[2018] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 93, 94 and 95/2012

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

DELEVAN SMITH
KEVIN MASON
OAKLAND NUNES v R

Leroy Equiano for the appellants

Miss Cheryl-Lee Bolton and Mrs Venise Blackstock-Murray for the Crown

21 November, 15 December 2017 and 15 January 2018

BROOKS JA

[1] On 15 December 2017, the applications for leave to appeal were granted, we treated the hearing of the applications as the hearing of the appeals and we made the following orders in this matter:

a. The appeals are dismissed.

b. The convictions and sentences are affirmed and the sentences in respect of each appellant are deemed to have commenced on 29 August 2012.

We promised at that time to put our reasons in writing. We now fulfil that promise.

[2] The dominant feature of these appeals was the absence of a large part of the record of the evidence taken during the trial. The appellants, Messrs Delevan Smith, Kevin Mason and Oakland Nunes complain that the deficient record of appeal would prevent this court from fairly analysing the appeal from their convictions at that trial. The appellants also complain that the identification evidence as recorded in the transcript was inadequate, and that the learned trial judge erred in failing to give himself the appropriate direction on good character, to which, they said, they were entitled.

[3] The appellants were tried in the High Court Division of the Gun Court. The sitting was held in the parish of Saint Ann, before a judge, sitting without a jury. The appellants were convicted on 28 August 2012 for the offences of illegal possession of firearm and robbery with aggravation.

[4] In analysing the issues of the deficient record and the complaint about the summation concerning visual identification and good character, it is first necessary to explain how the loss of a portion of the record occurred.

The missing record

[5] The missing part of the record is the evidence taken on the first day of the trial. The chief court reporter gave an explanation for its absence. She stated that inclement weather prevented the court reporters from travelling to Saint Ann on Monday, 27

August 2012. That was the first day of the trial. The trial went ahead despite the absence of the court reporters, but the court reporters were present for the rest of the trial. Their transcript of those proceedings was available to this court.

[6] The judge's notes of the first day of trial were, however, not located. The registrar of the Supreme Court reported that she had searches made for the learned trial judge's notes in this case, but the searches were in vain. Neither counsel for the prosecution nor the defence took any notes of the evidence taken on that day, that they thought could assist this court. Consequently, apart from the learned trial judge's summation of the case, there is no record of the evidence taken during that first day.

[7] The missing evidence is that of three of the prosecution's four witnesses. The three witnesses were the victim of the robbery, Mr Roy Grandison, as well as two police officers, Detective Constable Rolando Anderson and Inspector Carol Simmons.

The prosecution's case

[8] The prosecution's case, as mainly derived from the learned trial judge's summation of the case, reveals that Mr Grandison was robbed at gunpoint on Friday, 21 October 2011. On that day, Mr Grandison was at his home at Golden Grove in the parish of Saint Ann. It was about 5:30 pm. He was tending to his pigs when he heard someone calling for "Christina". He walked toward his gate in order to tell the caller that there was no one there by that name. He saw three men as he walked. They were inside his premises, also approaching him, still calling as they drew closer.

[9] Mr Grandison then discovered that the calling was but a ruse. The men formed a semi-circle in front of him. One of them brandished a firearm and another pulled Mr Grandison's gold chain from his neck. Mr Grandison's girlfriend was nearby. She raised an alarm; shouting "thief". The man with the gun went toward her, leaving Mr Grandison with the two other men.

[10] With the threat of the gun out of the way, Mr Grandison decided to escape. He wrestled away from the two men, who had sought to restrain him, and fled the premises. He summoned friends and neighbours and, with them, went in search of the robbers. He also made a report of the robbery to a police team that was on mobile patrol in the area. Constable Ivan Stewart was a member of the police team.

[11] Within 90 minutes of the robbery, the same police team apprehended three men based on the description that Mr Grandison had given. Almost immediately after the police had done so, Mr Grandison and his friends arrived at the roadside location where the police had accosted the men. Mr Grandison behaved very badly. He accused the three men of being the ones who had robbed him earlier. He even grabbed a chain from the neck of one of the men, stating that it was his chain. Closer examination of the chain revealed, however, that it was not Mr Grandison's chain. On making that discovery, he threw the chain on the police car, in disgust. No firearm was found on any of the men. Neither was Mr Grandison's chain found.

[12] The three men were taken to the Claremont Police Station. Mr Grandison also went to the station. He again behaved very badly, striking at one of the men in the

presence of the police. Inspector Carol Simmons was obliged to take steps to avoid Mr Grandison hitting any of the men. The men, who are the appellants, were arrested and charged for the offences mentioned above.

