[2012] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 63/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

PRINCE EMANUEL DELL v R

Norman Godfrey for the appellant

Mrs Lisa Palmer-Hamilton and Miss Michelle Salmon for the Crown

14, 15, 16, 18 February 2011 and 6 July 2012

DUKHARAN JA

[1] The appellant was convicted in the High Court Division of the Gun Court in the parish of Manchester on 5 June 2009 for the offences of illegal possession of a firearm and shooting with intent. He was sentenced to 10 years and 15 years respectively with the sentences to run concurrently.

[2] The matter first came before a single judge of this court who refused leave to appeal against conviction and sentence. This is a renewal of that application.

[3] We heard arguments on 14, 15 and 16 February 2011 and on 18 February 2011, we treated the application for leave to appeal as the hearing of the appeal, allowed the

appeal, quashed the convictions, set aside the sentences and entered a verdict of acquittal. We promised to put our reasons in writing. These are our reasons.

Prosecution's case

[4] On 28 October 2007 at about 11:30 pm Constables Everald Thomas, Claire Thomas and a Constable Campbell, all from the Mandeville Police Station, were conducting a spot check along Spur Tree main road. The check was being conducted in the vicinity of a corn stall. Whilst there, the police officers noticed a white Honda Civic motor car approaching from the direction of Gutters. The said car slowed down a few chains away from where the officers were and then proceeded to drive slowly in their direction. Constable Everald Thomas signaled the vehicle to stop. As the vehicle proceeded towards him, he said that he observed four male passengers in the vehicle, including the appellant whom, he said, was sitting in the left front passenger seat. The vehicle, however, did not stop but sped off uphill. The officers then boarded their service vehicle and gave chase. They eventually caught up with and passed the vehicle some 20 chains away. The vehicle had stopped and reversed and the occupants including the appellant were seen exiting it. Loud explosions sounding like gunshots were heard coming from the direction where the men were. Constable Everald Thomas said that as a result of this, he and his fellow officers were forced to take cover and he returned the fire. The men, however, made good their escape in nearby bushes.

[5] Detective Sergeant Pat Wallace testified that on the night of 28 October 2007, he responded to a radio message. As a result he went to Spur Tree main road to give assistance to some of his colleagues. On arrival he said he saw a Honda Civic motor

car parked along the said roadway. He retrieved an assault rifle from beside the left passenger door on the ground. The same morning he handed over the said rifle to Detective Sergeant George Williams.

[6] Two identification parades were conducted on 9 January 2008 at the May Pen Police Station by Sergeant Valdin Amos. Constable Claire Thomas failed to identify anyone, but Constable Everald Thomas identified the appellant as being the man he saw in the front passenger seat of the motor car.

[7] At the end of the case for the prosecution, a no case submission was made by the defence, which was unsuccessful.

Defence case

[8] The appellant gave an unsworn statement. He said he was a mason living at Barrett Mountain in Westmoreland. His defence was one of denial, as he was not involved in shooting at the police nor was he in any car at Spur Tree. He said he was taken to Mandeville by the police for the purposes of an identification parade and that is when he knew what he was there for.

Grounds of Appeal

[9] The grounds of appeal are as follows:

> "(a) The Learned Trial Judge misdirected herself when she rejected the No Case Submission made on behalf of the Appellant [sic] in relation to the inadequacy of the identification evidence.

(b) The circumstances under which the Complainant Constable Everald Thomas purported to identify the Appellant [sic] as his assailant would in the circumstances amount to no more than a fleeting glance and he could not have seen his face.

(c) The verdict is unreasonable and cannot be supported by the evidence."

Submissions

[10] Mr Godfrey for the appellant relied on the original grounds of appeal. He submitted that the identification of the appellant was done in difficult circumstances. Constable Everald Thomas, he said, on his evidence, would have had only a fleeting glance of the appellant. He further submitted that the case against the appellant depended wholly on the correctness of the visual identification by Constable Thomas.

[11] Mr Godfrey submitted that Constable Thomas first saw the face of the appellant when the vehicle was approaching him, and he was at that time signaling the vehicle to stop. He further submitted that on the occasions when the witness claimed he had opportunities to view the appellant there was no evidence whether he had a side or a frontal view. He said the witness' opportunity to view the appellant when the vehicle was approaching him would be almost non-existent, as the headlights of the vehicle would have impaired his vision.

[12] Mr Godfrey submitted that no consideration or no proper consideration was given to the no case submission. He said that the learned trial judge ought to have upheld the submission based on the principles outlined in ***R v Turnbull*** [1977] QB 224. He

further submitted that the verdict was unreasonable and ought not to be allowed to stand.

[13] Mrs Palmer-Hamilton for the Crown submitted that the learned trial judge acted properly in not upholding the no-case submission. She submitted that the learned trial judge addressed her mind to the issues as to the strength and weaknesses of the identification evidence, and properly ruled that the matters relating to the reliability of the identification evidence were for her jury mind.

Analysis

[14] Visual identification was the central issue in this case and the case against the appellant depended wholly on the correctness of the visual identification by Constable Everald Thomas (see ***R v Turnbull***). Constable Thomas' evidence was that on the night in question he had three opportunities to see the appellant. The learned trial judge concluded that the cumulative effect of each opportunity increased the likelihood that it was not a fleeting glance.

