JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 128/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

DWIGHT KIRKALDY v R

Mrs Nadine Atkinson - Flowers for the applicant

Miss Maxine Jackson for the Crown

23 January and 21 March 2014

MANGATAL JA (Ag)

[1] This is an application by Mr Dwight Kirkaldy ("the applicant") for leave to appeal against his conviction and sentence in the High Court Division of the Gun Court, held in the parish of Kingston. He was tried before Edwards J between 7 October and 20 December 2010. A single judge of this court refused the applicant permission to appeal but he has renewed his application before the court. The applicant was convicted on an indictment charging him with illegal possession of firearm and wounding with intent. He was sentenced on 20 December 2010, to serve 12 years imprisonment at hard labour on each count. The sentences were ordered to run concurrently.

[2] The convictions arise out of allegations, which were accepted by the tribunal of fact, that on 17 December 2009, at about 2:00 in the afternoon, Master Adrian Tomlin ("the complainant"), who was then 15 years old, was on Seba Crescent, in the parish of Kingston. He was on one side of a gully where some men were doing construction work. The complainant saw the applicant. He had known him as "Bobo", for about two months before the incident. The complainant said that he used to go across the gully to Calladium Crescent and he would see the applicant there. On the day in question he saw him with his cousin Sean, another man whom he had known before by the name "Reno" and there was a fourth man who had a mask on his face. The men were on the other side of the gully, at an area known as "Villa". Sean, Reno and the masked man were all by a banana tree which was about 30 feet away from the complainant. The applicant was about 20 feet away from the banana tree and from the other men and about 35 feet away from the complainant. The complainant saw the applicant with a short black gun in his hand which he pointed at him. The complainant heard a "whole heap" of loud explosions sounding like gunshots, and saw a "whole heap" of fire coming out of the applicant's gun. He then fell, felt like he was about to die, and realized he had been shot in the left side of his neck. The complainant ran to a nearby bar and was assisted to the Kingston Public Hospital.

[3] The complainant said that he was in the hospital for about five days. He was visited in the hospital by the police but because of the condition of his throat he was unable to speak to them. He subsequently gave a statement to the police. Additionally, after this shooting incident the complainant had to go back to the hospital a few

months later at which time, he indicated, he was treated for a stroke, as the right side of his body could not move.

[4] The complainant also gave evidence that on 30 April 2010, at about 3:00 in the afternoon, he was at the top part of Calladium Crescent when he saw the applicant in what he referred to as "a rat patrol", that is, in a soldiers' jeep, whilst the jeep was driving by. The complainant called out to the soldiers, the jeep slowed down but he was not able to speak to any of the soldiers. The complainant ran after the jeep and followed it to the Olympic Gardens Police Station. There on the steps of the station he saw the applicant sitting amongst other persons seated on the steps. The complainant then pointed out the applicant to the police as the man who had shot him. At the time when he pointed the applicant out he was about 14 feet away. When he pointed him out, the applicant said to the complainant (who indicated that he is called "Blaze"), "Me, Blaze, me shoot you?"

[5] In cross-examination, the complainant revealed that he had seen the applicant "whole heap of time" after the shooting incident before seeing him in the soldier jeep. In answer to questions in re-examination, followed up by questions by the learned trial judge, as to whether he had a reason why he did not make a report to the police when he had previously seen the applicant, the witness' answer was that he did not. The witness continued "through mi done give the statement".

[6] Detective Corporal Grant gave evidence that he was stationed at the Olympic Gardens Police Station and he was the investigating officer in this matter. He stated that on 30 April 2010, he was at the station when he saw the complainant attend there and, in the presence and hearing of the applicant, pointed the applicant out as one of the men who had shot him on 17 December 2009, along Seba Crescent. The applicant said "Man, mi a innocent man, sir. Mi a innocent man, sir". Under caution, he further stated "A innocent man oonu a sen go a jail". After being informed of the offences of shooting with intent and illegal possession of firearm and cautioned, the applicant said to Detective Corporal Grant "Mi nuh have nutten fi seh, sir".

[7] At his trial, the applicant made an unsworn statement. He said that he was 21 years of age and lived at 34 Calladium Crescent. He was a vendor and sold various wares at markets in Old Harbour, May Pen, Ocho Rios and Kingston. He stated that December is one of the most important times for a vendor to make money and so he was during this time at the market with one Nicola Brown. When he came home in the evenings, he never heard that there was any complaint that the police were looking for him for anything he had done. However, he did hear that some shooting had taken place because there was a dispute between the "top and the bottom".