The defence

[13] The appellants each gave sworn testimony and proffered a defence of alibi. They denied having robbed Mr Grandison, and stated that they were at another house in the area at the time of the robbery. They had been staying at that house, they said, for all of that week. It was accommodation that had been provided for them by a man named Mills, for whom they were working, tending to his farm. They asserted that they were hardworking men and that they did not rob people. They called as a witness, Miss Jodian Johnson, who stated that they were at the house until after the time of the robbery. Mr Mills also testified as to their presence in the area and as to their good character as hardworking, honest, men.

The grounds of appeal

[14] The appellants each filed two grounds of appeal. They were:

> "1. The evidence does not support the finding of Guilty [sic].
>
> 2. The sentence is manifestly excessive."

Mr Equiano, on their behalf sought and obtained permission to argue three additional grounds of appeal, namely:

> 3. "The character of the [Appellants] was essential to the case, they having given sworn evidence. There is no

indication in the Learned Trial Judge's summation that the characters of the [Appellants] were ever taken into consideration."

4. "The evidence as presented in the transcript does not demonstrate the sufficiency of the identification evidence."

5. "The circumstances under which the complainant purported to have been able to make an identification of his assailants are important in any review process and for the [Appellants'] complaint of wring identification to be effectively assessed on appeal. The absence of the notes of evidence in this crucial area of the trial operates unfairly against the [Appellants]."

[15] The appeals raise three main issues:

a. The impact of the missing record.

b. The adequacy of the summation in respect of visual identification.

c. The adequacy of the summation in respect of the appellants' good character.

The question of whether the sentences are manifestly excessive will also be briefly considered. The first two issues will be considered together.

The first and second issues – the impact of the missing record and the adequacy of the summation in respect of visual identification

[16] Mr Equiano accepted that the absence of the record of the evidence was not, in itself, fatal to the conviction. He argued, however, that the absence of such a large and important part of the record of the evidence would hamper the appeal. He submitted

that the absence of the complete record would prevent the court from determining whether the learned trial judge was correct in his analysis of the critical issue of visual identification.

[17] Learned counsel argued that the learned trial judge's summation of the identification evidence was not enough to conduct that exercise. He pointed out that the learned trial judge did not recount what Mr Grandison had said about certain critical things. Mr Equiano cited the following areas in which uncertainty existed:

a. the length of time that Mr Grandison saw the men for, or the distance from which he saw them;

b. the lighting available at the time of the sighting; and

c. the description Mr Grandison gave to the police.

[18] It was essential, Mr Equiano submitted, to know what evidence Mr Grandison gave in regard to these issues. Instead of this detail, Mr Equiano submitted, all this court has are the learned trial judge's conclusions, without any objective basis on which to assess those conclusions.

[19] The combination of the absence of the record of the evidence and the deficiencies in the summation, he submitted, resulted in serious doubt as to the safety of the convictions. In support of his submissions, he relied, in part, on the judgment of this court in **Sylvester Stewart v R** [2017] JMCA Crim 4.

[20] Ms Bolton, for the Crown, countered Mr Equiano's submissions by arguing that it could be gleaned from the summation of the learned trial judge, what evidence was adduced before him. Learned counsel argued that the learned trial judge explained that the evidence showed that the police accosted the appellants based on the description that they had received from Mr Grandison. She accepted that there was some unfairness in the absence of the evidence in respect of the identification, but submitted that the court could and should rely on the learned trial judge's summation.

[21] In analysing this issue, it must first be noted that it was not unlawful for the learned trial judge to have proceeded in the absence of the court reporters. Section 12(3A) of the Gun Court Act states that the trial judge's notes shall be a sufficient record of trials in the Gun Court. The subsection states:

> "Save as otherwise provided by rules of court or regulations under this Act, a High Court Division of the Court shall observe as nearly as may be the like process, practice and procedure as a Circuit Court, so, however, that, unless otherwise provided as aforesaid–
>
> (a) **the Judge shall take notes of the evidence and other proceedings taken before that Division**;
>
> (b) **such notes shall be sufficient record for all purposes of the proceedings taken before that Division**;
>
> (c) such notes or a copy thereof certified by the Clerk of the Court as being a true copy, and the documents received in evidence before the Judge, or copies thereof certified by the Clerk of the Court as being true copies, **shall be read and received as the evidence in the case by the Court of Appeal**, which may,

> nevertheless, if it thinks fit in any case, require the production of the original documents, or any of them, or of the original notes of evidence." (Emphasis supplied)

[22] The difficulty, however, is that the learned trial judge's notes, in this case, were not produced. There is authority, which Mr Equiano candidly brought to our attention, that that failure is also, by itself not fatal to the convictions. The learned author of Taylor on Appeals opined, at paragraph 8-071, that the "absence of an adequate or any shorthand record of the trial is not a ground of appeal in itself". The learned author went on to state that that absence may prove effective if it is combined with some other irregularity or misdirection. In this regard he cited Channel J, who said, in **R v Elliott** (1909) 2 Cr App Rep 171; 73 JP 252:

> "Where, however, there is reason to suspect that there is something wrong in connection with the hearing of the case, the absence or insufficiency of a proper shorthand note may be material."

