[2016] JMCA Crim 31

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA, HANOVER

SUPREME COURT CRIMINAL APPEAL NO 9/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

DAVIN MCDONALD v R

Chumu Paris for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions, for the Crown

8, 10 December 2015 and 28 November 2016

MORRISON P

[1] On 10 December 2015, having heard submissions from counsel on 8 December 2015, the court announced that the application for leave to appeal against conviction and sentence in this matter would be refused. It was ordered that the applicant's sentence should run from 22 January 2013. These are the reasons which were promised for the court's decision, with apologies for the delay.

[2] The applicant sought leave to appeal against his conviction and sentence on 22 January 2013 for the offences of illegal possession of firearm ('count 1') and shooting with intent ('count 2') in the Western Regional Gun Court, holden at Montego Bay in the parish of Saint James, after a trial before D McIntosh J ('the judge'). The applicant was sentenced to 12 years' imprisonment at hard labour on count 1 and 15 years' imprisonment at hard labour on count 2, and the court ordered that these sentences should run concurrently. The application for leave to appeal was initially considered on paper and refused by a single judge of the court on 19 April 2015. This is therefore the applicant's renewed application for leave to appeal.

[3] At the outset of the hearing of the application, Mr Chumu Paris, who appeared for the applicant, advised the court that no issue would be taken with the matter of sentence. The single issue which arises on this application is therefore whether the applicant, who denied committing the offences for which he was charged, was correctly identified as the offender.

[4] The case for the prosecution was as follows. On the morning of Sunday 23 October 2011, Special Corporal Clive Hunt, Special Sergeant Oliver Daley and Woman Constable Greaves were on mobile patrol duties in the Saint James area. At about 10:55 am, as the police officers proceeded along on Dudley Kassim Drive in Montego Bay, two loud explosions, sounding like gunshots, were heard in succession coming from the direction of Barnett Street. Special Sergeant Daley, who was the driver of the police vehicle in which the officers were travelling, drove onto Miriam Way heading in the

direction of Barnett Street, when two men were seen running towards the police vehicle. One of the men, who was identified in court as the applicant, was armed with a black handgun in his right hand. Upon Special Corporal Hunt ordering him to drop the gun, the applicant pointed it in the direction of the police vehicle and fired one shot. Special Corporal Hunt immediately alighted from the vehicle and fired one shot in the applicant's direction.

[5] The applicant and the other man then turned and ran in the direction of Barnett Street, with Special Corporal Hunt in pursuit. The applicant ran onto the compound of the Tastee Patty shop, while the other man ran along Barnett Street in the direction of the Westgate Shopping Centre. Special Corporal Hunt continued to chase the applicant, who ran through an open gate of a fenced area and onto an open lot, where he turned around and fired two shots in Special Corporal Hunt's direction. Special Corporal Hunt immediately took cover and fired one shot in the applicant's direction from the M-16 rifle with which he was armed. The applicant then turned and continued running into an area of thick vegetation, where Special Corporal Hunt saw him throw the gun into what he described as the swampy area. The applicant next jumped into a gully, still chased by Special Corporal Hunt, who held on to him by the back of the waist of his pants and asked him why he had fired shots at the police. The applicant's reply was "Officer, a scare mi did a try scare yuh because mi waan escape". Special Corporal Hunt then took the applicant, who gave his name as Davin McDonald of a Hopewell address, back to the open lot, where he saw Special Sergeant Daley, Woman Special Constable Greaves

and other police personnel. Despite a subsequent search of the swampy area, in the presence of the applicant, the handgun was never recovered.

[6] Special Corporal Hunt estimated the time which had elapsed between his first seeing the applicant and the other man running towards the police vehicle and his holding onto the applicant in the swampy area as three minutes. During that time he did not lose sight of the applicant, nor was his view of him obstructed in any way.

[7] Under cross-examination by counsel for the defence, it was suggested to Special Corporal Hunt that "you never saw this young man with any gun"; "this young man never fired any gun at you"; and that the applicant had not told the officer that he was trying to scare him.