[8] One day, he did not go to the market and he was at home because he was not feeling well. There was a joint military patrol doing duty in the area. They stopped and searched and found him with a knife and took him to the police station. Whilst at the

station he saw when the complainant came there and pointed at him and said "A you shoot me". The accused man said he had nothing to do with this alleged shooting.

[9] In his application before this court, the applicant advanced three grounds on which he contends that his conviction ought to be set aside. The first is that the learned trial judge erred in accepting the complainant's evidence of identification. The second is that the internal inconsistencies in the evidence of the sole witness as to fact make any conviction unsafe. Following on from the second ground, the third is that the learned trial judge erred in determining that the inconsistencies in the evidence did not go to the root of the Crown's case.

[10] Mrs Atkinson - Flowers, who appeared for the applicant, made submissions which may be summarized as follows:

1. The quality of the identification evidence was such that it raises serious doubts about the credibility of the witness as well as the correctness of the identification. Reliance was placed upon the substance of the no case submission advanced by counsel at the trial. Counsel also submitted that the fact that the witness admitted in cross-examination that he had actually seen the applicant a number of times after the incident yet had not reported it to the police also affects the quality of the identification evidence.

2. There were serious internal inconsistencies. For example, the complainant in evidence in chief stated that after the shooting he next saw the applicant in a soldier vehicle. However, in cross-examination it was

revealed that the complainant had seen the applicant "whole heap a time" after the incident, prior to seeing him in the soldier vehicle. It was submitted that the explanation proferred by the complainant as to why he had not told the police about those previous occasions when he saw the applicant, i.e. that it was because he had already given his statement to the police, was woefully inadequate.

3. There was also clear evidence of previous inconsistencies. For example:

    (a) The evidence of the complainant was that he saw the applicant with a short black gun which he fired in his direction. Yet in cross-examination it was brought out, in exhibit 1, that he had told the police that on the day he got shot, four men, Sean, Reno, the applicant and a fourth man with a handkerchief over his face, were firing shots at him. He had told the police that he then heard loud explosions and realized that these men were now firing at him as they pointed guns in his direction.

    (b) The complainant in cross-examination at first denied telling the police that when he first heard the explosions they had stopped, and because he did not know they would shoot him, he stood there looking at them, before he heard the other shots, resulting from which he was shot. However, on being further pressed, and when shown his statement, he admitted that he had said so. This must be seen in light of the witness' evidence in examination in chief that he saw the applicant with a firearm and that it was the applicant who proceeded to fire at him.

4. At one point in the transcript, the learned trial judge queried as to "is it when you were walking and look back you feel [sic] the shot or when you was [sic] running you feel [sic] the shot?" The witness never offered any explanation and this inconsistency remains unresolved.

5. There is also evidence that remained in a state of confusion as to whether it was the complainant who signed the statement he gave to the police ("which was signed as "Adrian Tomlin") or whether it was his brother Damani Tomlin who signed it for him.

6. Mrs Atkinson - Flowers relied upon the case of ***R v Curtis Irving*** [1975] 13 JLR 139, for the oft-cited and well-known proposition that, where the sole witness for the prosecution has been so completely discredited by reason of unexplained contradictions and inconsistencies so as to render his evidence so manifestly unreliable that no reasonable jury could safely act on it, a trial judge will be well justified in not leaving the case to the jury.

[11] In response to those submissions, Miss Jackson, on behalf of the Crown, submitted that in relation to the first ground, the learned trial judge properly accepted the identification evidence of the complainant as being correct and reliable. The evidence was sufficiently substantial to obviate the risk of mistaken identification and the trial judge abided by the principles in ***R v Turnbull*** [1977] QB 224. Counsel further submitted that this is a recognition case and in cases of this nature the time required for making the observation need not be as long as in a case where the witness had no prior knowledge of the assailant. It was pointed out that there was unchallenged

evidence that both the complainant and the applicant knew each other. Further, it was argued that the circumstances of the identification in this case were not tenuous nor could it be said that they were unreliable. Reliance was placed upon the case of ***Wilbert Daley v R*** (1993) 43 WIR 325.

