[2020] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 53 & 60/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

OMAR FEAR & DWAYNE DONALDSON v R

Miss Gillian Burgess for the appellant Omar Fear

Mrs Emily Shields and Miss Marissa Wright for the appellant Dwayne Donaldson

Miss Patrice Hickson and Miss Kameisha Johnson for the Crown

5 December 2017 and 4 May 2020

MORRISON P

[1] At the conclusion of the hearing of these appeals on 5 December 2017, we allowed the appeals, quashed the appellants' convictions, set aside the sentences imposed on them at trial, and entered judgments and verdicts of acquittal. At that time, we promised reasons for this decision. With profuse apologies for the delay, which was entirely due to a regrettable oversight, these are the promised reasons.

[2] On 4 May 2012, after a trial before D McIntosh J ('the judge') in the High Court Division of the Gun Court for the parish of Saint Elizabeth, the appellants were

convicted of the offences of illegal possession of firearm, rape, wounding with intent and indecent assault. On that same date, the judge sentenced each of the appellants to concurrent sentences of 15 years' imprisonment for illegal possession of firearm; 20 years' imprisonment for rape; 20 years' imprisonment for wounding with intent; and three years' imprisonment for indecent assault.

[3] Both appellants applied for leave to appeal against their convictions and sentences. On 27 March 2017, after considering the applications on paper, a single judge of this court granted them leave to appeal.

[4] The facts of the case may be briefly stated as follows. The complainant was the prosecution's single witness as to fact at the trial. Her evidence was that, in the early hours of 18 October 2010, while she was in bed at her home in Bull Savannah in the parish of Saint Elizabeth, the door was broken in and a man entered. She was able to see him by the light of a lit kerosene lamp in the room and recognised him as someone she knew before, but not by name. As she reached for a machete that she had nearby, the man used something to hit her in her forehead, causing it to bleed. The man pulled her out of the house by holding on to her nightdress and when they got outside she saw another man waiting. She knew that man by name as Omar Fear, as they had grown up together. The men, both armed with guns, took her along a track to a clearing, where they each both took turns having sexual intercourse with her against her will while the other had his penis in her mouth. After they had had their way with her, and were debating what next to do, she managed to escape and run away. While

running, she heard a sound, "bow", and felt something sting her at the back of her leg. She ran to a relative's house and made a report and in due course the police came and she made a report to them as well.

[5] On being told that their names were being called in connection with the assault on the complainant, the appellants turned themselves in to the police. The complainant subsequently identified the appellant Donaldson at an identification parade and both men were arrested and charged with the offences. At the trial, both men made unsworn statements in which they maintained their innocence. They said they had been at a bar together up until 11:00 pm on the night of 17 October 2010, after which they each went to their respective homes, where they remained until morning. In addition, the appellant Fear's girlfriend gave evidence, in which she said that he was at home with her at the time the offences were said to have been committed. The judge rejected the alibis of both appellants, disbelieved the appellant Fear's witness, and accepted the complainant as a witness of truth.

[6] When the appeals came on for hearing on 5 December 2017, Miss Gillian Burgess and Mrs Emily Shields, who respectively appeared for the appellant Fear and the appellant Donaldson, sought and obtained the court's permission to argue supplemental grounds of appeal in place of the grounds originally filed by their clients.

[7] Common to both sets of grounds were complaints about the judge's treatment of the issue of identification, in particular, what was said to be his failure give adequate directions. In the end, it was primarily on the basis of these complaints that Miss Patrice

Hickson for the prosecution felt obliged to concede that there were "problems with the case".

[8] As has been seen, both appellants placed the question of identification squarely in issue. Accordingly, in addition to the credibility of the witnesses who gave evidence for both the prosecution and the defence, the principal issue in the case was the correctness of the complainant's identification of the appellants as the persons who violated her rights on the morning of 18 October 2010.

[9] As is clear from the following statement he made early in the summation[1], the judge appreciated this:

> "I will say at the outset that there really are two issues, two identifiable issues in this case. The first issue is that of credibility, which is relevant and which must be paramount in any case where an accused says he is not guilty; and the second issue which looms large in this case, is that of identification. And once this court identifies the issue of identification, it must mean that the court must warn itself of the dangers of convicting on the evidence of visual identification. And the importance of identification evidence is that it doesn't matter whether or not it is a case of recognition or it is a fleeting glance, once the issue of identification arises the court must warn itself of the dangers. And this court, being aware of the stricture laid down in the law in respect to identification, accordingly warns itself."

[1] Transcript, pages 222-223

[10] This was, as it turned out, more or less the full extent of the judge's general directions on the question of identification. Miss Burgess and Mrs Shields both submitted that, in the circumstances of this case, they were wholly inadequate. In order to test this submission, it is first necessary to set out the now canonical guidelines on identification evidence given by Lord Widgery CJ, speaking for the Court of Appeal of England & Wales in **R v Turnbull and others** (**'Turnbull'**)[2]

> "First, 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 he 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.
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> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material

[2] [1977] 1 QB 224, 228-229

> discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
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> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
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> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.
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> In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution ..."

[11] In cases in which the defendant relies on an alibi, Lord Widgery went on to add this[3]:

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to

[3] At page 230

> support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

[12] Obviously with these guidelines in mind, the single judge of appeal's comment was that "the learned trial judge treated with the **Turnbull** directions in a most perfunctory manner". We agree. The **Turnbull** guidelines require a trial judge to warn the jury, or if, as in this case, he sits alone as judge of law and fact, to warn himself of (i) the special need for caution in cases based on identification evidence; (ii) the reason for the special need for caution; (iii) the fact that mistakes in even the recognition of close relatives and friends are sometimes made; (iv) the fact that, no matter how honest and convincing the identifying witness (or a number of such witnesses) may seem, there is always a possibility that he (or they) may be mistaken; (v) the need to examine closely the circumstances in which the identification by the witness or witnesses came to be made (bearing in mind factors such as lighting, period of observation, distance and the like); (vi) the fact that, even if they reject the defendant's alibi, this does not by itself prove that he was the person identified by the identifying

witness; and (vii) any specific weaknesses which may have appeared in the identification evidence[4].