[8] The applicant was also positively identified as the armed man to whom Special Corporal Hunt had given chase on the morning in question by Special Sergeant Oliver Daley, and by a civilian witness, Mr Orville Spence, who was driving in the area at the material time. Mr Spence testified to seeing two men, one of whom he identified as the applicant, running from the direction of Barnett Street. The applicant had what appeared to be a pistol in his hand and, according to Mr Spence, the two men turned and ran away in the opposite direction immediately a marked police vehicle came on the scene. Mr Spence then heard explosions coming from the direction of where the two men were and saw when one of the police officers, who was armed with a long gun, fired back at the two men. While Special Sergeant Daley was not able to speak to the actual circumstances in which the applicant was apprehended by Special Corporal

Hunt, Mr Spence told the court that he saw the applicant run over to the Tastee Patty compound and venture into what he described as the underbrush, "and the police man with the long gun ... some distance behind him". According to Mr Spence, a group of two or three other police officers then went down into the swampy area and proceeded to search for the applicant, who was eventually found "hiding in the underground" and taken up to the marked police vehicle. Under cross-examination, it was suggested to Mr Spence that "you never saw this man at any time with any gun, and you never saw any police officer find him in any swamp, tek him out of any swamp".

[9] After the incident, the applicant was taken to the Montego Bay Police Station, where he was handed over to Detective Sergeant Clinton Brady. In the presence of the applicant, Special Corporal Hunt made a report to Detective Sergeant Brady about what had taken place earlier. When cautioned and asked by Detective Sergeant Brady whether what Special Corporal Hunt had reported was true and whether he had a firearm, the applicant made no statement. But when cautioned again and asked if he had a licence for a firearm, applicant's response was, "Officer … if mi do anything like this again unno kill mi." The applicant's hands were then swabbed for gunshot residue and the samples sent to the Forensic Laboratory for testing. Although the relevant certificate was not tendered in evidence by the prosecution, it appeared from the evidence given by Detective Sergeant Brady in cross-examination that the result of this testing was negative.

[10] After an unsuccessful no case submission was made on his behalf, the applicant elected to make an unsworn statement in his defence:

> "… my name is Davin McDonald. I am 20 years of age. I am from Hopewell, Hanover. I take a taxi from Hopewell, came out of the taxi, in Montego Bay. Hear explosions, and I see other people running over by the car park and I run over at the the [sic] car park. Police come ... Police come hold me … Come over at the car park and hold me and asking me fi gun, where is the gun? … And I said to him, I don't know anything about any gun."

[11] That was the case for the defence.

[12] In his summation, after giving a brief summary on the evidence for the prosecution, and after indicating that "this court attaches no weight to [the applicant's] statement from the dock and discards it", the judge said this:

> "… [T]here are no real discrepancies touching and concerning the fabric of the Prosecution's case or the material evidence on which the Prosecution case rests. There is no dispute that the accused man was there, and that there was no problem involving identification because the evidence of Hunt is unchallenged as to him keeping the accused man in his view at all material times, that is from the time he first saw him with the gun, until the time he succeeded in holding him in a gully or ditch or whatever it was that he held him in. So that identification is not an issue.
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> So that there can be no issue that he was one of the two men walking on Miriam Way, who turned back, ran across Barnett Street, into Tastee premises, into the swamp area and then into a gully.
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> There is no issue there since he was held and brought back by Corporal Hunt. That he had the gun, there is evidence

> coming from both officers that he had a gun in his hand while he was on the street. This is corroborated by the witness Mr. Orville Spence. One of two men had a gun and they all particularised the accused as the man with the gun. They all described him as the man who fired at the police party.
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> They all particularised him as the man who Hunt fired a shot at [sic]. They all particularised him as the man who ran.
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> So there can be no issue about who he was, his identity, that he had a gun and that he fired on the police party.
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> There is one issue in this case which causes me some concern. And that is to do with the fact that it is said that although the hands of the accused were swabbed, there was no result from the swabs taken. Now this could happen in several different ways.
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> And I am not going into them because one, the evidence has not been properly adduced, and secondly, because nobody has taken any steps to elucidate on what could have caused that to happen. If it did happen.
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> Suffice it to say, that this Court, is satisfied of the credibility of the witnesses and in particular, the evidence of Orville Spence, as to the correctness of the identification, identity of this accused man, of the correctness of he being the person who was armed with a firearm, of the correctness of him being the person who fired at the police, this Court finds beyond all reasonable doubt that the accused man is guilty on both charges of this indictment."