[12] Miss Jackson also submitted that the fact that the complainant admitted that he saw the applicant several times after the incident did not and could not affect the reliability of his identification evidence in relation to the incident. She additionally submitted that this evidence did not affect the credibility of the witness as it relates to the identification evidence. Further, that the witness gave an explanation. All that evidence was examined and weighed by the learned trial judge.

[13] The Crown also referred to the fact that the learned trial judge gave herself directions in relation to identification by means of confrontation.

[14] In relation to the second and third grounds, it was argued that the case of ***R v Irving*** is readily distinguishable on the basis that the number and nature of the discrepancies and inconsistencies in the case at bar are relatively fewer and less significant than obtained in ***R v Irving***. Further, the learned trial judge carefully listed and analyzed the discrepancies and inconsistencies in the case before coming to her verdict. Miss Jackson contended that as regards the question of unresolved inconsistencies, there is no requirement that the judge should comb through the evidence to identify all of the conflicts and discrepancies. After examining and

analyzing most of them, the learned trial judge, as she was entitled to do, characterized them as not going to the root of the Crown's case.

[15] In relation to the submission that the complainant's explanation as to why he did not tell the police about his sightings of the applicant prior to the date when he saw him in the soldiers' jeep, being "woefully inadequate", Miss Jackson argued that this was really a matter for the tribunal of fact, being the learned trial judge. Reliance was placed upon this court's decision in ***Brown and McCallum v R*** SCCA Nos 92 & 93/2006, delivered on 21 November 2008.

[16] As regards the submission concerning the statement to the police and the uncertainty as to who signed it, the respondent submitted that this aspect of the complainant's evidence was dealt with and clarified during the course of his examination in chief. In addition, counsel submitted that this is not a case in which the witness' statement was being put into evidence for a determination to be made on the strength of it. The learned trial judge, the argument continued, had before her the witness himself, who testified about the incident and therefore she was correct not to attach any weight to the issue of the signature.

Analysis

Ground 1- The correctness and credibility of the identification evidence

[17] In assessing the submissions of both counsel and the summation by the learned trial judge, it is necessary to examine some of the evidence which was adduced at the trial. On the question of identification, it is important to note the following:

1. The complainant saw the applicant, his cousin Sean, and another man whom he had known before as Reno, along with a masked man.
2. The complainant says that he had known the applicant for two months before the incident and he used to see him "like everyday".
3. The complainant was acquainted with the applicant's family members before the incident.
4. The identification took place at 2 o'clock in the afternoon.
5. The complainant saw the applicant at a distance of 35 feet and there was nothing obstructing his view of his face.
6. The complainant saw the applicant's face for two minutes before the gun fire and he said that when he was looking at the applicant's face, the applicant was looking back at him.

[18] The learned trial judge drew a clear distinction between the elements of visual identification and that of credibility. In our view, she specifically and amply, at pages 128 and 145-146 of the transcript respectively, dealt with the issues of visual identification and of confrontation. There is in any event no challenge to the learned trial judge's summation on those bases. What is being alleged is that the quality of the identification evidence raises issues as to its reliability. As Miss Jackson submits, the learned trial judge, at pages 128 -129 and 136 carefully examined and recapped the evidence as to the circumstances concerning the identification. We entirely agree with the learned judge and Miss Jackson that the identification evidence was of good and reliable quality, and was more than sufficient to support the verdict arrived at. The circumstances surrounding the identification cannot be described as tenuous, nor can they be described as having "a base which is so slender that it is unreliable and

therefore not sufficient to found a conviction" as discussed by Lord Mustill in ***Daley v R*** at page 334. At page 146 of the transcript, the learned trial judge stated:

> "...The Court finds that the circumstances of the identification based on the evidence of the complainant is of good quality. I accept that he knew the accused before as Bobo and that the accused is Bobo. I accept that the incident took place in the daytime and that the distance between the complainant and the accused was not of such as to prevent the complainant from seeing and recognizing the accused that it was he, Bobo. I accept on the evidence, that there was sufficient time to see the person across the gully and to recognize him as Bobo. I accept on the evidence that there was nothing to prevent the complainant from doing so."

[19] The learned trial judge also at page 152 of the transcript appropriately described the circumstances in which the identification took place in the instant case, echoing comments similar to those made by this court, per Morrison JA in ***Brown and McCallum v R***, at paragraph 38:

> "The identification evidence I found was not shaken, it was not a fleeting glance case, it was not made in difficult circumstances."

