[2010] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 191/2001

BEFORE: THE HON. MR. JUSTICE SMITH, J.A
THE HON. MR. JUSTICE HARRISON, J.A
THE HON. MR. JUSTICE DUKHARAN, J.A (Ag.)

PRINCE WILSON v REGINA

Leroy Equiano for the Applicant.

Miss Maxine Jackson, Crown Counsel, for the Crown.

5 May 2008 and 22 July 2010

HARRISON, J.A.

[1] In the High Court Division of the Gun Court, on 15 August 2001, this applicant was convicted on an indictment which charged him on count 1 for illegal possession of a firearm and on count 2 for wounding with intent. He was sentenced to a term of 10 years imprisonment on count 1 and 20 years imprisonment at hard labour on count 2. The learned judge ordered that the sentences should run concurrently.

[2] On 5 May, 2008 we treated the hearing of the application for leave to appeal as the hearing of the appeal. The appeal was allowed, convictions quashed, sentences set

aside and a verdict of acquittal entered. We promised then to put our reasons in writing. This is a fulfillment of that promise.

The Evidence Presented by the Prosecution

[3] On Wednesday 24 January 2001, the complainant Allen Newman, his daughter's mother Dawnette, and their young daughter were at home at an address in Tawes Pen, St. Catherine. At about 7:00 am, Newman was sweeping at his gate when the accused man known to him as "Markie" rode up on his bicycle. The accused was once friendly with Dawnette and she also has a child for him. He called her whilst he was on the roadway. She went to him and they spoke. He said to her: " mi hear sey yuh friend dem a go carry you a jail". She said nothing in response and returned to the yard. Newman then turned to the accused and told him that it was not Dawnette's friend but it was he (Newman) who was going to carry Dawnette to jail. The accused turned to him and asked him if he was a bad man to which he answered "No, I am a mad man." Thereafter, the accused rode away on his bicycle.

[4] Newman went inside to have his breakfast. He was about to take up his bicycle to go to work when the accused returned to his gate on his bicycle. The accused came off, went into the yard and said to Newman: "Pussy gwaan like how you weh nah gwaan out a did (sic) gate". Immediately after he spoke those words, he pointed a gun at Newman who turned sideways. As he did this, Newman heard an explosion coming from the gun. The shot went through one leg and lodged in the other. He was taken to Spanish Town Hospital where he was admitted for 3 ½ months and was treated for the gunshot injury.

The Defence

[5] The accused elected to remain silent but he called three witnesses to testify on his behalf. The first witness was Coreen Jackson who said she lived along the same road as Newman. She said she had gone to the shop to buy eggs on the morning of the 24th January when she heard an explosion. She looked up and saw a man with a gun in his hand "tracking up" to where another man on a bicycle was waiting and they rode off. She also said that the man who was "tracking up" the road had come from the direction where the complainant lived and that he was not the accused man.

[6] Roseanne Wilson also gave evidence but the trial judge said she had said nothing of any probative value.

[7] Anaiba Smith who was a good friend of the accused man also testified on his behalf. She said that at about 7:15 am on the 24th January, she heard an explosion and thereafter, she saw people running. She subsequently found out that the complainant had been shot. At some point in time, later that very morning, she went to the accused man's home because her Aunt wanted him to do something for her urgently. On her arrival there she found him "fast asleep".

[8] The learned judge rejected the defence and convicted the accused man on both counts of the indictment.

The Grounds of Appeal

[9] The original grounds of appeal were abandoned and leave was granted to Mr. Equiano, counsel for the applicant, to argue two supplemental grounds. They are set out hereunder:

> "(a) The learned trial judge erred in law when he failed to give the requisite identification warning to himself;
>
> (b) The learned trial judge (sic) intervention and questioning of the witnesses was excessive."

The Issues

[10] At the very outset of the trial, the learned trial judge posed the following questions to counsel for the accused:

> "HIS LORDSHIP: Mr. James, you said identity is the issue?
>
> MR. JAMES: Yes, M'Lord.
>
> HIS LORDSHIP: When you say 'identity', what do you mean whether or not the person whom he said shot him is that person in the dock?
>
> MR. JAMES: That is correct, M'Lord.
>
> HIS LORDSHIP: Okay."

[11] The learned trial judge in directing himself after he was addressed by both counsel for the defence and the prosecution stated however, that identification did not arise for consideration and that the live issue in the case turned on the question of credibility. He said that he had accepted the complainant as a witness of truth and was

satisfied so that he felt sure that the complainant was speaking the truth. He said at page 80 of the transcript:

> " …let me state that the question of identification, the issue of identification does not arise. This has been candidly and properly acknowledged by counsel for the accused man in his closing address to me. The parties are well known to each other, in fact they share, I don't know if the word share is, I don't think share is correct, they have a common baby-mother mother. And it would seem that the accused man preceded (sic) the virtual complainant. So there is no issue that they are, well known to each other. That being so, the sole question revolves on the question of credibility."

[12] Mr. Equiano submitted that the learned judge had fallen into error when he said that identification did not arise and that his failure to warn himself on the dangers of acting on visual identification would be fatal to the applicant's conviction.