[13] The judge then proceeded to sentence the applicant in the manner which we have already described, after rejecting an enquiry from counsel for the defence as to whether he would consider a social enquiry report with the unfinished comment that "[w]hen he pleads guilty, I order a Social Enquiry Report, not when a trial …"

[14] When the matter came on the hearing before us, Mr Paris sought and was granted leave to argue a single supplemental ground of appeal, which was as follows:

> "The learned trial judge's consideration of the identification evidence was deficient."

[15] In his very able submissions on behalf of the applicant, Mr Paris pointed out the differing accounts of Special Corporal Hunt and Mr Spence as to the circumstances in which the applicant was apprehended in the swampy area. Although the judge expressed himself as being impressed by Mr Spence's evidence, Mr Paris observed, he failed to consider the impact of that evidence on Special Corporal Hunt's evidence of having been alone in the swampy area when he apprehended the applicant. In fact, despite Special Corporal Hunt's evidence, identification remained a live issue in the case and the judge was in these circumstances obliged to advise himself of the dangers of identification evidence by giving even a modified **Turnbull**[1] warning.

[16] In support of these submissions, Mr Paris referred us to the decision of the Privy Council in **Beckford v R**[2], in which the main issue at the trial concerned the credibility of the identifying witness, Lord Lowry said the following[3]:

> "Mr. Robertson QC, who appeared for the appellants before the Board, advanced two general propositions which were strongly supported by authority: that a general warning on Turnbull lines were [sic] required in the recognition cases, as

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[1] **R v Turnbull and others** (1976) 63 Cr App R 132
[2] (1993) 97 Cr App R 409
[3] At page 413

> well as those involving the identification of a stranger, and that the warning was none the less required even if the sole or main thrust of the defence was directed to the issue of the identifying witness's credibility, that is, whether his evidence was true or false, as distinct from accurate or mistaken: since the trial judge gave no warning whatever concerning the possibility of a mistake and the danger of acting on identification evidence, his charge to the jury was 'fatally flawed' ... and, there being no other significant evidence against the appellants, their convictions must be quashed. Their Lordships are ... satisfied that the argument for the appellants is based on irrefutable logic and unimpeachable authority and is, having regard to the facts, unanswerable."

[17] In response to these submissions, Miss Llewellyn QC submitted that the real issue in this case was one of credibility and that in these circumstances the issue of identification was "redundant". While the discrepancy between and the evidence of Special Corporal Hunt and Mr Spence is clear, the learned Director continued, it does not go to the root of the narrative, which naturally identifies and places an illegal gun in the hands of the applicant. In this regard, we were referred to a passage from Archbold[4], under the rubric "Identification by continuity of presence", which states as follows:

> "Where an eye-witness observes a crime being committed, calls the police and keeps the offenders under surveillance until the police arrest them, but does not purport to recognise them or identify their facial features, a judge is not obliged to comply fully with the classic *Turnbull* requirements and give a full and separate analysis of the weaknesses and strengths of the identification evidence. A

[4] Archbold Criminal Pleading, Evidence and Practice, 2013, para. 14-38

> general *Turnbull* direction, followed by the appropriate warnings and an analytical review of the evidence of the eye-witness is sufficient."

[18] There is no doubt that the judge did not in terms give either a classic or a modified **Turnbull** warning in this case. As is well known, **R v Turnbull and others** establishes, among other things, that[5] –

> "... whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, we should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."