[20] In addition, we agree with Miss Jackson that the fact that the complainant during cross-examination admitted that he saw the applicant several times after the incident yet had not reported that to the police has no effect upon the reliability of the identification, as opposed to the credibility of the complainant in testifying that the applicant shot him.

[21] As regards the question of the credibility of the complainant in relation to this aspect of the matter, it should be noted that in examination in chief, the complainant was not asked when he next saw the applicant. He was asked if he never saw the applicant again. It was then that he described the rat patrol incident. Further, the complainant gave an explanation that there was no reason why he had not told the police about these previous sightings, but it was "through mi done give the statement".

[22] The quality of the identification evidence being good, "it will ordinarily be within the usual function of the jury, in keeping with ***Galbraith***, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proferred, and the like"- per Morrison JA in ***Brown and McCallum v R***, paragraph 35.

[23] The learned trial judge, as the tribunal of fact was entitled to do, did examine the concern which is being raised by the applicant, and appears to have accepted the explanation advanced by the complainant, finding that nothing turned upon this aspect of the matter. At pages 142-143 of the transcript the learned trial judge examined and weighed the relevant considerations as follows:

> "In cross-examination, it was asked of him when did he report to the police that he saw the man who shot him in the community, well he told the court that he already made his report to the police and this court does not find that anything turns on this."

[24] Accordingly, we are of the view that this ground of appeal has not been made out.

Grounds 2 and 3- The issue of internal inconsistencies and whether the trial judge erred in finding them not to go to the root of the Crown's case

[25] One of the principal matters relied upon by the applicant under this head is the issue concerning how it is that the complainant claims that he was shot by the applicant yet he saw him many times before the day of the rat patrol but never reported that to the police. As discussed in relation to ground one, the matter of whether this internal inconsistency or contradiction or incredulity was material or serious, or whether it was immaterial or slight, was in essence a matter for the learned trial judge to assess. She had the benefit of seeing and hearing the witnesses and was therefore, as Miss Jackson submitted, in the best position to make the assessment as to the witness' reliability and truthfulness. As highlighted by the Crown, there was indeed clear evidence that upon seeing the applicant in the custody of soldiers, as opposed to simply seeing him on Calladium Crescent, the complainant did not remain impassive. He made an immediate and deliberate attempt to speak to the soldiers and he promptly went to the Olympic Gardens Police Station and pointed out the applicant to the investigating officer.

[26] It is clear that the learned trial judge accepted the complainant, a young man who was only 15 years of age at the time of the incident, and whose intelligence and exposure level she would have had an opportunity to assess, as a witness of truth and

she accepted his explanation as to why he did not report the earlier sightings to the police. This was all well within her purview and role as the tribunal of fact.

[27] In examination in chief, the complainant stated that he saw the applicant with a short black gun and he saw him fire in his direction. In cross-examination the complainant denied telling the police in his statement that there had been four men firing shots at him. This aspect of his statement became exhibit one. The applicant argued that this was another inconsistency and was compounded by the fact that at first in cross-examination the complainant denied telling the police certain things. However, when further pressed, he admitted that he said, in his statement, that "when I first heard the explosions they had stopped and because I did not know they would shoot me, I stood there looking at them, before I heard the other shots, resulting from which I was shot". The applicant submitted that this is a matter that seriously undermined the credibility of the complainant, since the picture painted in examination in chief was that the complainant only saw the applicant with a gun, shooting at him, yet in cross-examination he admits saying that he did not know if "they would shoot" him (Emphasis provided).

[28] As Miss Jackson pointed out in her written submissions, this is how the learned trial judge dealt with these issues at page 139 of the transcript:

> "He denies telling the police four men fired shots at him that is 'Sean', 'Bobo', 'Reno' fired shots at him. He was shown his statement and he said he could not recall telling the police that. But it was shown to him and that section of his statement was tendered into evidence for the purpose of attacking his credibility.

> Again, I find that this is an inconsistency but I find that it is not an inconsistency going to the root of what this court has to determine. I find that shooting did occur and that all four men did in fact shoot... that is three, three men under the banana tree on his side and one on the gully, even though there is an inconsistency in the sequence of firing. This court finds that does lessen the credibility of the complainant slightly, but it does not affect it in any major material particularity."