[15] According to Constable Everald Thomas' evidence, he would have seen the face of the appellant for the first time "while the vehicle was approaching him" when he was signaling the motor car to stop. When he was cross-examined by counsel for the appellant he admitted that the headlights of the vehicle were on while it was approaching him. He, however, said that the lights were not shining in his face even though he was facing the direction from which the motor car was coming. It is highly

unlikely that he would have been able to accurately see anyone in the vehicle as the car was approaching with the headlights on.

[16] Constable Thomas' evidence was that the distance from where the car was to where he was standing would have been about 1 chain and he would have had a minute to see the applicant's face. He further testified that he estimated that the vehicle would have been travelling at a speed of 2 kilometres per hour. A chain is a very short distance and it is unlikely that any motor car travelling at even such an inordinately low speed, would have taken 1 minute to cover such a distance. This narrative by Constable Thomas generates doubt as it cannot be founded upon reason. If he was observing the driver to see whether or not he was slowing down, it would have been difficult for him to have adequately observed the other persons in the motor vehicle from that distance. Although a police officer is likely to have a greater appreciation of the importance of identification, and would so look for particular identifying features (see ***R v Ramsden*** [1991] Crim LR 295), having regard to the circumstances highlighted, it would have been difficult for Constable Thomas to have made the observation he testified to in such difficult circumstances.

[17] The second occasion that Constable Thomas said that he would have seen the appellant was while the vehicle was slowly driving past him after he had signaled it to stop. He testified that the appellant was in the front left passenger seat and he would have been able to see as the car windows were down. He estimated that the distance between him and the car at that point would have been about 2 to 3 feet and the place was brightly lit by streetlights. He claimed to have been able to see the face of the

appellant from the shoulders up. There was no evidence which indicated how close the streetlights were in relation to where the spot check was being carried out that aided the officer. Constable Thomas said that as the car approached he stepped sideways to the vehicle. It would therefore mean that he would not have properly had a frontal view of the occupants of the vehicle, and at a minimum, he would have had only a side view. Given the distance he said he was standing, and the uncertainty of the distance of the streetlights, it is not clear how the constable would have been able to adequately see the appellant.

[18] The third instance where Constable Thomas said that he would have seen the appellant was when the police vehicle caught up with the motor car and pulled up beside it. He said that at this time he would have seen the face of the appellant for about "six, seven seconds". The evidence of his colleague Constable Claire Thomas contradicts this portion of Constable Thomas evidence. It is her evidence that "we tried to stop, but the speed we were going we pass the vehicle a bit, at that time the car was in motion of reversing". Constable Everald Thomas who was seated in the right rear section of the police vehicle could not therefore have seen the appellant in the way he described.

[19] It is our view that the learned trial judge failed to carry out a proper analysis and an assessment of the weaknesses in the identification of the appellant.

[20] On the issue of a no case submission, the trial judge has the power to rule that there is no case to answer if he/she considers that the evidence is insufficient to sustain

a conviction. This applies also to a judge sitting without a jury. In ***Daley v R*** (1993) 30 JLR 429, the headnote reads thus:

> "Where the prosecution relies on identification evidence, the quality of which is poor, the trial judge should withdraw the case from the jury, not because the court believes a witness is lying but because the evidence if taken to be honest has a base which is so slender that it is unreliable and therefore insufficient to found a conviction."

[21] Also in ***Regina v Omar Nelson*** SCCA No 89/1999, delivered on 20 December 2001, Harrison JA (as he then was) stated, that in circumstances where counsel makes a no case submission:

> "A trial judge is … required … to make an assessment of the quality of the evidence, exclusive of the jury, as a preliminary issue and then made [sic] a further determination whether or not to leave it to the jury for them to decide the ultimate issue of guilt or otherwise of the accused. Consequently, he has to consider certain factors in order to make that determination, namely, inter alia, the lighting at the relevant time, the length of time the victim had to observe …, the circumstances existing when the observation was made and whether or not the assailant was recognized as known before by the victim. A mature consideration of those factors will usually assist the trial judge in coming to a proper conclusion as to whether or not he should withdraw the case from the jury."

[22] In the instant case, the submission of Mr Godfrey that Constable Everald Thomas was unable to see the face of the appellant in what could be described as difficult circumstances has merit. It is quite unlikely that the officer could have seen the face of the appellant when the vehicle was approaching with the headlights on. Secondly, as

the car drove past the officer, he said that he had stepped sideways. It therefore means that there would not have been any opportunity for him to have gotten a frontal view of the appellant. On the third occasion when he said he would have seen the appellant, it would have been virtually impossible for the officer to have seen the appellant, when the police vehicle in which he was travelling sped past the motor vehicle in which it was said that the appellant was an occupant and the latter vehicle was in reverse motion.

[23] The cumulative effect of these sightings, in our view, makes this a case of a fleeting glance. In our view, a no case submission should have been upheld by the learned trial judge. We would regard the verdict as being unreasonable having regard to the evidence.

[24] As stated, we quashed the conviction and set aside the sentences and entered a verdict of acquittal.