[2012] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 195/2003

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

IAN GORDON v R

L. Jack Hines for the appellant

Miss Meridian Kohler, Miss Lavern Walters and Garcia Kelly for the Crown

6, 7, 10 February and 16 March 2012

BROOKS JA

[1] On 29 August 2000 at about 4:00 am, three men entered premises 21 Tavern Drive in the parish of Saint Andrew. They fired several shots through the front and both sides of a small wooden house located at those premises and then left. Two men, Garfield Gordon and Vincent Raffington, who were inside the house at the time, were shot. Both eventually died from their injuries.

[2] At about 10:30 that very morning, Mr Ian Gordon, the appellant herein, was taken into custody for the offences. Forensic tests of swabs, taken of his hands that morning, revealed that he had gunshot residue on his hands. The following day, 30

August 2000, he was pointed out, on an identification parade, as one of the gunmen, who had fired the shots at the ill-fated house. He was arrested and charged for the killings. Despite the swift action of the police in apprehending and charging the applicant, three years were to pass before he would be tried.

[3] On 6 October 2003, he was convicted on an indictment which charged him with those killings. On 8 October 2003, he was sentenced to suffer death for the offences. A re-sentencing exercise, which was done on 23 August 2005, resulted in a similar sentence. On 23 July 2009 the sentence was commuted to imprisonment for life by the Governor General in exercise of the prerogative of mercy. The exercise was spurred by the length of time that had elapsed since the date of conviction.

[4] The appellant was granted leave to appeal against the convictions. Original grounds filed by him were abandoned. Before us, learned counsel, Mr Hines, with the permission of the court, argued two supplementary grounds of appeal:

> "1. [The] learned trial Judge erred in that he failed to treat adequately in his directions on [sic] the crucial issue of [visual] identification i.e. the direct evidence in this case.
>
> 2. The learned trial Judge erred in that he failed to treat adequately with the circumstantial evidence offered in support of the direct evidence i.e. the existence of elevated levels of gunshot residue on his hands."

These will be dealt with in turn.

Ground One: Failure of the learned trial judge to give adequate directions on visual identification.

[5] The essence of Mr Hines' submission was that the sole eyewitness to the shooting, Mr Peter Miller had only had a fleeting glance of the gunmen. Learned counsel submitted that the learned trial judge, was obliged to, yet failed to bring to the attention of the jury, the effect of this and other weaknesses in the visual identification evidence. As a result, Mr Hines submitted, the summation was fatally flawed and the conviction must be quashed.

The opportunity for viewing

[6] The evidence in respect of Mr Miller's sighting of the gunmen was that he was sitting on a stone at 21 Tavern Drive when he was alerted by the barking of a dog. He looked and saw three men step over the back fence of the premises and, as they were walking in his direction, he could see their faces. He recognised two of them as persons whom he had known before. One was the appellant. He noticed that all three men had firearms in their hands. He ran. The men fired shots. He went some distance away and stopped. From an elevated vantage point, he saw the gunmen fire shots into the house where Mr Gordon and Mr Raffington were.

[7] The circumstances of the sighting were explained in evidence by Mr Miller. He said that he had known the appellant for over 20 years. He had seen him about three hours earlier that morning, outside nearby premises. When the gunmen had entered No 21 Tavern Drive there were electric lights burning outside of four of the five buildings on those premises. These lights illuminated the premises. The men were

"about a chain and a little bit" away, when he first saw them. He "gave a watchful eye on them stepping over the fence". They were a chain away from him when he ran. He observed them as they fired shots at the house and he saw them some minutes later, as they walked along Tavern Drive away from No 21.

[8] The elements of the identification, on which Mr Hines focussed in his submissions, are set out below.

Fleeting glance

[9] The first of these elements is that of the time period of the observation. The time that Mr Miller said that he saw the men for, before he ran, was demonstrated at the trial. It was estimated at "about three seconds". At paragraph 7 of his written submissions, Mr Hines argued:

> "…Seeing the accused for a fleeting glance even in recognition cases is what it is [;] a mere glimpse, a flash [;] a very short time – he the Judge does not have to use special language – he does not have to list weaknesses. It is the inherent nature of the fleeting glance – which makes it prone to mistake, and why it is singled out in **Turnbull** [(1976) 63 Cr App R 132; [1976] 3 All ER 549]"

[10] Learned counsel argued that the learned trial judge failed to bring the significance of this short sighting to the attention of the jury. Mr Hines accepted that the learned trial judge was not obliged to use any specific form of words, nor did he have to use the word "weakness" in reference to any deficiency in the identification evidence. Learned counsel submitted, however, that it was the significance of the

deficiency that the learned trial judge ought to have communicated to the jury and this, counsel argued, he failed to do.