[29] At first blush, as discussed during the hearing, the learned trial judge did appear to be finding as a fact that four men were shooting at the complainant when the complainant had not given evidence that this was so. However, when the evidence is examined thoroughly, it is noted that whilst the complainant denied telling the police that four men were shooting at him, he never in his evidence expressly stated that this was as a matter of fact not so. In re-examination, as the learned trial judge pointed out, the complainant did say that he heard two sets of shots, and not one set,

as he had earlier testified. One set was coming from under the banana tree and another from the applicant. Having therefore found that the complainant was a credible witness, the learned trial judge was entitled to draw inferences, as she did, from the primary facts as found by her. She found that there were two sets of shots and inferred that when the complainant said that one set of shots was coming from the banana tree that meant that the other men also fired at him, as did the applicant.

[30] The applicant also complains that the complainant in his evidence stated that it was when he was walking away and looked back that he felt the shot, yet he had told the police in his statement that it was when he was running that he felt the shot. In

answer to questions from the learned trial judge, the complainant repeated that it was when he walked and looked back that he got the shot. When the learned trial judge persisted and asked whether he could think of any reason why he had told the police that it was when he was running, the witness said he could think of no reason for that. This is how the learned trial judge dealt with these interlocking issues of the sequence and of the number of men firing at pages 140-141 of the transcript:

> "In re-examination he said Reno, Sean and the other man was under that banana tree. He said he heard two sets of shots, one set coming from under the banana tree and one set from 'Bobo' and he repeated that he did not know that they would shoot him. He said that when he walk and look [sic] back he felt the shot and then he ran. He said he could not tell of any reason why he told the police that is when he ran off he felt something hit him. This matter arise(s) from the court's question. He told defence counsel that he heard a set of shots after he had gotten shot. It was put to him that this was not what he told the police and he agreed that that was not what he had told the police and that section of the statement was tendered into evidence, Exhibit 2, for the purpose of attacking the credibility of the witness. Again, this is inconsistency in the complainant's evidence, I however find that goes [sic] to the root of the case, that is, whether it was the accused who was armed with a shot gun and fired at the complainant. At that time he was in the company of three other men who was [sic] also firing. The difference in the sequence of events, taken as a whole, is that the rest of the evidence maintains [sic] the credibility of the witness in a minor way but not sufficiently so for me to disregard his evidence. The complainant was shot and seriously injured, when months after he suffered a stroke which sent him back to the hospital. He said that he had a stroke, there is no medical evidence in the court. But he is disabled as a result, on his right side and he cannot use his left hand to write. He was fifteen when he was shot. I do not find the inconsistency in the sequence to affect his credibility greatly or bear on the question of identification of the accused as the person who was armed with a firearm and who was in the company of three other men, shot at the complainant."

[31] As regards the question of who signed the complainant's statement, we cannot agree with Mrs Atkinson - Flowers that at the end of the day this aspect of the evidence was left in a state of confusion. At the conclusion of the complainant's evidence, it seems clear that he was saying that it was he who signed the statement and not his brother. We agree with Miss Jackson that when carefully examined, the overall evidence on this subject and its import in the case were such that the learned trial judge was correct not to attach any weight to this issue.

[32] In our view, the learned trial judge adequately demonstrated an understanding and application of the relevant principles involved in assessing the credibility of the witness. Whilst there were a number of inconsistencies in the evidence of the complainant, we agree with the learned trial judge and Miss Jackson that the nature and level of the inconsistencies when taken together, were not of such a material nature or of such severity as to render the evidence of the complainant manifestly unreliable or the conviction unsafe. The learned trial judge dealt with all of the salient issues and resolved the areas of inconsistency and discrepancy in a wholly permissible manner. It is fair to say that the question of exactly how many men were shooting at the complainant, (whether it was he alone, or whether he was in the company of other men who were also shooting), and the inconsistencies in the evidence as to the sequence of events, did have some effect on the credibility of the complainant. However, at the end of the day, as the learned trial judge found, the essential question was whether she was satisfied so that she felt sure that on the day in question the applicant was armed with a firearm and shot at the complainant. Edwards J was quite

justified in finding that such inconsistencies and discrepancies as existed did not erode the complainant's credibility in any major way and did not go to the root of the Crown's case.

[33] In the circumstances, we are satisfied that the grounds of appeal must fail and that there is no basis for interfering with the learned trial judge's verdict. Mr Kirkaldy's application for leave to appeal, is therefore, refused and his sentence should be reckoned as having commenced on 20 December 2010.