otherwise called Barry. There was no evidence to show how the appellant came to have been at Admiral Town Police Station when Sergeant Dawes saw him. However, the controversy as to how the appellant came to Sergeant Dawes' knowledge as one of the persons who fired at the police remained unresolved. The learned judge did not consider the impact of this material discrepancy. In fact it was completely overlooked by him.

[29] There is also a conflict as to the date on which Constable Richards said he had written his statement. He stated that it was written in 2006 but he had mistakenly dated it as being written in 2007. The learned judge stated that by looking at the date,

it could be seen that the statement was written shortly after, or at the time at which the appellant was taken into custody. The learned judge found the date of 2006, to be correct by referring to the evidence of Sergeant Dawes. On Sergeant Dawes' evidence the appellant would not have been in custody until November 2007, one year after the incident. Constable Richards said he gave the statement to Sergeant Dawes the very day he made the report, which would be 6 December 2006. On this evidence, the statement ought to have been dated 6 December 2006. The statement, which was before the learned judge, was originally dated 10 December 2007. This date appears in the statement on three separate occasions. The year 2007 was deleted and the year 2006 substituted therefor. Curiously, although the witness said he had made a mistake with the date when he had written the statement, when initially pressed in cross-examination, he said he could not remember the date, yet he had no difficulty in recalling that the incident occurred in December 2006 or that he had written the statement on the day he made the report. When further pressed, he said that he could not recall if it had been written in 2006. In these circumstances, grave doubt must be cast on his veracity. Clearly, this would have a serious impact on his credibility.

[30] It is also worthy to note that the warrants for Barry and Stunkle were prepared on 10 and 12 December 2007 respectively. Sergeant Dawes spoke of seeing the appellant in custody on 13 December 2007. There was no evidence that in November 2007, the appellant was in custody on any charge. If he were pointed out in November as Constable Richards asserted, this would mean that the appellant was taken into custody before the warrant was prepared.

[31] The foregoing raises serious questions as to the overall credibility of Constable Richards as well as his reliability. It is doubtful that reliance could be placed on his evidence to show that the appellant had been correctly identified. Therefore, it could not be said that the prosecution had proved its case beyond a reasonable doubt. In these circumstances, it would have been unsafe to have allowed the conviction to stand.

[32] Although the foregoing is sufficient to dispose of the appeal, we think the issue concerning the alibi direction should be briefly addressed. The appellant said he was in custody on the date of the incident. However, Sergeant Dawes said checks made by him revealed that this was untrue. Although the court in ***R v Burge and Pegg*** (1996) 1 Cr App Rep 163 stated that a ***Lucas*** direction (***R v Lucas*** [1981] QB 720) should be given where the defence relies on a false alibi, it is now well established that it is not in all cases an alibi direction, in keeping with the ***Lucas*** principle, is required - see ***R v Harron*** (1996) 2 Cr App Rep 457. In that case, it was held that where there is no realistic distinction between the issue of guilt and the issue in relation to an alibi where the only possible basis for rejecting the defendant's alibi would be acceptance of the prosecution's evidence of identification, there is no necessity to give a ***Lucas*** direction.

[33] In ***Roberts and Wiltshire v R*** Smith JA (Ag) made certain observations, within the context of the guidelines laid down in ***Turnbull v R***, surrounding the need for a warning where there is rejection of an alibi, as follows: where the rejection of the alibi

supports the identification evidence; where the conflicts in the evidence in respect of the alibi creates a risk that the alibi evidence supports the identification evidence; where the alibi evidence crumbles and there is a risk that the collapsed alibi could be regarded as confirmation of a disputed identification evidence; and where the alibi evidence conveys no apparent weakness, the evidence can only be rejected if the correctness of the identification is certain. Smith JA (Ag) went on to point out, among other things, that where an alibi might be rejected due to inherent weaknesses, ordinarily there should be a warning that a false alibi is not in itself proof that a defendant was not where the identifying witness placed him.

[34] In the instant case, the learned judge, in dealing with the defence of alibi said:

> "Of course in his unsworn statement he is raising an alibi and if he raises an alibi it is not for him to prove, it is for the prosecution to disprove since the accused man has nothing to prove. And the prosecution can only do this before the court with credible, reliable, cogent evidence which indicates that he is, not where he says he is but where the prosecution witnesses say he was."

[35] It is well known that no special formula is needed for a warning relating to the defence of an alibi. However, it is perfectly true that, as contended for by Mr Lorne, the learned judge failed to have demonstrated that he had taken into consideration that a false alibi could support a genuine defence. This omission, on the part of the learned judge, would not have amounted to a substantial miscarriage of justice in the circumstances of this case.

[36] In light of what we considered to be the glaring weaknesses in the case, in our judgment, the conviction could not stand. We also considered that in these circumstances a retrial could not be appropriate as it would be giving the prosecution the opportunity to make good the evidential deficiencies in this case - see ***Reid v R*** (1978) 27 WIR 254, 257.

[37] It was for these reasons the orders mentioned in paragraph [2] were made.