[2012] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 137/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

OKEDO WILLIAMS v R

Mr Ravil Golding for the applicant

Miss Sasha Marie-Smith and Miss Cadeen Barnett for the Crown

16 November 2011 and 6 July 2012

HARRIS JA

[1] On 14 December 2009, the applicant was convicted in the Circuit Court for the parish of St James for the murder of George Grant Jnr. He was sentenced to a term of life imprisonment at hard labour and it was ordered that he should not become eligible for parole until he had served 30 years.

[2] An application made by him to a single judge for leave to appeal against conviction and sentence was refused. Before us is a renewal of the application.

[3] The evidence for the prosecution came from its sole eye witness, Mr Kimoy Hines, who stated that at about 9:30 on the night of 6 January 2008 he was seated on a bench in front of his mother's shop on Crawford Street, Mount Salem in the parish of St James along with the deceased. They were engaged in a discussion. As they conversed, the applicant passed them and proceeded to a lane opposite to the shop. As he passed, Mr Hines stated, he observed that the applicant, who was dressed in a white cap with a blue logo affixed to the front, a white polo shirt and a blue "cut jeans", had the handle of a gun protruding from his waist. At that time, he related, he saw the applicant's face for a minute. After the applicant went into the lane he said he saw someone called Andrew throw a black shirt across the lane. He went on to say that sometime after, he heard explosions coming from the lane, following which the deceased got up and then fell on him. Having looked up, he saw the applicant pointing a gun in his and the deceased's direction. At this time, he said, the applicant was about 10 feet away and he said he saw his face for about 3-5 seconds. He continued by disclosing that he pulled the deceased into a nearby gully and thereafter several other shots were fired. He, Mr Hines, then felt loss of sensation in his right foot. He said that when he first saw the applicant, he (the applicant) was directly under a light emitting from a pole about 17 feet away. While passing, the applicant got as close as an arm's length away from him.

[4] The applicant was previously known to Mr Hines. He said he had known him for 15 or 16 years. They lived in the same community in close proximity to each other, attended the same school and played marbles together. Mr Hines said he would see

the applicant two or three times weekly. The incident lasted for 19-20 minutes. Immediately before and during the incident, the witness said that he had the opportunity to observe the applicant by the aid of a light hanging from the ceiling of the shop, lights from the surrounding houses and lights from the poles on the road.

[5] Corporal Michael Chisholm, the investigating officer stated that on 7 January 2008, after having spoken to another police officer, he went to the Cornwall Regional Hospital where he saw the body of the deceased. The deceased was known to him. On 12 January 2008, having received certain information, he went to Salmon Photo Studio, St James Street where he saw the applicant. He informed him of the need for interrogating him. The applicant was taken to his home which was searched by the police. Nothing of interest was discovered.

[6] On 27 January 2008, he was arrested and charged for the murder of the deceased. When cautioned, he said, "Mi nuh killed nobody."

[7] Dr Murari Sarangi testified that on 14 October 2008, he conducted a post-mortem examination on the body of the deceased. On examination, he observed a gunshot entry wound to the right side of the deceased's abdomen and an exit wound on his left thigh. There was no gunshot deposit around the wound. The bullet caused injury to his intestines and blood vessels resulting in excessive bleeding. Death, he said, was due to haemorrhagic shock.

[8] The applicant gave an unsworn statement. He said:

"The night wen time 'Dee' sey mi shoot him friend, mi, mi uncle, Junior, Dave, Mack and 'Hallow-p' wen stand up pon di same spot wen time we start hear di gunshot start fire. After we hear di gunshot start fire, everybody ask a what is going on down there so, dat a down di lane. After we stand up 'pon di road, everybody hear di gunshot dem and ask what is going on down there so. Everybody is looking to see what is going on down there. After, mi see two car drive past mi. Mi uncle said to mi sey 'Come mek wi goh down now…'

ACCUSED: Said to me sey, 'Come mek wi go down now, shots start fire.'

HER LADYSHIP: 'Come mek wi goh down now?

