**[2012] JMCA Crim 58**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 146/2005**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MRS JUSTICE HARRIS JA**
**THE HON MISS JUSTICE PHILLIPS JA**

**KEVIN TYNDALE v R**

**Patrick Atkinson for the applicant**

**Mrs Caroline Hay and Miss Keisha Prince for the Crown**

**12 & 13 October, 11 December 2009 and 20 December 2012**

**PANTON P**

[1] We heard this application for leave to appeal on 12 October 2009 and gave our decision refusing same on 27 November 2009, along with brief oral reasons. The sentences were ordered to commence on 20 December 2005. These are our written reasons.

[2] The applicant was convicted before Donald McIntosh J on 20 September 2005 in the High Court Division of the Gun Court of the offences of illegal possession of firearm, wounding with intent and robbery with aggravation. He was sentenced to concurrent terms of 30 years imprisonment on each count. A single judge of this court having

refused leave to appeal, the applicant renewed his application before the court. The single judge had expressed the opinion that the crucial issue was one of visual identification, and he felt that the learned trial judge had dealt with the issue and others quite well. He found no reason to fault the manner in which the judge had summed up the case.

**The grounds of appeal**

[3] The original grounds of appeal were:

> "(a) Conviction was against the weight of the evidence.
>
> (b) The Learned Trial Judge erred in failing to recognize or to treat properly the weakness of the identification of the Applicant.
>
> (c) Sentence was manifestly excessive."

Mr Patrick Atkinson for the applicant sought and was granted leave to argue the following supplemental grounds:

> "1. The Learned Trial Judge was in error to proceed with the trial when the Defence Attorney was unprepared, he not having sight of any disclosure nor having any instructions from the Defendant/Applicant. This error resulted in a trial that was manifestly unfair.
>
> 2. The Learned Trial Judge misdirected himself in law when he relied on the integrity and honesty of the uncorroborated Complainant to base his finding that his identification of the Defendant/Applicant was accurate beyond a reasonable doubt.
>
> 3. The Learned Trial Judge failed to direct himself as to important issues affecting the purported

> identification of the Defendant/Applicant. These included how it was that the Applicant [sic] knew that the Defendant/Applicant was the suspect in his case upon being informed of his arrest by the press. This non-direction amounted to a misdirection in law."

Mr Atkinson submitted original ground (a) without argument, while ground (b) was subsumed in supplemental grounds 2 & 3.

**Defence attorney unprepared**

[4] According to the first supplemental ground, the judge erred in proceeding with the trial when the applicant's attorney was without instructions and unprepared. Mr Atkinson said that when the matter came to trial, Mr C J Mitchell who then appeared for the applicant, was forced to start the trial at a time when he was not prepared. The judge, he said, should have enquired of the reason for Mr Mitchell's unpreparedness, but he did not. He made five points:

> (i) The prosecution is required to furnish disclosure, not just of statements on file, but any statement within their, or their agents' knowledge, which would be relevant to the trial.
>
> (ii) Mr Mitchell was not allowed to explain to the court.
>
> (iii) This would lead to the taking of instructions from the accused thereby guiding counsel as to what the defence was.
>
> (iv) In order to defend properly, one has to know what the Crown is saying.
>
> (v) Effective representation requires some investigation by the defence.

[5] It is difficult to dispute the correctness of points (i), (iii), (iv) and (v), and it is hoped that every attorney would understand the need to act responsibly in this regard. An attorney ought to have constantly in mind the canons that guide practice at the Bar, and the consequences of irresponsibility and negligence. So far as (ii) above is concerned, it will always be a question for the court to determine whether an explanation is called for or will be entertained. The transcript of the proceedings reveals that at the commencement of the trial at 11:50 am on 27 July 2005, Mr Mitchell announced to the judge that he had written to the Director of Public Prosecutions "on the 27th of July" (that is, on that very day) to say that he "had received no documents". The trial date had been agreed by Mr Mitchell and counsel for the Crown in the presence of a judge on 31 May 2005, and on 16 June 2005, Mr Mitchell made an application for bail which was refused.