[11] Mr Hines also submitted that the learned trial judge invaded the province of the jury when he sought to suggest to the jury that the demonstration given by Miller, as to the viewing time, seemed to indicate a period longer than three seconds. On Mr Hines' submission, this statement by the learned trial judge was not only wrong but exacerbated the judge's failure to point out the short period as a weakness in the identification evidence.

Witness smoking ganja

[12] The next element on which Mr Hines focussed was the acuity of the witness. Learned counsel submitted that the learned trial judge failed to tell the jury directly, that Mr Miller's observation was made in less than ideal conditions. On learned counsel's submission, the learned trial judge ought to have told the jury that the fact that Mr Miller had been smoking ganja at the location, for a number of hours leading up to the sighting, could have affected his acuity and could have led to his making a mistake. According to Mr Hines, the direction need not be based on science, but "it must show that a person who is smoking ganja is more likely to make a mistake".

[13] Learned counsel pointed out that this aspect of the evidence had not escaped the learned trial judge's attention. He argued that the learned trial judge had promised to give the jury a specific caution on the issue but never did. The learned trial judge said at page 298 of the transcript:

> "…remember that Mr Miller, on his own terms was there from 10 o'clock smoking ganja and cigarettes and what [defence counsel] Mr. Mitchell, has said, is saying in fact if he is there from 10 o'clock puffing away on a – I think he said – he said something like a 'ganja challis' – he said puffing on a 'ganja challis' from that time, you know by 4 o'clock, what do you expect. That is what Mr Michell is saying. What do you make of the comment of Crown Counsel? What Crown counsel said is that, let's face it, when he saw them coming over the wall, if he was in that state that defence counsel was talking, could he see any of the faces and say look at these men. He never did anything like that, he told you he turned and he left, he ran. So, that you see, you look at the evidence, this part of it is important. **I will give you a caution on this part of the evidence.**" (Emphasis supplied)

The admixture of races

[14] As a further complaint about the summation of the learned trial judge on the issue of identification, learned counsel submitted that the learned trial judge erred when he failed to inform the jury in words to convey the concept "that in Jamaica because of the admixture of races more than one person may bear a marked resemblance and also that at the time of identification (a mere three seconds) combined with the smoking of ganja and fright from the sight of the three men and what they were about to do could lead to a mistake and you identifying someone you think you know".

Analysis

[15] Subject to what will be said below about alibi, we have observed, from our reading of the transcript, that the learned trial judge did give an adequate **Turnbull** direction to the jury. He told the jury of the likelihood of mistakes being made, even by

an honest witness and he brought to their attention the initial suggestion, by the defence, that Mr Miller was mistaken, and a later suggestion that he was lying, with malicious intent.

[16] The learned trial judge not only told the jury of the dangers inherent in visual identification but brought to their attention the need to apply the concept to the circumstances of the instant case. In addressing the matter of the time for which Mr Miller said he observed the men, the learned trial judge said:

> "You, however, examine carefully the circumstances in which the identification was made, **how long the person, he says was the accused was under observation. That's one of the key things you look at. How long did Mr Miller have the opportunity to look at the man, the men rather, coming over the fence, how long**. At what distance, the length of time, the distance. What he said the length of time was, there was a notation in this court about that, but, I must tell you as a matter of fact, Mr. Foreman and your members, that it is your views that are sought in relation to the facts. I felt that the three seconds, as exhibited by, Miller, was in fact a little longer than three seconds. You were there, you saw it, you make up your minds about that." (Emphasis supplied)

[17] The above quotation shows that the learned trial judge did express an opinion but he made it clear that the issue of the time was the jury's domain. He also, more than once, specifically brought to the attention of the jury, the evidence of the time allowed for viewing the offenders. Contrary to Mr Hines' submission, the learned trial judge was not obliged to use the term "fleeting glance". We accept the submission of Miss Kohler, for the Crown, that there is no specific formula for communicating the relevant concepts to the jury (see **Mills, Mills, Mills and Mills v R** (1995) 46 WIR

240). We also agree with Miss Kohler, that the time for viewing was not a "fleeting glance", in light of the fact of the other sightings and the previous acquaintance with the appellant.