In that case, the learned judge was treating with the provisions of a United Kingdom statute, the Criminal Appeal Act 1907. Section 16 of that Act, which has since been repealed, required shorthand notes to be taken of the proceedings at the trial. It also required that a transcript of the notes be supplied in the event of an appeal.

[23] In **R v Rutter** (1908) 1 Cr App Rep 174; 73 JP 12, the English Court of Appeal took a similar stance. In that case, there was no proper shorthand note of the proceedings of the trial. The court held, in part, that the provisions of section 16(1) of Criminal Appeal Act 1907 were merely directory, and that the taking of a shorthand

note was not essential to the validity of the proceedings. The relevant portion of section 16(1) stated:

> "Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the registrar so directs, and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof:..."

[24] In the case of **R v Richards** [1997] Crim LR 48, it was a portion of the summation that was missing. There was a disagreement between counsel, who appeared at the trial, as to what directions the trial judge in that case had given in respect of self-defence. It was the doubt about the accuracy of that direction, which was compounded by the fact that the "judge unquestionably got the law wrong in his remarks at the end of his summing-up when he was telling the jury what to look for in relation to the defence of self-defence", rather than the missing record that led to the Court of Appeal's overturning the conviction.

[25] This court is treating with a different statute and regulations. The effect of the relevant provisions of the Gun Court Act, and regulations made thereunder are, however, not entirely dissimilar in effect to the 1907 statute. Section 16(1)(d) of the Gun Court Act provides for regulations to be promulgated under the Act. Pursuant to that authority the Gun Court Act (Shorthand Writers) Regulations were promulgated. The relevant portions of regulations 2 and 3 of the Regulations require notes to be taken by court reporters and for those notes to be produced for the purposes of an appeal. Regulation 2 states:

> "Shorthand notes shall be taken of the evidence and other proceedings at the trial of any person before a High Court or a Circuit Court Division of the [Gun] Court".

Regulation 3 reads:

> "A transcript of the shorthand notes taken or any part thereof shall—
>
> (a) on any appeal or application for leave to appeal, be made and furnished to the Clerk of the Gun Court if he so directs for transmission to the Registrar of the Court of Appeal;
>
> (b) ..."

[26] As in the case of the English statute, it must be stated that the requirements of the regulations, in this regard, are directory only. It is also noted that this court, on occasion, does decide appeals based solely on the transcript of the trial judge's summation. Those are usually cases involving trial with a jury. It is only if there is a basis for requiring a transcript of the evidence that one is produced. The decision as to whether a transcript of the evidence is required will depend on the circumstances of the particular case. Rule 3.7(1)(c) and (d) and rule 3.8(2) of the Court of Appeal Rules also indicated that there is no obligation for the entire transcript of the evidence to be produced. These rules require the portion of the transcript of the evidence that is relevant to the grounds of appeal.

[27] On that reasoning, it may be held that the absence of the missing evidence in this case, by itself, cannot be fatal to the conviction. The next question to be answered is whether there is any other defect or insufficiency, which in addition to the absent record that could render the conviction a miscarriage of justice.

[28] Ms Bolton is correct in her submissions that the learned trial judge's summation does provide an adequate description of the circumstances of the visual identification. Although the learned trial judge dealt with and rejected the defence of alibi, before treating with the prosecution's case, he did set out what Mr Grandison and the other witnesses for the prosecution said. He is recorded at pages 108-118 of the transcript, as having done so. The summation can be used by this court to test the learned trial judge's assessment of the issue of visual identification.

[29] The learned trial judge dealt with the opportunity that Mr Grandison had to view the robbers. The learned trial judge did not recount any evidence of an actual time period for which Mr Grandison could see the three men. That time may, however be gleaned from the description of the circumstances. Mr Grandison, it seems, did not see the men when he first heard the calling. It was as he walked toward his gate that the men came into view. They were walking toward him as he walked toward them. He also spoke to them, suggesting that they had come to the wrong yard. The description suggests more than a few seconds within which Mr Grandison could have seen these men.