ACCUSED: … a my house, shots start fire. So he said, 'Come mek wi goh down a my house.' After I went down, I goh sleep a mi bed, me and mi uncle."

[9] The following grounds of appeal were filed, the applicant having abandoned the original grounds and obtained leave to file these grounds:

"1. That the learned Trial Judge fell into error when at the conclusion of the Crown's case she failed to withdraw the case from the Jury. The case should have been withdrawn from the Jury for the following reasons:

The main and only issue at trial was one of identification and the evidence of identification by the main prosecution witness as it relates to the applicant was woefully inadequate, in that it was of a fleeting glance nature (3-5 seconds) made under extra ordinarily difficult circumstances (the witness himself was under gunfire attack), it was night and it was unsupported by any other credible witness.

2. The Learned Trial Judge having accepted that the evidence of identification was of a fleeting glance nature made under extra ordinarily difficult circumstances had a duty to withdraw the case from the consideration of the jury.

3. The sentence imposed on the Applicant was manifestly excessive in all the circumstances."

[10] The thrust of Mr Golding's submissions is that the quality of the identification evidence was poor and the learned judge should not have left the case for the jury's consideration. Counsel argued that the nature of the recognition of the assailant by the witness was a fleeting glance as the identification of the shooter had been made under very difficult circumstances and was unsupported by some other evidence. The witness' power of observation was not good although he claimed to have had the applicant under observation, he argued. He contended that at the time the person passed the witness, he would only have been able to see a profile of him. Furthermore, the witness said he saw Andrew throw a shirt across the lane; inferentially, that shirt was black, which was worn over a white shirt in which the applicant was dressed, yet the witness did not see when the applicant picked up the shirt. Obviously, he argued, he would not have had the person under observation after he passed. The witness said he heard explosions, the deceased got up with outstretched arms and fell on the witness, and the deceased was pushed over the gully, all of this occurred within 3-5 seconds, which the learned judge acknowledged to have been a fleeting glance, he argued. The witness, he submitted was under gunfire, as he too was shot. In light of these circumstances, the viewing was a fleeting glance being made under very difficult circumstances and as a consequence, the learned judge ought to have withdrawn the case from the jury, he contended.

[11] Miss Smith argued that the evidence must be considered in its entirety. The applicant, she submitted, incorrectly placed emphasis on the 3-5 seconds during which the witness viewed the applicant at the time of the shooting. There was unchallenged evidence, she argued, from the witness that the applicant was known to him. Although the incident occurred at night there was unchallenged evidence of adequate lighting from the pole which was 17 feet away and on the shop 25 feet away and when the applicant fired, he was 18 feet away.

[12] The witness, she argued, was also able to observe him at the previous sighting when he approached and had recognized him from he was 15 feet away, and when he passed he was within touching distance at which time he viewed his face for one minute. He had him under observation and noted the manner in which he was dressed, she submitted. The jury could have inferred that he was paying attention to the applicant, and the judge's statement as to a fleeting glance was an attempt by her to assist the jury in its deliberation, she contended.

[13] The main thrust of Mr Golding's submissions relates to the quality of the identification evidence. It is well settled that where the case against an accused is substantially dependent on the correctness of the visual identification of an accused, which the defence claims to be mistaken, the guidelines laid down in **R v Turnbull** [1976] 3 All ER 549 become applicable. A judge, therefore, is bound to give the jury the requisite warning of the special need for caution before convicting and of the possibility that a convincing witness may have been mistaken in the identification of the

accused. The jury should also be directed to carry out an examination of the circumstances surrounding the identification made by a witness or witnesses.

[14] Although identification by way of recognition may be more reliable than that of a person not previously known to the identifying witness, the jury's attention should also be adverted to the fact that even in cases of recognition mistakes can be made. The quality of the evidence of an identifying witness is paramount. Where its quality is satisfactory and adequate, it may safely be left for the jury's consideration. However, where the quality is poor, the trial judge is obliged to withdraw the case from the jury and instruct them to acquit. Lord Widgery, in **Turnbull**, speaking to the issue as to when a case should be or should not be withdrawn due to the quality of the identifying evidence, said at page 554:

> "When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is 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."