[18] We do not agree with Mr Hines' submission that the learned trial judge should properly have returned to the issue of the witness' acuity being affected by his smoking of ganja. Certainly, there was no scientific evidence adduced in that regard and the witness specifically denied that he was "high". The learned trial judge, concisely and pointedly, dealt with the issue with a Jamaican jury when he brought to their attention the opinion of the learned defence counsel:

> "…if he is there from 10 o'clock puffing away on a – I think he said – he said something like a 'ganja challis' – he said puffing on a 'ganja challis' from that time, you know by 4 o'clock, **what do you expect**." (Emphasis supplied)

We find that the words "what do you expect" is a comment by the learned trial judge. Had he gone on to address them as Mr Hines has submitted that he should have, the learned trial judge would have been asking the jury to speculate as to how the ganja had, if at all, affected Mr Miller's powers of observation. That would not have been appropriate.

[19] As has been mentioned before, there is no requirement for using a special formula in directing the jury on the matter of identification. It is true that in **R v Oliver Whylie** (1977) 15 JLR 163 at page 165 H, Rowe JA (Ag) (as he then was) addressed the mixture of races in Jamaica when he said:

> "It is common knowledge that more than two million people inhabit Jamaica and that there is a rich mixture of all races in this population. There is therefore always the possibility that one person may bear a marked similarity or resemblance to another in any given geographical area. The further possibility exists that an honest and prudent person may make a mistake in visually identifying another."

[20] We, however, find that it is the effect of the mixture, that is, the possibility of mistake, on which the stress is to be placed. The learned trial judge was not obliged to mention the mixture but he properly addressed the possibility of mistake. At pages 294 - 295 of the transcript he said:

> "…you Mr. Foreman and your members, have to remember that even an honest witness can make mistakes in identifying other persons. Even honest people can do so, make a mistake and Mr. Foreman and your members, those mistakes have happened."

At pages 295 - 296 of the transcript he went on to say:

> "I must, therefore, warn you of the special need for caution, before convicting the accused, in reliance on the evidence of identification, that is because as I told you it is possible for an honest mistake to be made."

[21] In our view, this ground should fail.

Ground Two: Failure to treat adequately with the circumstantial evidence.

[22] Mr Hines submitted that the treatment, by the learned trial judge, in his summation concerning the evidence of the existence of gunshot residue (GSR), on the appellant's hands, were inadequate and misleading. He submitted that the learned trial judge failed to tell the jury that the presence of the GSR was only proof that the

appellant had fired a weapon, or was close to someone who had fired a weapon, up to six hours before his hands were swabbed.

[23] Mr Hines also submitted that to attempt to use the evidence concerning GSR as circumstantial evidence was ill-conceived and dangerous. Learned counsel argued that the learned trial judge used an inappropriate example to attempt to explain circumstantial evidence. He also failed, according to Mr Hines, to direct the jury that they could not convict on the circumstantial evidence by itself and that it was necessary for them to have found that the identification evidence was such, that it could prove the appellant's guilt.

[24] Two factors should be noted in considering this ground. The first is in relation to the scientific evidence. The evidence from the forensic expert, Mrs Dunbar, was that when GSR is detected on a person's hand at either elevated or intermediate levels, it indicates that the person had fired a firearm. The expert found that the swab of the appellant's left palm had GSR at an intermediate level and that of the back of the left hand had GSR at an elevated level. The swabs of the right hand had GSR at trace levels only. There was no real contest as to the reliability of the evidence concerning the GSR.

[25] The second factor to be noted is that the appellant's evidence is that from 4:00 p.m. on 28 August 2000, he was at his girlfriend's home at Mona Commons and that he did not leave there until 6:30 the next morning. In fact, he testified that he slept at

that house from about 8:00 p.m. on 28 August 2000, until he awoke at about 6:30 on the morning of 29 August 2000.

[26] The learned trial judge reminded the jury of these factors. His directions in respect of inferences and circumstantial evidence are to be found at two places in the transcript. At page 273 of the transcript, he dealt with inferences. He is recorded as saying:

> "Another part of your function is to draw reasonable inferences from the facts you find proved. Where there is no direct evidence available, you draw inferences from the facts. You must be quite sure that it is the only inference that can be drawn in the circumstances. And let me tell you how it works. It sound [sic] very simple, this is it. You imagine; The fact is, you have a box, you put a bit of cheese in the box, another fact is, you put a mouse in the box, you close the box. When the box is opened the cheese is gone. The reasonable inference in those circumstances is that the mouse ate the cheese…I cannot tell you which facts to find, and what inferences you find are tant [sic] amount to finding of facts."

Although Mr Hines complained about this example, we cannot agree with his submission that these general directions were in any way illogical or misleading. Indeed, it is an analogy, which is frequently and properly, given by trial judges to exemplify the drawing of inferences.