[6] Mr Mitchell informed the judge that up to the moment that he was in the courtroom, he had not taken a statement from the accused since he did not have the papers. However, the Crown's records disclosed that Mr Mitchell had indeed been served. Whatever may be the true position as to the service of the papers, it seems incredible that an experienced attorney who has been retained to represent someone charged with an offence under the Firearms Act, and who had agreed to a trial date, and had taken instructions sufficient enough to make an application for bail, would have waited until the morning of the trial to take instructions from his client, or to receive copies of the statements in the possession of the prosecution. In that situation, it would

have been right for the learned judge to have proceeded with the trial without more ado.

[7] As it turned out, the learned judge adjourned the court early at the end of the examination-in-chief of the first witness to permit the attorney time to take a statement from the applicant. On resumption, Mr Mitchell was able to cross-examine the witness searchingly for one hour and seven minutes. The trial continued on the following day as well as on four subsequent days, and there was no further complaint by the attorney for the rest of the trial as to lack of instructions or non-receipt of documents. In our view, there was no question of the judge forcing Mr Mitchell to conduct the defence while being unprepared. Mr Mitchell had clearly been allowed sufficient time to prepare and conduct the defence. Additionally, the lengthy trial process demonstrated that he took good advantage of same. Accordingly, we found no merit in the first supplemental ground.

**The allegations by the prosecution**

[8] At about 6:15 p.m. on 28 January 2003, Kenloy Burrows, a bus contractor, aged 38 years, drove a motor vehicle to Tavern Drive in Papine, St Andrew, with a view to conducting business with someone. He got out of the vehicle, and later when he tried to get back to the vehicle was confronted by the applicant and another man, both of them being armed with guns. They were within touching distance of each other. The men told him, "don't run, don't try nothing". They relieved him of jewellery that he was

wearing and of his billfold. They inquired of him as to the identity of the individual he had come to and stated that he seemed to be a police officer.

[9] The applicant instructed the other man to shoot Mr Burrows. This, the other man did by shooting Mr Burrows in the shoulder. He was searched by the men and his licensed firearm discovered by them. Thereafter, he was shot several times and his attackers fled leaving him on the ground bleeding. He was taken to the nearby University Hospital of the West Indies where he was a patient for several weeks. While in hospital, he was visited by the police but he had been shot in the mouth and was unable to speak. After he was discharged from the hospital, he made a report at the Papine Police Station and gave a statement which the police have mislaid. The incident lasted approximately four and a half minutes.

[10] On 26 February 2005, he attended an informal identification parade at the Hunt's Bay Police Station where he identified the applicant as one of the men who had attacked him. The applicant had refused to participate in a normal identification parade. Consequently, an informal parade was arranged with an attorney representing the applicant as well as a justice of the peace being present. At the identification parade, Mr Burrows asked the officer conducting the parade to have the men speak. This was done, and thereupon he identified the applicant as one of his attackers. The identification was on the basis of the general facial appearance as well as the voice of the applicant. Mr Burrows had said that there were no distinguishing marks on his face

but he was sure that the applicant was "the man who robbed and shoot [him] face to face, middle daylight".

**The defence**

[11] The applicant made an unsworn statement that he knew nothing of the robbery and shooting of Mr Burrows and that he was arrested one morning in February 2005, in Montego Bay, photographed and placed on an identification parade. His image was also shown on television, he said. He called as witnesses, his brother Oneil and Mr Milton Walker, managing editor of CVM television station. His brother said he saw the images on CVM TV, but Mr Walker said that was not so as they were not shown.

[12] The learned judge accepted the evidence presented by the prosecution and rejected the alibi advanced by the applicant as well as the contention that there had been corrupt behavior by the police as regards the identification of the applicant at the informal parade. The learned judge stated what he regarded as the issues and ruled that the prosecution had proven its case to his satisfaction.