[30] The learned trial judge dealt with the issue of distance. He recounted that Mr Grandison and the men arrived within a "few feet away from each other" (page 109 of the transcript). He also dealt with the actual view that Mr Grandison had. At page 109, he recounted that Mr Grandison said "all three men were in front of him in is line of vision and he could see them clearly". The learned trial judge also noted that Mr

Grandison described the clothing that each man was wearing. He also stated that Mr Grandison said that the appellant, Mr Mason, was the man with the gun and the spokesman for the three.

[31] The learned trial judge did not recount any detailed evidence from Mr Grandison about lighting. He however dealt with the issue of lighting. He stated that Mr Grandison said that he was able to see the men clearly. The time of day, approximately 5:30 pm in the month of October suggests that there would be adequate natural lighting to lend credibility to Mr Grandison's statement.

[32] The learned trial judge summed up the identification evidence on pages 111-113. He said, in part:

> "…As far as [Mr Grandison] is concerned the lighting at the time was sufficient for him to be able to see the men clearly.
>
> There was sufficient time for him to have been able to see the men clearly, and there was this talk before any action took place, during which time he says he had these men under observation..."

After making those comments, he dealt with the essence of the **Turnbull** (**R v Turnbull** [1973] 3 All ER 549) warning as to the dangers of visual identification evidence.

[33] Mr Equiano submitted that there was some conflict in the evidence about the appellant, Mr Smith's, complexion. The learned trial judge's summation and the evidence of Constable Ivan Stewart suggest that Mr Grandison had told the police that one of the men was of fair complexion. It seems that none of the appellants, as they

appeared in court, could reasonably have been described as fair. The situation proved problematic for Constable Stewart. He failed to answer a number of questions on that point, in cross-examination.

[34] The appellant, Mr Smith, was questioned about the matter in cross examination. He denied ever having done anything at the time to have lightened his complexion. He admitted, however, that he had had, from birth, a mole on his face.

[35] The learned trial judge dealt with the point in his summation. He addressed both the complexion and the distinguishing characteristic on the appellant, Mr Smith's face. He said, at pages 115-116 of the transcript:

> "The other issue raised by the defence is [the] complexion of Mr. Smith and led defence attorney to ask Mr. Smith quite promptly, more than once, if he had been bleaching. Naturally, one would expect that Mr. Smith would say no. But even if you look at Mr. Smith as he sits now you must wonder. But Mr. Smith, while he could get away from complexion of his skin which overwhelmingly many people are not able to express themselves quite eloquently as to fair, dark brown or whatever, Mr Smith cannot get away from the pimple which he has on his face and which, as he says, had been there from birth. So that there can be no issue about the identification of Mr. Smith or any of the men and it does not matter whether any of the police officers think that of the three men now in the dock, that Mr. Nunes is the fairest of them…. "

It cannot be said that the learned trial judge did not address the issue of identification and link it to the evidence.

[36] At least six aspects of the case support the conclusion that the learned trial judge was correct in his findings in respect of the identification evidence:

a. the relatively short time between the robbery and the apprehension of the appellants;
b. the police accosted the appellants based on Mr Grandison's description of the robbers;
c. when the police held the appellants, Mr Grandison was in the process of parking his car in order to accost the appellants;
d. Mr Grandison's irate behaviour toward the appellants, both at the roadside as well as at the police station;
e. the learned trial judge's finding that he was "very impressed" by the evidence of Mr Grandison, who he said "gave his evidence in a cogent, reliable, truthful manner" (page 117 of the transcript); and
f. there was no suggestion by either counsel appearing at the trial that the learned trial judge had misquoted the evidence in any way.

[37] Admittedly, there were gaps caused by the missing evidence. One was the absence of any recounting of the testimony given by Inspector Simmons and Detective Constable Anderson. All that can be gleaned from their participation in the case is that the inspector was at the police station and restrained Mr Grandison. The learned trial judge dealt with their testimony in a short paragraph. He said at page 117 of the

transcript that they "merely gave supportive evidence...in the limited manner in which there was interchange between Mr. Grandison and the police".

[38] The second area is as to the shirt that the appellant, Mr Mason, was wearing on the day of the incident. It was, apparently, the prosecution's case that he was wearing a green army-type shirt. In his testimony he denied that. He said he was wearing a brown shirt. The factual dispute is immaterial. The learned trial judge found that the appellants were wearing the same clothes that the men who robbed Mr Grandison were wearing (page 116 of the transcript).