[27] With respect to the circumstantial evidence, the learned trial judge, at pages 349 - 350 of the transcript, after reviewing all the evidence, sought to summarise the prosecution's case. He said:

> "The prosecution is relying on the identification of this accused man by Peter Miller. They are relying on the circumstantial evidence contained in the evidence of Miss Dunbar, where it is her opinion, having done an analysis and examination on the swabs that were presented to the lab by Corporal Powell, there is the determination that there was gunpowder residue at an elevated level on the back of the accused man's hand. In this case some of the evidence upon which the prosecution relies is circumstantial.
>
> Mr. Foreman and your members, I will explain the difference between direct evidence and circumstantial evidence because it is important for you to bear in mind the difference between them. Direct evidence is evidence which is capable of proving a fact that is in issue…
>
> Circumstantial evidence is evidence from which you may infer—remember I told you how to draw inferences—you may infer the existence upon the fact in issue….There is no evidence in this regard that anybody washed their hand. If, for example, he had slept the night and gotten up, if he had been in this bed and as he says, how then do you explain the elevated level on his hand? Because what Miss Dunbar says is that the residue in respect of the elevated levels starts to decrease after six hours and it is not known where he was from four o'clock the evening before. In fact –well, let us start from four o'clock before to eleven o'clock. On his evidence, remember he was not touching any guns."

[28] Mr Hines complains that, in those directions, the learned trial judge did not draw to the attention of the jury the possibility that the appellant could have, in fact, been somewhere else. Learned counsel is correct that the learned trial judge did not inform the jury of that possibility. The learned trial judge had faithfully outlined the sworn testimony of the appellant and that of his witness concerning his alibi. He did not, however, explain to the jury that a false alibi may have been proffered, even though the appellant would not have been at the scene of the double killing at Tavern Drive.

[29] The need for such a direction can be found in the important, and oft cited case of **R v Turnbull** [1977] QB 224; [1976] 3 All ER 549. Lord Widgery CJ in delivering the judgment of the court explained what it is that trial judges are to bring to the attention of the jury with regard to defences of alibi. He said at page 553 g:

> "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 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.**" (Emphasis supplied)

Importantly, the learned Law Lord went on to say, immediately after that passage, that the court was setting out guidelines "which involve only changes of practice, not law" (page 554 a).

[30] The requirement for those directions have, however, been emphasised in many cases since **R v Turnbull**. For example, in **Bernard v R** (1994) 45 WIR 296, their Lordships in the Privy Council found that giving the direction should be considered the norm. They said at page 304 e:

> "In their [Lordships'] view, when dealing with a defence of alibi, the trial judge should normally tell the jury that, if they

> definitely disbelieve the alibi, they must still entertain the possibility that the accused was not at the scene of the crime and has produced a false alibi to strengthen his case that he was not there."

[31] By 2001, the position had hardened somewhat. In **Roberts and Wiltshire v R** SCCA Nos 37 and 38/2000 (delivered 15 November 2001), this court spoke to the direction as a "requirement". That was a case where one of the accused had not given evidence at the trial, but had denied, in his unsworn statement, that he was at the scene of the crime. In respect of that accused, F. A. Smith JA (Ag) (as he then was), said at page 9 of the judgment of the court:

> "We accordingly hold that a trial judge is only **required** to give a direction on the defence of alibi where there is evidence that the defendant was at some other particular place or area at the material time." (Emphasis supplied)

[32] By 2005, it seems that the requirement had reached the stage of an obligation. This stance can be inferred from the judgment of this court which was delivered by F. A. Smith JA (Ag) (as he then was), in **R v Gavaska Brown, Kevin Brown and Troy Matthews** (2001) 62 WIR 234. There, this court considered circumstances where the appellant Troy Matthews had given an unsworn statement but had also called a witness to support his alibi. At page 242 of the report, the court said:

> "In **Mills, Mills, Mills and Mills v R** (1995) 46 WIR 240 the Privy Council held that the observations of Lord Widgery in **Turnbull** have no application to an alibi put forward only in an *unsworn* statement. However, in the instant case the appellant called an alibi witness. The trial judge pointed out the discrepancies between the appellant's unsworn statement and the witness's evidence. **In these circumstances a rejection of the alibi evidence by the**

> **jury might have led them to think that that supported the identification evidence. In our judgment, because of this danger, the trial judge ought to have directed the jury in terms of Lord Widgery CJ's observation in Turnbull;** see **R v Pemberton** (1993) 99 Cr App Rep 228.
>
> This omission further justifies our conclusion that the appeal of Troy Matthews must be allowed." (Emphasis supplied)