As shown, the jury should not be directed to acquit even if the evidence of identification is poor where there is other supporting evidence, capable of supporting a conviction.

[15] When assessing the quality of the evidence the question is whether the evidence is so weak that it is unreliable. In ***Daley v R*** (1993) 43 WIR 325 at page 334 Lord Mustill said:

> "…in the kind of identification case dealt with by ***R v Turnbull*** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as ***R v Turnbull*** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the ***Turnbull*** doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

The **Turnbull** rules are intended to address the "ghastly risk run in cases of fleeting encounters" as Lord Widgery pointed out in ***R v Oakwell*** [1978] 1 WLR 32 at 36.

[16] In directing the jury on the issue of visual identification, the learned judge said it was a trial dependent on the correctness of the identification, which the defence stated to be mistaken. She gave the appropriate warning in keeping with the **Turnbull** guidelines and went on to say at page 17:

> "So, what you have to do, Mr. Foreman and your members, is to examine carefully the circumstances in which the identification of Mr. Williams was made by Mr. Hines. These are some of the things you are going to consider. How long did Mr. Hines have the defendant under observations [sic]? At what distance? In what light? Did anything interfere with his observations? Did he see him before, or know him before? If so, how often? What was the length of time between his observation of the person and the identification of him to the police? Is there any mark [sic] difference between the description given by the witness to the police and the appearance of the defendant? So, these are some of the issues you're going to consider when you're considering whether Mr. Williams has been properly identified by Mr. Hines."

[17] She reminded them of the physical layout of the area in some detail and the lighting. In dealing with the lighting, she said at page 20:

> "He tells you also about the lighting, because you remember one of the things you have to look at is the light, because this is nighttime. He tells you that light [sic] were around the vicinity of the shop and the lane. He tells you that there is a bulb attached to the ceiling, at the front of the shop, and this bulb was situated just above where he was sitting. He tells you that there is a light pole on the left side of the shop, seventeen feet away from the shop and this pole points directly to the lane. He said there are other lights in the area on other houses and there is a set of light-poles on the right-hand side of the lane, and this second light shows directly into a lane not the same lane. He is talking about a lane which is in front of the shop. So, I want you to get the full picture, shop, lane, and then there is another lane in front of the shop, and this second light-pole on the right is in the vicinity of a church, and because of this light pole one could see anything on that lane. In other words, that lane that is in front of the shop.
>
> He tells you that one Andrew lives on this lane, the lane that is directly in front of the shop. In fact, Andrew's fence, he tells you helps to make the lane, and this lane is about sixteen feet from his mother's shop. So I just want you to get the understanding of the physical layout. The light pole on the right, which is the one that shines in the lane where Andrew lives, is twenty to twenty-five [sic] away from Andrew's gate. So that is in relation to the lighting in the area."

[18] She went on to draw their attention to the sightings of the applicant by the witness and that the witness spoke of the two sightings within 19- 20 minutes, the first on the applicant's approach when he observed him for one minute, and the second when he saw him for 3-5 seconds. The jury was also directed that there was no evidence that the witness saw the applicant put on the black shirt but was reminded that he said he was able to see the applicant's shirt while he was in the lane.

[19] Not failing to direct them that the second view of the applicant was crucial, she reminded them that the witness said he would have seen the applicant's face for 3-5 seconds. She then said:

> "I need not tell you that three to five seconds is not a long time, it could be determined as a fleeting glance."

Continuing, she said:

> "So, when he is seeing the man with the gun now, and he is saying that he knew him before and you bear that in mind, it is not a long time he is seeing his face for, and bearing in mind, he is telling you that it is the same man who had passed him while walking down the lane, whose face he had seen for one minute."

[20] Although she said 3-5 seconds was a fleeting glance, she was careful in pointing out to the jury that even if it was a fleeting glance, they would have to carefully examine the evidence to determine whether the witness could have seen the applicant's face in 5 seconds, bearing in mind that he said he had seen the appellant's face for a minute when he first approached, prior to the shooting.