[13] It is abundantly clear that in cases where the prosecution relies on visual identification by a witness, the law requires that the jury be given a general warning, or a judge sitting without a jury is required to remind himself of the dangers involved in relying on such evidence to support a conviction and the reasons for such caution: See ***R v. Turnbull*** (1976) 63 Cr. App R. 132. This warning is usually required even in "recognition" cases, as for instance, where the accused was known to the witness before. In ***Beckford et al v. Reginam*** (1993) 97 Cr. App. R 409, the Judicial Committee of the Privy Council reiterated the requirement, even in recognition cases, of the Turnbull warning. The headnote reads:

> "A general warning on Turnbull lines is required in all identification cases whether the witness identifies a person

> he recognises or a stranger. Even if the sole or main issue raised by the defence is the credibility of the identifying witness, that is, whether his evidence is true or false as distinct from accurate or mistaken, a general warning is nonetheless required."

[14] In the instant case, the applicant was known to the complainant. He knew him as "Markie", a fact which was not challenged nor denied. Newman said he had known the accused for approximately 17 years but did not see him often. When he was asked how often he used to see the accused before the incident, he did not answer the question. He said he got to know him because he lived in the community. When asked if they had talked to each other he said, "not upon a regular basis, I don't recall that." However, he recalled saying something to him once on an occasion whilst he, Newman, was "filming a show". He was asked how long ago before the incident and he said: "long enough now". He also said the applicant would come to the gate and call his child's mother so he would see him. He did not recall however how often the applicant came to the gate. Under cross-examination it was put to Newman that it was not the accused who had shot him. He disagreed with the suggestion and said it was he who had shot him. He said: "Him shoot me. A him, I am not blind, I must know who shoot me because nothing nuh do mi eyes them. It is early morning, it is not night and other people were in the yard. People in the yard call to him and seh, 'What kind a idiot thing that.' Tru' mi tell him I am going down the jail, that is why him ride away and come back".

[15] Coreen Jackson, one of the witnesses called on behalf of the defence, stated at page 39 of the transcript that after she heard the explosion, she saw a man "tracking up" the road and he had a gun in his hand. She said that it was somebody that she knew and that it was not the accused man. She gave his name as Horace. She said in

answer to a question by the judge that it was not the accused man who had the gun and that this man went up to another man who was on a bicycle and they rode away. She further testified that after they rode off, she went into a lane where she saw people gathered. She then heard something about Newman and saw when he was lifted out of a yard. The judge asked: "Is it the same lane you saw the gunman coming up?", and she said yes. The following questions were asked along with her responses:

> "Q: Did you see Markie?
>
> A: No, I didn't see him nowhere.
>
> Q: You didn't see him in the lane?
>
> A: No, no.
>
> Q: You didn't see him in the crowd?
>
> A: No."

[16] In reviewing the evidence of Coreen Jackson the learned judge said at page 83 of the transcript:

> "…she heard an explosion. And she looked up and saw a man tracking up the road. and he tracked up to where another man on a bicycle was waiting and they road(sic) off and the man who was tracking up the road came from the direction of where the virtual complainant lived. And that man was not the accused…"

[17] The learned judge had clearly omitted to remind himself of Jackson's evidence when she said that the man who was "tracking up" the road had a gun in his hand.

[18] It is our view that the learned judge had elevated the issue of credibility above that of mistake and for that approach we think that his directions were faulted. The facts of the case as they were presented on behalf of the defence called for a discussion on

the issue of identification because even if Mr. Newman was an honest witness he could have been mistaken when he said he had recognized the applicant.

[19] We are of the view, that in the circumstances of the case, the learned judge ought to have borne in mind the “usual Turnbull caution”. His failure to do so is fatal to the conviction. Learned counsel for the Crown agreed that in view of the error she could not support the conviction. We commend her for this approach.

[20] Ground 2 which complained about the trial judge’s intervention and questioning of witnesses was not pursued.

[21] The real question for the Court was the disposition of the appeal in light of the fundamental defect in the summation. In ***Junior Reid and Others v. The Queen and Errol Reece and Others v. The Queen*** P.C. Appeals Nos. 14,15 & 16 of 1988 and 7 of 1989 delivered on July 27, 1989; (1989) 26 JLR 336 Lord Ackner delivering the judgment of the Board said this -

> "Their Lordships have no hesitation in concluding that a significant failure to follow the guidelines laid down in Turnbull will cause the conviction to be quashed because it will have resulted in a substantial miscarriage of justice."

[22] In the instant matter, we considered whether there ought to be a re-trial and did bear in mind the guidelines set out by the Privy Council in ***Reid v R*** (1978) 27 WIR 254 for ordering a re-trial. In our opinion, the interest of justice would not be served if we were to order a re-trial. Foremost among the reasons for not ordering a new trial was the fact that there would be a considerable length of time elapsing between the date

that the offence occurred and a new trial, if that should take place. The offences for which the appellant was charged had occurred on 24 January 2001. He was tried on 7 June 2001 and was convicted on 15 August 2001. It was for these reasons we entered a verdict and judgment of acquittal.