**[2020] JMCA Crim 30**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 37/2015**

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

**ASHADANE HENRY v R**

**Ms Jeromha Crossbourne and Ms Renee Freemantle for the applicant**

**Miss Sophia Thomas for the Crown**

**29 January 2019 and 31 July 2020**

**BROOKS JA**

[1] On 24 January 2014 at about 7:50 pm, Ms Latoya Calman was walking with her daughter on Denbigh Road in parish of Clarendon. She saw the light from a car coming slowly behind her. She looked around and noted that two men were in the car. She quickened her pace to get to where there was a streetlight. She glanced around as she walked. The passenger alighted from the car. He was armed with a 'shine' gun that had a long nozzle. He approached them, pointed the firearm at Ms Calman's daughter and threatened to shoot the child. He demanded Ms Calman's handbag and cellular

telephone, and took them. He also tried to get her jewellery, but failed, after having difficulty getting the items off her.

[2] The car came up and went onto the right side of the road, opposite to where they were. It was a right hand drive vehicle. The male driver was therefore on the side that was away from Ms Calman. He leaned over to the passenger's side of the vehicle, beckoned to the gunman and told him to come. Ms Calman recognized the driver as someone whom she had known before for some 18 years. They had attended the same primary school, although she was ahead of him in school. She would also see him in the community where she lived.

[3] The gunman left her and went into the car. It drove away. Ms Calman was observant. She noted the make, colour and the registration number of the vehicle. She made a report to the police, informing the investigating officer of the details of the car.

[4] The police tracked down the vehicle using the information, which Ms Calman had provided. When they found, and approached it, a man, who was leaning against it, ran. The police quickly apprehended that person and took him into custody.

[5] The vehicle was one of a small fleet of cars used in a car-rental business. One of the operators of the business testified that that at the time of the robbery, the applicant, Mr Ashadane Henry, had had the vehicle on hire. In fact, the operator had delivered it to Mr Henry just about four hours before the time of the robbery. The vehicle was still on hire to Mr Henry when the police found it.

[6] On 31 January 2014, Ms Calman attended an identification parade and there pointed out the man, whom the police saw at the car, as the man with the gun, who had robbed her. She attended another identification parade on 3 February 2014 and there pointed out Mr Henry as the driver of the car.

[7] Mr Henry was, however, the sole accused at his trial in the High Court Division of the Gun Court for the offences of illegal possession of a firearm and robbery with aggravation. He gave an unsworn statement in his defence. He said that at the time of the robbery he did not have the vehicle; he had loaned it out to someone. He said that he received a call informing him that the police had detained the vehicle and that it was at the police station. He said that he went to the police station with the owner to retrieve the vehicle but he was detained. Mr Henry did not say to whom he had lent the car. He said, however, that Ms Calman was telling a lie on him. He did not explain why she would do that.

[8] The learned trial judge heard the evidence without a jury. On 8 May 2015, he found Mr Henry guilty of the offences of illegal possession of a firearm and robbery with aggravation. He sentenced Mr Henry, on 19 June 2015, to serve 12 years imprisonment in respect of the former offence and 15 years imprisonment for the latter.

[9] A single judge of this court refused Mr Henry's application for leave to appeal against his convictions. The learned single judge, however, granted leave to appeal

against sentence. Mr Henry, in addition to pursuing the appeal against sentence, has renewed the application before the court, to appeal against the convictions.

[10] Ms Freemantle argued three grounds of appeal on Mr Henry's behalf. They are:

> "(a) The Learned Trial Judge erred in not upholding the no case submission made on behalf of [Mr Henry]
>
> (b) The Learned Trial Judge failed to adequately identify and examine the several issues related to visual identification;
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> (c) The Learned Trial Judge failed to adequately assess the recognition evidence."

The grounds will be considered separately and in turn.

**Ground (a) – The no case submission**

[11] Ms Freemantle submitted that the learned trial judge ignored the principles that govern the approach a trial judge should take on hearing a no-case submission, in cases of disputed visual identification. It was that error, learned counsel submitted, that led to the rejection of the no case submission that was made at Mr Henry's trial.

[12] On Ms Freemantle's submission, the evidence of visual identification, which the prosecution presented, was so poor that no tribunal of fact, properly directed, could have convicted on it. She submitted that the length of time, the time of night, the limited lighting, the unreliable evidence as to the distance for observing the driver, and the fright caused by the circumstances of the robbery, all led to a limited opportunity to see the driver of the vehicle. In addition to those factors that militated against the prosecution's case, learned counsel submitted, there was also Ms Calman's pointing out,

on another identification parade, of a different person, as the driver. Learned counsel relied on the cases of **R v Turnbull and Another** [1977] QB 224; [1976] 3 WLR 445 and **Dwayne Knight v R** [2017] JMCA Crim 3, in support of her submissions.