[21] The learned judge, in her directions to the jury, made reference to the second sighting being done under difficult circumstances. This does not mean that this case falls within the kind of risk to which Lord Widgery, in **Oakwell**, made reference, given the circumstances of the case. It does not follow that although the evidence of identification might not be perfect, a case cannot be left for the jury's consideration, provided there is sufficient evidence on which a verdict can be reached. In ***R v Jones*** (1995) 47 WIR 1, cited by Miss Smith, a case which was substantially dependent on visual identification, although the circumstances surrounding the identification were not

ideal, their Lordships were satisfied that there was enough evidence upon which the case could have been left for the jury's deliberation.

[22] In that case, the deceased and his wife, Mrs Angela Taylor, had driven to a restaurant to pick up some food. On their return to their parked car, the appellant fired several shots through the window of the car, four of which hit the deceased and mortally wounded him.

[23] At the trial Mrs Taylor testified that while the deceased and herself were seated in the car she looked back and saw a man. At the time he fired the shots, she could not see his face. After the firing ceased she alighted from the car and looked to the back of the car where she saw a man walking. He looked back twice, once he being 4 feet away, then a second time when he was about 8 feet away. The incident lasted for 2 minutes, during which time she saw his face for 15 seconds. It was still daylight approaching dusk; darkness fell about 20 minutes after the incident.

[24] Their Lordships, in giving affirmation to the learned trial judge's directions that the circumstances of identification were not ideal but despite this, it was a proper case for the jury's consideration, concluded that the case was one which was correctly placed before the jury for their deliberation. At page 4 their Lordships said:

> "Whether Mrs Taylor recognised the accused man in all the circumstances was essentially a question for the jury rather than for the judge to decide. The jury would be very familiar with the degree of light available at that time and they had had the opportunity of seeing Mrs Taylor and would have the opportunity of seeing and perhaps hearing the accused. Even if there were some discrepancies in the evidence and even if the quality of

> identification was not of the best, it cannot be said that no reasonable jury could convict. Their lordships accordingly reject the argument that the judge erred in not ruling that there was no case to answer. It was however, important that, leaving it to the jury, the judge should then give sufficient directions, to the jury in accordance with ***Turnbull***."

[25] As correctly submitted by Miss Smith, in assessing Mr Golding's complaint, one would be required to look at the evidence in its totality. This is a recognition case, the applicant being well known to the witness. They resided in the same neighbourhood, within close proximity of each other. He saw him frequently. They attended the same school. They even interacted sometime, by playing marbles together.

[26] On the night of the incident, the witness would have had the opportunity to view the applicant's face on two separate occasions within the space of 19-20 minutes. He would have seen his face for one minute while he, the witness, sat on the bench with the deceased. At that time, he was able to observe the applicant from he was approaching 15 feet away until he passed within arm's length of him, the area being very illuminated.

[27] It may be that when the applicant emerged from the lane and began shooting the 3-5 seconds observation could be said to have taken place under difficult circumstances. The applicant was then only 10 feet away from the witness, but significantly, the witness became frightened after the deceased fell on him, at which time he looked up and saw the applicant. However, even if it could be said that the second observation was a fleeting glance, occurring under difficult circumstances, there

was the first sighting during which he had seen the applicant's face for a minute. It may be that the witness had briefly lost sight of him while he was in the lane, in that, he was unable to have seen his face. However, the witness said he was able to see his shirt while he was in the lane; he saw a black shirt being thrown across the road in the lane and notably the applicant appeared from the lane wearing the black shirt, firing shots. Even if the witness did not have him continuously under observation after he passed him, the applicant is someone who is very well known to him. It cannot be said that the identification evidence is deficient. There was ample evidence which could have been properly left for the jury to decide whether they believed that the witness was credible and reliable. Clearly, on such evidence, the jury could have concluded that the person who the witness said he saw shoot the deceased was correctly identified as the applicant, the learned judge having satisfactorily directed them on all issues raised in respect of visual identification.

