JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 148 OF 2005

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE KARL HARRISON, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

ANDREW CAMPBELL

V.

REGINA

Alonzo Manning and Barrington Frankson for the appellant.

Mrs. Diahann Gordon-Harrison for the Crown.

November 6 and December 18, 2006

PANTON, J.A.

1. The appellant, who was convicted by Mr. Justice Daye sitting alone in the Regional Gun Court in Montego Bay, was granted leave to appeal by the single judge on September 15, 2006, in order that "the quality of the identification evidence... be canvassed before the Court". The convictions were recorded on the 18th August, 2005, for the offences of illegal possession of firearm, for which he was sentenced to five years imprisonment, and wounding with intent, for

which he was sentenced to seven years imprisonment at hard labour. The prosecution had alleged that the appellant at about 10 p.m. on July 4, 2005, was in possession of an illegal firearm which he used to shoot and injure Paul White while he sat on a wall not far from where they both lived.

2. At the commencement of the hearing before us, we granted leave to the appellant to argue a supplemental ground as regards the learned judge's refusal to permit a question to be asked of one of the witnesses for the defence. So far as the original grounds were concerned, Mr. Frankson made submissions in respect of grounds (a) and (b) which read as follows:

> "(a) The evidence of identification was so tenuous and manifestly unreliable that a reasonable jury properly directed would not convict.
>
> (b) The evidence given by the sole witness for the Prosecution was filled with inconsistence (sic) and contradictions that it was wholly unreliable and could not be acted upon to found a conviction as a consequence whereof the convictions ought to be quashed and the sentences set aside."

3. In respect of ground (a), Mr. Frankson submitted that the incident having occurred at night and the identification having been made by moonlight, and there being no corroborative evidence "there was a duty placed upon the prosecution to adduce evidence in proof of moonshine that particular night". The lack of corroboration, he said, was a matter for the learned judge 'to take ...

into consideration in his assessment of the evidence". The judge, he said, should have warned himself; and, "on this limb alone, the failure to warn himself makes the conviction unwarranted". Mr. Frankson also sought comfort from the fact that the complainant at different times referred to the appellant as "Damion" and "Fast Car". This, he said, showed that he was confused with the identification.

4. Mrs. Gordon-Harrison, in a comprehensive response, submitted that the glaring weakness in the case was the fact that there was one witness only. However, she said, the learned trial judge had repeatedly warned himself of the danger of convicting on the evidence of a sole witness. She pointed to the fact that the complainant had known the appellant for three years, that they lived in the same area, and he would see the appellant twice per day. She submitted that the circumstances of the incident facilitated a proper identification being made, given the fact that the complainant and the appellant were in close proximity while they wrestled. Furthermore, the complainant watched as the appellant "went straight up to him house" (page 18 line 4).

5. An examination of the learned judge's summation of the facts and directions on the law does not reveal any support for the strictures levelled by Mr. Frankson at the judge's handling of the matter. Mrs. Gordon-Harrison is correct in saying that the learned judge had repeatedly warned himself of the danger of convicting in the circumstances that presented themselves. The

following references indicate that the learned judge was conscious of his responsibilities, and did what was required of him:

> (a) at page 114, lines 15-17, he said, "I must approach the evidence of the identification with the utmost caution";
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> (b) at page 115, he said, " Even though it is a recognition case, the warning about a witness being mistaken once it is a case of identification evidence, is still applicable. And I must still bear in mind that I should take into account as the tribunal of fact and law the quality of the identification which involved the circumstances and the conditions under which the identification and the recognition was (sic) made";
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> (c) at page 116, lines 20-23, he said, "The relevant period is ten o'clock in the night. And that is a factor which arises for close consideration in this case. The incident took place at night"; and
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> (d) at page 120, he noted, "So, if that is admitted, the only means of identifying would certainly have to be moonlight, and that is the means by which he said he saw the accused".

The above quotations are in addition to the general directions that the learned judge gave to himself in respect of the burden and standard of proof. In the circumstances, it cannot be said that the necessary caution had not been given or exercised by the judge. Further, we cannot agree with Mr. Frankson that it was necessary for the prosecution to provide scientific evidence that it was a night on which the moon was out.

6. The complainant, Paul White, testified that he had seen the appellant twice on the date of the incident — firstly at 1p.m., and secondly at 10 p.m. during the commission of the offences. On the first occasion, according to the complainant, the appellant asked him for "a fare", and he gave him fifty dollars. The appellant, however, gave evidence that he went to work "after eleven" and remained on the job until "around to four". He reached home after 8 p.m. and never left home for the remainder of that night. He called a witness, Leonard Brown, to support his contention that he could not have been seen by the complainant at 1 p.m. as he was at work. Mr. Brown, a retired teacher, said that the appellant worked under his supervision at a welding and engineering establishment. When he was asked if the appellant worked for him on the date in question, he responded thus:

> "Well, to be honest, the date is bothering me, but I know during the period that something turn up this way. It was two days or three days before he did some work for me". (p. 80)

It was in that context that the learned judge disallowed the question asked in re-examination. The following is the record of what transpired:

> "Q. You checked the work that was done at River Bay Road, did you not?
>
> A. Yes, I went down there.
>
> Q. The day afterward, the following day you ...? The day after he worked at River Bay, he worked for Mr. Young, is that correct?
>
> MISS BURKE: Objection, My Lord. I am objecting because this line of questioning does

> not arise under cross-examination. There is no ambiguity nor does it arise on re-examination because there is no ambiguity and these issues did not arise from cross-examination of the witness.
>
> HIS LORDSHIP: Yes?
>
> MR. MCLEOD: My friend suggested that the day he worked for Water Commission...
>
> HIS LORDSHIP: It is re-examination.
>
> MR. MCLEOD: It is re-examination, and I am just straightening up the days as far as that is concerned.
>
> HIS LORDSHIP: I don't see the ambiguity there.
>
> MR. MCLEOD: As my Lord pleases. Thank you Mr. Brown...".

We find no fault with the ruling of the learned judge.

7. So far as the other complaints in respect of discrepancies are concerned, we see no merit whatsoever in them, so there is no basis for interfering with the verdict on that score. The case clearly depended on the credibility and reliability of the witnesses who gave evidence before the learned judge. He made it abundantly clear that he believed the complainant, and did not believe the appellant and his witnesses. The learned judge had the benefit of seeing and hearing the witnesses and was therefore in the best position to make the necessary assessment. We see nothing on the record to cause us to feel that he did not take full advantage of the benefit he had of seeing and hearing the

witnesses. In such a situation, it is not for us to substitute our own views. It cannot be ignored that he would have taken into consideration that the appellant was well-known to the complainant, and that indeed the witnesses in respect of the alibi and the complainant knew each other very well. The case was obviously a simple one. At the completion of the evidence, learned counsel for the appellant addressed the learned judge for seven minutes; prosecuting counsel took just a minute more. The learned judge then rose for the space of three hours before resuming to give his decision and the reasons therefor.

8. We find that the challenge to these convictions is not well founded. In the circumstances, the appeal is dismissed. The convictions and sentences are affirmed. The sentences are to run from November 18, 2005.