[13] Miss Thomas, on behalf of the Crown, cited the cases of **R v Galbraith** [1981] 2 All ER 1060, **R v Turnbull and Another** and **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008. She submitted that these cases show that the issue of credibility and reliability of the identification witness, is usually one for the jury at the trial.

[14] Learned counsel argued that the evidence concerning the sighting of the driver was such that, if believed, was sufficient for the tribunal of fact to be satisfied by Ms Calman's evidence that she saw and could recognise the driver. In such circumstances learned counsel argued, the learned trial judge was correct in rejecting the no case submission. She argued that Ms Calman had provided an explanation for pointing out someone else on one of the identification parades and, therefore, it was an issue of credibility for the consideration of the tribunal of fact. Miss Thomas also relied on **Separue Lee v R** [2014] JMCA Crim 12, in support of her submissions on these points.

*Analysis*

[15] Mesdames Freemantle and Thomas were not in disagreement in their respective submissions as to the relevant principles concerning no-case submissions in identification cases. The principles, which are supported by the cases that learned

counsel cited, are that ordinarily the issue of credibility of an identification witness is for the consideration of the tribunal of fact. Where, however, the evidence concerning the sighting of the offender is such that the sighting amounts to a fleeting glance or even a longer time in difficult circumstances, the trial judge should accede to the submission of no case to answer.

[16] In this case, it cannot be said that this was a fleeting glance, or one so affected by the trauma of the moment, to have prevented a reliable observation of the driver of the car. The evidence that the prosecution led, showed ample time and opportunity for Ms Calman to recognise the driver of the getaway car. The relevant evidence, in summary, was as follows:

> Lighting:
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> Although it was night, Ms Calman said that the streetlight that she strove to go under was directly above the car and the windscreen was clear, allowing her to see the driver's face. The streetlight was 15 feet away from where she stood. She said that there was also a bar nearby, with a big bulb, which was turned to the road. That bulb, she said, gave a bright light. The headlights on the car were also on.
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> Distance:
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> Ms Calman said that the vehicle came within 6–7 feet behind her as she looked around at it. At one point, it was only 5

feet away from her. It was about 10-15 feet away when it stopped on the opposite side of the road.

Time for observing:

The estimate of 10 minutes, given by Ms Calman as the time that the incident lasted, at best, could only be described as unrealistic. Based on her description of the incident, it could not have lasted as long as she had testified, but certainly was long enough to view the perpetrators. She also stated that she was able to see the driver's face for four minutes. Although that span of time is also unlikely (the learned trial judge held that it would be at least five seconds), that evidence, at the stage of a no case submission, must have been considered long enough for a reliable viewing of the driver.

Method of identification:

She said that she saw the front part of the face of the driver clearly. She saw his hairstyle. He had nothing covering his face and he was facing her. She recognised him as someone she knew before by name and she had seen him at close quarters during the very month in which the robbery took place.

> Weaknesses in the identification:
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> Ms Calman said that she was frightened and upset during the incident. The gunman was pointing the firearm at her daughter. Her daughter was crying at one stage. It could have been distracting. The fact that she pointed out someone else at the identification parade as being the driver is also a significant weakness in the identification evidence.

[17] Miss Freemantle also complained that there were discrepancies in Ms Calman's evidence concerning the distances from which she made her various sightings. Ms Calman pointed out various distances in the courtroom and counsel who were present ascribed estimated measurements in most cases. The learned trial judge indicated that he took into account the distances pointed out. The discrepancies, such as there were, were not such that the prosecution's case could not withstand scrutiny. It was a matter for the tribunal of fact to analyse the evidence and the discrepancies, and to determine what it believed.

[18] The issue of Ms Calman's pointing out of another person, on a different identification parade, is next for consideration under this ground. The police held four identification parades. They held three on 31 January 2014, and a fourth on 3 February 2014. She pointed out someone on the first identification parade as the gunman, who had robbed her. She did not point out anyone on the second parade. On the third parade, she pointed out a volunteer as being the driver of the vehicle. Mr Henry was

not on any of those three parades. He was, however, the suspect on the fourth parade, when she pointed him out as being the driver of the vehicle.

[19] She explained her incorrect identification of the volunteer. She said the men on the parade had their heads tied and held them down. She said that she asked for the headdress of one to be removed. Out of frustration, she said, she pointed him out. She testified that she knew that he was not the person. When asked to explain why she pointed out that person she said:

> "Because I got frustrated knowing that when I came on the one before I asked him why the person's head was tied and on this one again it had repeated so I just got frustrated." (Page 77 of the transcript)

[20] She is recorded at page 78 of the transcript as further explaining that frustration:

> "I was basically annoyed of [sic] the fact that when I went in there I asked the question already why the head was tied and I didn't get the chance to point out the person and then I come back again and the same thing repeated again, is like I just got frustrated and wanted to come out of the room."