[19] The important general point which emerges from **Beckford v R**, upon which Mr Paris so heavily relies, is that such a warning should usually be given whenever identification is in issue, irrespective of the fact that the main thrust of the case for the defence is that the identifying witness ought not to be believed. Indeed, in that case, Lord Lowry went on to observe[6] that –

> "It is not within the discretion of the trial judge to determine whether or not he will give a general warning on the

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[5] (1976) 63 Cr App R 132, 137
[6] At page 414

> dangers of visual identification, and to elaborate and illustrate the reasons for such a warning. That is the starting point from which he ought not to swerve."

[20] But Lord Lowry also made a further point[7] which may be of particular relevance in the circumstances of this case**:**

> "Judges, however, are human and due to an oversight in a particular case a judge might omit to give the general warning although he alerts the jury to the possibility of mistaken identity. Such a lapse might not be fatal if there are elements in the identification evidence which renders [sic] the acceptance of the identification evidence inevitable."

[21] It seems to us that, in terms of categorisation, this case may well be on the borderline as an identification case. For, on the one hand, it is clear from the suggestions put by the applicant's counsel to Special Corporal Hunt and Mr Spence, as well as from the applicant's unsworn statement, that his denials related more to the question whether he was armed with a gun and fired shots in the direction of the police officers, rather than to his presence in the general vicinity at the material time. Looked at this way, the only issue in the case was, as the Director contended, the credibility of the witnesses who testified to his having a gun in his hand and firing shots.

[22] However, looked at the other way, to the extent that it is always the responsibility of the prosecution to prove that the person charged has been correctly

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[7] ibid

identified as the offender, it is also possible to say that in a case such as this identification is always in issue. As the extract from Archbold relied on by the Director demonstrates, even in this kind of case, where the applicant was continuously under surveillance by Special Corporal Hunt up to the time of his being taken into custody, some form of modified **Turnbull** warning might well have been required.

[23] But it seems to us that, in the special circumstances of this case, the judge's failure to warn himself explicitly as to the need for caution in relation to identification evidence must to a significant extent be mitigated by the clear admissions attributed to the applicant by both Special Corporal Hunt and Detective Sergeant Brady. As will be recalled, when Special Corporal Hunt asked the applicant why he had fired shots at the police, the applicant's reply was, "Officer, a scare mi did a try scare yuh because mi waan escape". And when he was asked by Detective Sergeant Brady if he had a firearm licence, the applicant replied, "Officer … if mi do anything like this again unno kill mi." Both these answers, if believed, must in our view plainly conform to Lord Lowry's description in **Beckford v R** of "elements in the identification evidence which renders [sic] the acceptance of the identification evidence inevitable".

[24] Further, while it is true that the judge did not warn himself as to the need for caution in approaching identification evidence, he did express himself to be -

> "... satisfied of the credibility of the witnesses and in particular, the evidence of Orville Spence, as to the correctness of the identification ... of this accused man, of the correctness of he being the person who was armed with a firearm, of the correctness of him being the person who fired at the police."

[25] As regards Mr Spence's evidence, Mr Paris' point that it was incumbent on the judge to demonstrate the manner in which he reconciled the discrepancy between that evidence and that of Special Constable Hunt is obviously a fair one. But it must in our view be borne in mind that on either account, if believed, as the Director submitted, the applicant would have been guilty of both of the offences for which he was charged. The judge, who heard both gentlemen give evidence, was particularly impressed by Mr Spence's evidence and it seems to us that this is a view of the matter which he was fully entitled to take.

[26] It is for these reasons that the court concluded at the conclusion of the hearing of this matter that the application for leave to appeal should be dismissed.

[27] One final word. As we have already indicated, the question of sentence is not in issue on this application. However we think it is right to say, with the greatest of respect to the very experienced judge, that his response to counsel's question regarding the possibility of a social enquiry report, to the effect that he would only consider ordering such a report in the case of a guilty plea, is not grounded in any known principle of sentencing. Indeed, as this court has pointed out time and again, although there is no mandatory requirement that a social enquiry report should be obtained in all

cases as an aid to sentencing, "... obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice"[8].

[8] **Michael Evans v R** [2015] JMCA Crim 33, per McDonald-Bishop Ja at para. [9]; see also **Sylburn Lewis v R** [2016] JMCA Crim 30, per Morrison P at para. [15].