[13] In this case, although, as Miss Hickson submitted, the judge may have had the **Turnbull** guidelines in mind in a very general way, he nevertheless failed to direct himself in a number of critical respects. So, he did not warn himself that, although recognition may be more reliable than identification, mistakes in recognition of even relatives or friends are sometimes made. Nor did he say anything at all about the possibility of an honest witness being mistaken. Nor did he examine in any detail the circumstances of the identification. Nor did he address any areas of potential weakness in the identification evidence (the principal one of which must, of course, have been the absolute terror that the early morning home invasion and personal violation must have instilled in the complainant). Nor, having rejected the appellants' alibi defences, did he warn himself that that did not by itself establish that they were guilty of the offences for which they were charged.

[14] It could well be that the judge took the view that, as judge of law and fact, a **Turnbull** warning in somewhat abridged form might have been sufficient in this case. But, as we were reminded by the several authorities to which Mrs Shields referred us in

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[4] See generally, in addition to **Turnbull** itself, **Scott v The Queen** [1989] 1 AC 1242; **Reid (Junior) v The Queen** [1990] 1 AC 363; **Beckford and Others v Regina** (1993) 97 Cr App R 409; and, most recently, the decision of this court in **Rayon Williams v R** [2020] JMCA Crim 7, para. [45]

her skeleton arguments on behalf of the appellant Donaldson, this court has long been committed to the position that a trial judge sitting without a jury "… must demonstrate in language which does not require to be construed that … he has acted with the requisite caution in mind"[5]. Accordingly, as Rowe P explained in **R v Locksley Carroll**[6]:

> "… judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification."

[15] In our respectful view, the judge's effort in this case fell far short of the approach prescribed by the authorities.

[16] In **Turnbull**, at the conclusion of that section of the judgment for which the case is best known and often cited, Lord Widgery added[7] that, "[a] failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe".

[17] It seemed to us that, in this case, the judge's various failings which we have pointed out above amounted to such a departure from the established guidelines as to render the judge's verdict unsafe in all the circumstances. Given the time which had

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[5] **R v George Cameron** (Unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 77/1988, judgment delivered 30 November 1989, per Wright JA (Ag), as he then was, at page 9

[6] (Unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 39/1989, judgment delivered 25 June 1990, page 14

[7] At page 231

elapsed since the appellants were arrested for these offences in late 2010, Miss Hickson, quite properly in our view, did not press for a re-trial of this matter.

[18] However, we cannot leave the matter without mentioning one further departure from the norm which also attracted the single judge of appeal's attention. During the summing-up, having completed his review of the complainant's evidence, and having warned himself that "in all sexual cases there is the need for corroboration", the judge straight away said this[8]:

> "I wish to state quite categorically and I wish to emphasize this, this court finds [the complainant] to be a truthful, credible, practical, honest witness. This court accepts her evidence in all its gory details on all its practical applications. And notwithstanding the fact that at times she beared [sic] her soul as if she emoted her experiences, her evidence was attacked but not discredited. Her evidence has been maligned but not discredited. And I repeat, I accept her as a witness of truth."

[19] The judge then went on to find, "beyond all reasonable doubt", that the appellants were the men who broke into the complainant's house, raped her and finally shot her in the manner she had described.

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[8] Transcript, pages 242-243

[20] The case against the appellants having been thus disposed of, so to speak, the judge next turned to a distinctly sardonic review of their defences. This is how he started out[9]:

> "Now, these two men who have nothing to prove, both gave statements from the dock. It is interesting to note that in their statements, and they have a right to say anything they want to say, they put themselves together or they tried to give each other the alibi of being out together that day and both leaving [the bar] at the same time … And both going home to bed with sufficient people in their houses to say that they came in at some time that night and that they remained home at some time that night."

[21] And so the review of the appellants' cases continued, in much the same vein, until the judge arrived at the by then plainly inevitable conclusion[10] that, "on the totality of the evidence, this court finds both accused guilty on all counts of this indictment".

[22] In our view, it would have been virtually impossible for anyone reading what the judge said in the extracts set out at paragraphs [18]-[21] above (even more so for the appellants) to conclude with any confidence that the appellants were afforded the substance of a fair trial in this case. On the face of them anyway, these passages clearly suggest to us that the judge found the appellants guilty without having given fair consideration to their respective defences. In this regard, we need only refer to Simon Brown LJ's observation (albeit in the context of a jury trial) in **R v Nelson**[11], that

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[9] Transcript, page 245
[10] Transcript, page 247
[11] [1997] Crim LR 234. Mrs Shields kindly referred us to the case in her skeleton arguments.

"[i]mpartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides".

[23] These are the reasons for the decision which we announced on 5 December 2017. However, the grounds of appeal filed on behalf of the appellant Fear also raised additional issues, relating in particular to the absence of DNA evidence to support the identification, the judge's failure to deal fully with an aspect of his defence and the impact of the long delay between his conviction and sentence before the judge and the hearing of the appeal. Without meaning any disrespect, we did not find it necessary to consider them for the purposes of these appeals. But we have no doubt that, having regard to Miss Burgess's thoughtful submissions in support of these points, they may well require this court's full attention in due course.