[33] The words highlighted in the above passage, are equally applicable to the instant case. Identification was the critical issue at the trial. There was one eyewitness only and there was a challenge as to his honesty. The GSR evidence would, no doubt, be an important factor for the jury's consideration. The presence of the GSR could not, however, by itself, place the appellant on the scene of the crime. There was the possibility that he was elsewhere, firing a gun, or in close proximity to a person firing a gun. Accordingly, there was a danger that without the appropriate direction, the jury could have found that, once they had rejected his alibi, there would have been no alternative to finding that the appellant was at the scene of the double killing. We find, however, that this was a fanciful possibility and that the jury, would still have convicted the appellant had the learned trial judge given the appropriate direction.

[34] In our view, therefore, there was no miscarriage of justice in that regard. We find that the defence was fairly explained and that the critical issue of identification was accurately and clearly outlined to the jury who must have believed the identification evidence given by the witness Mr Miller. Mr Miller's evidence was strong. He had known the appellant for 20 years. He had seen him earlier that morning, before the shooting. He saw the appellant for the period of time that it took the men to walk from

the fence to come within a chain of him. He saw the appellant again as the men left the scene of the crime. The jury, obviously, had rejected the suggestion that Mr Miller was a maliciously untruthful witness. Additionally, there was evidence of the presence of GSR on the appellant's hands, just over six hours after the event.

[35] There was strong scientific evidence concerning the GSR detected on the appellant's hands. The fact that the GSR was still detected at an elevated level, despite the time being at the outer limit for detecting that level, is consistent with the evidence of the expert witness that multiple firings of a firearm can cause elevated levels to exist beyond six hours. The expert said, "[w]ith multiple [firings] the elevated would be there longer". Mr Miller testified that shots were fired for about three minutes. The police found 23 spent shell casings. The prosecution's case was an extremely strong one and we find that, had the judge informed the jury of the possibility of the appellant being elsewhere apart from the scene of the killing, where he would have had this GSR deposited on his hands, their verdict would have been the same.

Sentence

[36] The instrument, which communicated the Governor General's decision to commute the appellant's sentence to one of imprisonment for life, did not specify a time before which the appellant would be eligible for parole. We are of the view that it would be appropriate to fix that period.

[37] Mr Hines submitted that, if the court were not in agreement with him on the grounds of appeal, the appropriate period in the instant case before the appellant would

be eligible for parole would be 20 years. He did so after comparing the manner of the commission of this offence with that in the case of **Lambert Watson v R** SCCA No 47/2006 (delivered 16 November 2009).

[38] Learned counsel pointed out that Ellis J, in sentencing Mr Watson, at the end of the trial, commented that the killing by Mr Watson of his common law wife and child by chopping them both to death, was the most "brutal and callous he had ever seen" up to that point in his career. Nonetheless, this court, after confirming the sentence of imprisonment for life imposed on Mr Watson, ordered that he should serve 20 years imprisonment from the date of his conviction, before he would be eligible for parole.

[39] On Mr Hines' submission, the antecedents and the social enquiry report provided in respect of the appellant show him to be a productive person, a good family man and having a positive reputation in his community. He argued that the court should consider that parole is not assured; the applicant has to satisfy the Parole Board that he has supportive infrastructure in place to minimise the likelihood of recidivism.

[40] The significant factor of this killing, in our view, is that these men had retired to their quarters and were shot therein. Some 23 cartridge casings were found outside the house, demonstrating the sustained nature of the attack as described by Mr Miller. Two lives were snuffed out. Such an attack should attract a severe penalty. We find that the appellant should serve a minimum period of 30 years before becoming eligible for parole.

Conclusion

[41] Based on the reasoning set out above, we find no merit in the complaints advanced in respect of ground one. We, however, do accept that there was a failure on the part of the learned trial judge in properly instructing the jury on the issue of alibi. He did not advise them of the possibility that the appellant could have advanced a false alibi although he was, in fact, not at the scene of the killing. We, nonetheless, find that based on the strength of the evidence in this case, there was no miscarriage of justice and that the *provisio* to section 14 (1) of the Judicature (Appellate Jurisdiction) Act should be applied.

[42] Because of the heinous nature of the killings we find that the appellant should serve 30 years imprisonment before becoming eligible for parole. That period shall be reckoned as having commenced on 8 January 2004.

[43] The appeal is dismissed. The convictions and sentences are affirmed. We further specify that the appellant shall serve 30 years imprisonment before becoming eligible for parole. The sentences are reckoned to have commenced on 8 January 2004.