**The submissions before us**

[13] Mr Atkinson's main argument was that the only nexus between the applicant and the charge was the identification by Mr Burrows who did not know the applicant before the day of the incident. He submitted that there was a fatal flaw as the identification evidence was not corroborated. He submitted that given the time of the incident and the absence of evidence of a proper description having been given to the police, the

evidence of identification was highly suspect. Mr Atkinson was of the view that the judge, although expressing the view that the "greatest weakness" in the identification evidence was the lapse of time between the offence and the identification, did not address that issue in his summation. He complained that although the learned judge relied on the credibility, integrity and veracity of Mr Burrows, he never directed himself that an honest witness may well be mistaken.

[14] Mrs Caroline Hay, for the prosecution, submitted that the learned judge had given himself the requisite warnings in respect of the evidence of identification and found the witness credible; hence, there was no flaw in the conviction. Mrs Hay recounted in detail the evidence that was before the learned judge. She pointed to the fact that the applicant and Mr Burrows were face to face within touching distance and there were no obstacles whatsoever to hinder vision. The incident lasted about four and a half minutes, thereby providing ample opportunity for observation. In addition, the applicant was engaged in giving verbal instructions to his accomplice and even returned to shoot Mr Burrows after they had left him, apparently thinking he was dead.

**The decision**

[15] We note that there had been a complaint that Mr Burrows had, firstly, seen images of the applicant on television and, secondly, having gotten word of his arrival at Hunt's Bay Police Station, he had gone there and had apparently been shown photographs and, or, the television images of the applicant thereby facilitating the identification process as regards the applicant. We found no merit in this as Mr Milton

Walker's evidence was unequivocal that the applicant's image was never placed on the television screen. Mr Walker's evidence demonstrated that Oneil Tyndale, the brother of the applicant, had given false evidence in that respect. The learned judge had taken due note of this, and said:

> "Mr Milton Walker … clearly indicated that although CVM had carried a news article on the accused Kevin Tyndale on the 12th of February in the year 2004, that his image, photograph, likeness or features were never aired by CVM TV. When one considers that, along with Oneil Tyndale, where does one go? This court has no doubt that Milton Walker would be in a position to know if CVM TV had carried any picture or images of the accused man Tyndale. So that if one accepts him as a witness of truth, then certainly Oneil's evidence as seeing his brother's picture on the TV could not also be true."

[16] As regards the question of photographs, the evidence that was before the learned judge was that the police officers who had been detailed to arrest the applicant had photographs of him, and that he was photographed after he was taken into custody in Montego Bay. However, from the lips of the highly placed Commander Reynolds of the Jamaica Defence Force, those photographs were not shown to any civilian and they were destroyed. The learned judge accepted the evidence of Mr Burrows that he was not shown any photograph of the applicant. We saw no reason why he should not have accepted that evidence.

[17] As the learned judge said, the case depended on the credibility of the witness Burrows. He said that he would make bold to say, "it boils down to a matter of credibility, it boils down to a matter of sheer honesty". He considered the length of time between the incident and the identification, the lighting at the time of the incident, and the length of time that the incident lasted. He took into consideration the proximity of the witness to his attackers, particularly to the one who was in constant conversation with him, and the fact that one returned to deliver the expected coup de grace. As regards the lighting, it was noted that even after Mr Burrows had been taken to the hospital, it was still light enough for Sgt Edwards to have visited the scene and to have made pertinent observations of the crime scene before the light had started to fade.

[18] There was a complaint that the learned judge did not address the likelihood of the witness being mistaken. That complaint was baseless, because at page 216 of the transcript, the judge is recorded as saying:

> "… witnesses can be mistaken and even convincing witnesses can be mistaken so that the court is obligated to view all circumstances of the identification, to take into consideration all the aspects relevant to the identification, before coming to any conclusion unfavourable to the accused."

[19] In the circumstances, having decided against the applicant on the grounds filed and argued, the application for leave to appeal was refused.