[39] Mr Equiano is, therefore, not correct in his submission that this court is unable to determine whether the learned trial judge had sufficient evidence in respect of visual identification in order to base his finding of guilt.

[40] It may also be noted, on the issue of the adequacy of the evidence concerning visual identification, that there was very experienced counsel representing the appellants. The fact that there was no submission of "no case to answer" is an indication that Mr Grandison's evidence must have passed the basic requirements of advancing the prosecution's case in this regard. Specifically, it must be deemed that this was not a case of a fleeting glance or a longer sighting in difficult circumstances, which are factors which would ground a no-case submission. The issue of visual identification was therefore left to the learned trial judge's jury mind. As has been demonstrated above, he considered the matters required of him by **Turnbull**. His findings cannot be faulted.

[41] The grounds of appeal based on this issue fail.

The third issue – the summation in respect of good character

[42] Mr Equiano correctly submitted that the appellants were entitled to a good character direction in respect of both the credibility and the propensity limbs of that direction. He cited the cases of **R v Aziz** [1995] 3 WLR 53 and **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 113/2007, judgment delivered 3 April 2009, in support of those submissions.

[43] Learned counsel argued that the learned trial judge adopted such a jaundiced view of the appellants and their witnesses that he improperly failed to give any consideration of the appellants' good characters. Mr Equiano submitted that the learned trial judge's approach lacked balance and, as a result, was unfair.

[44] The appellants all gave sworn testimony. Mr Mason said that he worked hard for what he had. Mr Nunes testified that he did not rob people. Mr Smith asserted that they were not wrongdoers. In addition they called, as a witness, Mr Mills, who testified that they were hardworking, honest people. Their respective testimonies did entitle them to the good character direction, as mentioned above.

[45] The authorities state, however, that the failure to give a good character direction does not automatically render a conviction fatally flawed. This court, in **Michael Reid v R**, at paragraph 44(v), said that the focus in each case should be the impact that the omission had on the trial and the verdict.

[46] Their Lordships in the Privy Council, in the case of **France and Vassell v R** [2012] UKPC 28, explained that the need for a good character direction will depend on the issues raised in the case. Their Lordships stated that where the issue involved is a clash of credibility, and the truthfulness and honesty of the witnesses is critical, the need for a good character direction is more acute (see paragraph 45 of the judgment). They approved the principle that where the giving of a good character direction would not have affected the outcome of the case, the failure to do so would not be fatal to the conviction. They said, in part, at paragraph 46:

> "But it recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."

[47] In this case, for the reasons set out in paragraph [36] above, the force of the evidence of the prosecution was compelling. This is a case where the absence of the good character direction would not have been fatal to the conviction.

[48] Based on that analysis, the ground on which this issue is based, also fails.

Sentence

[49] The appellants had each complained about their respective sentences. The complaints are not well founded. The learned trial judge imposed sentences of 15 years

imprisonment for both offences for Mr Mason, who was identified as the robber with the gun, and 12 years respectively, for each of the other two appellants. The sentences were well within the usual range of sentences for those offences. There is no miscarriage of justice in this regard.

New Trial

[50] During the course of submissions we enquired of counsel whether a new trial would be a feasible option, if we were to find that the conviction in this case was unsafe. Based on the reasoning above it is unnecessary to consider the point.

Conclusion

[51] The absence of a record of the evidence taken from Mr Grandison and two of the police witnesses was the cause of much concern to the court. Although it is accepted that the absence was not, by itself, fatal to the conviction, the situation was most unsatisfactory. This was especially so as the appeal had been adjourned over two years ago in order to have the learned trial judge's notebook found and the notes produced.

[52] A close examination of the record that was produced shows that there was no miscarriage of justice. The learned trial judge's examination of the evidence, particularly in respect of the important issue of visual identification was sufficient to demonstrate that Mr Grandison had a good opportunity to see the persons who robbed him and to identify them again. Mr Grandison was able to describe the men sufficiently well to the police that they apprehended the men fairly quickly, based on Mr Grandison's description. The evidence was sufficient to satisfy this court that the learned trial judge

was entitled to find, as he did, that Mr Grandison's evidence was not only truthful but reliable on the issue of visual identification.

[53] The learned trial judge was also entitled in the circumstances of this case, to find that the appellants were not people of good character. His failure to give himself a good character direction was therefore not fatal to the conviction.

[54] It is because the applications did cause some concern about the safety of the convictions that we granted the applications for leave to appeal against the convictions and sentences. It was, however, for the reasons outlined above that we made the orders set out in paragraph [1] hereof.