[21] Importantly, she testified that as soon as she was excused from the identification parade, and had exited the room, she saw a police officer, Inspector Norman, and explained the situation to him. He testified that she spoke to him, told him of her frustration and admitted that she had pointed out the wrong person on the third parade. He said that she seemed upset at the time.

[22] This incorrect identification by Ms Calman did not prevent the learned trial judge from finding that the issue of identification was one for the consideration of the tribunal

of fact to determine. Included in that issue is whether her explanation, about pointing out the wrong persons, was credible. In **R v George Robert Creamer** (1985) 80 Cr App Rep 248, the Court of Appeal of England held that the reliability of the opportunity to identify the perpetrator and the witness' explanation for not pointing him out on the identification parade, were matters for the consideration of the jury.

[23] In **Creamer**, an eyewitness failed to point out anyone on an identification parade. She testified that as soon as she left the parade she told the investigating officer that the person was in fact on the parade. She told the investigator the suspect's position in the line-up and stated that he had stared at her. She was allowed to point out Mr Creamer in court, as the perpetrator of the crime. The Court of Appeal of England stated that the whole issue:

> "…was correctly crystallised by the learned recorder when he said to the jury…that the question that they had to ask themselves was: 'Are we satisfied so that we are sure of what she is saying when she comes out of the room being correct and that she is in fact identifying this defendant as that person?'" (See page 252 of the report)

The court went further to say at page 253 of the report:

> "It appears to us that provided the opportunity for identification of a suspect was not so poor that the case has, on that account, to be withdrawn from the jury, there is no reason why the jury should not be invited to consider (as they were) whether the defendant was in fact identified by the witness following the identification parade.…"

The principle that this was an issue for the tribunal of fact was adopted by this court in **Dwight Gayle v R** [2018] JMCA Crim 34.

[24] Although the circumstances of the present case are different, the principle derived from **Creamer** is applicable. It was for the tribunal of fact to decide whether Ms Calman's testimony concerning the observation of the driver, and her reason for pointing out the wrong person on the identification parade, was reliable.

[25] Based on the above analysis, the learned trial judge's decision to reject the no case submission cannot be faulted.

**Ground (b) – The issues related to visual identification**

[26] Miss Freemantle's approach to this ground was to seek to poke holes in the prosecution's case and argue that the learned trial judge did not consider those flaws. She said that the learned trial judge:

a. did not adequately consider weaknesses in the visual identification evidence;

b. was wrong to have accepted that there was adequate time to view the face of the driver, even if it was for five seconds;

c. failed to give weight to Ms Calman's incorrect identification of a volunteer on one of the identification parade;

d. failed to appreciate that the identification evidence was "wholly insufficient";

e. ascribed disproportionate weight to the fact that Mr Henry had the vehicle on rental at the time of the robbery;

f. improperly rejected Mr Henry's statement that at the time of the robbery, the vehicle was out on loan.

[27] Learned counsel is not on good ground with these submissions. This court has accepted the principle that it is not sufficient for an appellant to show that the difficulties with the prosecution's case were such that there should have been a finding in his favour. He, instead, "must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable" (see the headnote of **R v Joseph Lao** (1973) 12 JLR 1238).

[28] In the present case, the learned trial judge:

a. considered the evidence of all the prosecution witnesses;

b. identified the various inconsistencies in Ms Calman's case and the discrepancies between her testimony and that of Inspector Norman;

c. gave himself the warning about relying on visual identification and considered the identification evidence in that context;

d. considered the defence; and

e. made specific findings of fact:

i. accepting Ms Calman as a forthright and honest witness;

ii. preferring Inspector Norman's evidence to hers, where they conflicted;

iii. accepting that the car being in Mr Henry's possession and Ms Calman's identification of him was not a coincidence; and

iv. accepting that Mr Henry was acting in concert with the armed robber and did not disassociate himself from that person when the offence was being committed against Ms Calman.

Based on that reasoning, the submissions in respect of this ground must fail.

**Ground (c) – The treatment of the recognition evidence**

[29] Miss Freemantle's submissions for this ground suffer from the same flaw that afflicted those in ground (b), namely, that the view of the case from the appellant's perspective does not mean that the learned trial judge's findings of fact were unreasonable and unsupportable.

[30] Learned counsel argued that Ms Calman's evidence, that she knew Mr Henry before the date of the robbery, was based on knowledge of him as a child in school. Miss Freemantle submitted that Ms Calman's evidence that she saw Mr Henry once in a

taxi in the same month of the robbery, was not sufficient to support a finding that she would recognise him if she saw him.