[28] At trial, at the end of the prosecution's case, counsel for the applicant made a no-case submission citing the cases of ***Kenneth Evans v R*** Privy Council Appeal 43 of 1990, delivered 8 August 1991 and ***Omar Nelson*** SCCA No 59/1999, delivered 20 December 2001. Both cases relate to visual identification. The learned judge rejected the no-case submission distinguishing these cases from the present case. We cannot say she was wrong in doing so.

[29] In **Evans**, the evidence against the appellant was that at 2:00 am on 18 February 1980, he was one of five men who entered the deceased's home where the sole identifying witness, Miss Nadia Facey, and the deceased were asleep. The

deceased was shot and killed. Miss Facey's evidence was that she was awakened by the gunshots, at which time she looked up and saw five men for 5-6 seconds and recognized one of them as the appellant who was known to her as Scabby-Diver. She failed to inform the police that Scabby-Diver was one of the men, nor did she give a description of the men to the police. The appellant, in his sworn testimony, denied that he was known by the alias Scabby-Diver. A defence of alibi was advanced by him. The appeal was allowed and the conviction quashed, inter alia, on the ground that the identification evidence by the sole eye witness was a fleeting glance and there was no other evidence to support the correctness of the identification.

[30] In **Nelson**, at about 3:30 am on 8 August 1998, the complainant was asleep at home when she was awakened by her cousin, Steven Coke, requesting that he be let into the house. After allowing Coke entry, as she attempted to close the door, a masked man armed with a gun, who she identified as the appellant entered, threatened to shoot her, hit her twice in the face and subsequently raped and robbed her. A second masked man was invited into the house who also raped her. The appellant having heard a sound outside the house, went to the window to investigate, drew the mask partially down his face, at which time she said she saw a side view of his face, being that of his mid forehead, mouth and nose, for 5 seconds. Coke stated that the men, wearing masks, accosted him on his way home, robbed him and ordered him to take them to his house. He said that, in the house, he was able to see from a flashlight which the second man had. The appeal was allowed. Harrison JA, (as he then was) at page 7, said:

> "We are of the view, as expressed above, that this was a case of a fleeting glance and in addition, the observation was of a portion of one side of the assailant's face only, for five seconds, made in difficult circumstances. Coupled with the fact that the lighting inside the house was inadequate, the evidence in support of identity was quite poor. We are of the firm view that, in the circumstances of this case, the no case submission should have been upheld and the case withdrawn from the jury."

[31] It is without doubt that there is a marked distinction between the foregoing cases and the case under review. In those cases the evidence of identification was woefully inadequate and therefore, it would not have been proper for them to be left for the juries' consideration. This cannot be said to be applicable in this case. There was sufficient evidence in this case to support the conviction. The jury could have reasonably convicted. As a consequence, it cannot be said that the verdict was unsafe or unsatisfactory.

[32] I now turn to ground three. In this ground Mr Golding submitted that the sentence is manifestly excessive as the range of sentences is normally 25 years. It is a settled principle that the object of sentencing is essentially for the protection of the public. This may be achieved by imposing a sentence directed at punishing the offender, rehabilitating him, or deterring him from committing other crimes. Where an offender has been convicted for the commission of a serious crime, a custodial sentence is invariably imposed. A trial judge may in his or her discretion impose a long sentence. The appropriateness of the sentence will depend on the nature of the offence and the circumstances surrounding its commission.

[33] In this case the applicant, in the most ruthless manner shot and killed the deceased. The learned judge in sentencing took into account that the killing was premeditated, in that the applicant having armed himself with a gun, put on a black shirt, returned and shot the deceased.

[34] We note with great concern the wanton killing occurring in the society by young men who choose to arm themselves with firearms. Our nation is under siege. In a case such as this, a long sentence is warranted. The learned judge was correct in imposing a life sentence and ordering that the applicant should not become eligible for parole until he has served 30 years. Such a sentence could not be said to be manifestly excessive in all the circumstances.

[35] The application for leave to appeal is refused. The sentence should commence on 14 March 2010.