[31] Importantly, learned counsel submitted, Ms Calman's admitted in her testimony that she told the police that the driver of the car "resembles Dujon", the nickname, by which she knew Mr Henry. Ms Freemantle submitted that when those issues are considered in the context of a brief sighting in difficult circumstances, the quality of the identification evidence was wholly insufficient to support a conviction.

[32] Ms Thomas supported the learned trial judge's approach to the issue of recognition. She submitted that Ms Calman's prompt pointing out of Mr Henry on the identification parade, was support for her testimony that she knew him before.

[33] As mentioned in the discussion in ground (b), there was nothing in the findings of fact by the learned trial judge, which could be said to be unreasonable or unsupportable. It cannot be ignored that, despite being frightened and angry at being robbed, Ms Calman was observant. She noted the particulars of the vehicle, which proved to be accurate. The learned trial judge found Ms Calman to be forthright and honest, although he preferred the evidence of Inspector Norman, where the inspector's evidence differed from Ms Calman. He found that Ms Calman's identification of Mr Henry and the car at the time of the robbery, and that Mr Henry was the person in charge of the car at the material time, was not a co-incidence. It cannot be said that the learned trial judge's findings are so against the weight of the evidence as to be unreasonable and insupportable. Consequently, the conviction should stand.

**Sentence**

*Submissions*

[34] Mr Henry was given leave to appeal against the sentences that the learned trial judge imposed. The learned single judge took the view that, as the learned trial judge did not mention the, now expected, starting point, range of sentences, and the reasoning that went into the sentences imposed, the sentences should be reviewed by the court.

[35] Miss Freemantle, in supporting the complaint against sentence, relied on the fact that Mr Henry had no previous convictions and that he received a positive community report. She submitted that he was a person who was capable of rehabilitation.

[36] Learned counsel argued that there was no mandatory minimum, but accepted that the usual range for the offence of robbery was 10-15 years imprisonment. She argued that Mr Henry did not deserve the higher end of the scale, given his absence of any previous convictions. She submitted that a sentence of 10 years would have been more appropriate for both offences.

[37] Miss Thomas conducted a helpful analysis of sentences imposed in similar cases of robbery with aggravation using a firearm. She concluded that the sentence of 15 years, imposed in this case, for the robbery, was consistent with the previously decided cases. She argued, however, that given Mr Henry's previous good character, a sentence of 10 years imprisonment would be more appropriate for the firearm offence. Learned

counsel relied, in support of her submissions, on **R v Walter Thomas** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 50/1999, judgment delivered 28 May 2002, **Kemar Palmer v R** [2013] JMCA Crim 29, **Jermaine Cameron v R** [2013] JMCA Crim 60 and **Joel Deer v R** [2014] JMCA Crim 33.

*Analysis*

[38] Learned counsel are correct that the sentence that the learned trial judge imposed for the offence of robbery with aggravation is consistent with the normal range of sentences imposed for that offence. In **Joel Deer v R**, Phillips JA conducted, at paragraph [12] of the judgment, an analysis of the sentences imposed in several cases involving robbery with aggravation and illegal possession of firearm. It can be gleaned from the cases, to which Phillips JA referred, that the normal sentence for illegal possession of firearm, in such cases, is 10 years, and the normal range of sentences for the offence of robbery with aggravation is 10 – 15 years.

[39] In the present case Mr Henry was not the actual gunman. He was, however, party to the contemptible act of pointing the firearm at Ms Calman's young daughter, and threatening to shoot her. Ms Calman is reported as having said that it was the "worst day of her and her daughter's life" (see page 3 of the Social Enquiry Report). Nonetheless, Mr Henry is said to be industrious and is well regarded among community members who know him.

[40] Based on the totality of these factors, the sentences cannot be said to be manifestly excessive. Had the firearm offence stood alone, a reduction to 10 years

would have been appropriate. In this context, however, a reduction would not benefit Mr Henry. The sentences should not be disturbed.

[41] It should be noted that the case of **Meisha Clement v R** [2016] JMCA Crim 26, which now formally guides trial judges as to the approach to sentencing, was decided after the present case.

**Conclusion**

[42] The learned trial judge carefully assessed the evidence in respect of the issue of identification, as he did in respect of all the relevant issues. He gave himself an adequate warning about the dangers of convicting on evidence of visual identification, and found that the circumstances of the observation were sufficient for Ms Calman to have made a reliable identification of the driver of the car, who had acted in concert with the gunman who robbed her.

[43] In the circumstances, we find that there is no basis for disturbing this conviction. The sentences imposed by the learned trial judge were within the normal range of sentences for these offences and there is, likewise, no basis for interfering with them.

[44] Permission to appeal against conviction, therefore, is refused. The appeal against sentence is dismissed. The sentences are affirmed and are to be reckoned as having commenced on 19 June 2015.