JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 72/93

COR: THE HON MR JUSTICE RATTRAY PRESIDENT
THE HON MR JUSTICE DOWNER JA
THE HON MR JUSTICE GORDON JA

REGINA VS BERESFORD MILLS

Paul Ashley for applicant

Lloyd Hibbert Deputy Director of Public Prosecutions for the Crown

27th June 1994 & 31st July 1995

DOWNER JA

On 8th June 1993, the applicant Beresford Mills was found guilty of illegal possession of firearm and robbery with aggravation in the Gun Court. It was a one day trial at the end of which Cooke J imposed a sentence of four years imprisonment on the first count and seven years imprisonment at hard labour on the second count. The sentences were to run concurrently.

The evidence adduced by the Crown reveals that it was a recognition case while the defence which was by way of an unsworn statement was an alibi. Here is how the evidence emerged as summarised by the learned trial judge in his reasons for judgment. The complainant Romeo Neil was a guard employed to Mogul Security Ltd. There was no dispute on the issue that the complainant and the accused knew each other. Both were employed to the same company

on the accused's account, as guards. On the other hand, Neil's version was that the accused was employed to wash cars at the head office.

On the morning of the incident at about 2:00 o'clock Neil recalled that he was posted at the Midway Mall on Mannings Hill Road. It was a premises that had the benefit of flood lights and in addition the Mall had the advantage of the street lighting. The flood light was about a chain from the staircase and from his position upstairs he saw Roger, as Mills was called, entering the premises and he went down to ascertain the purpose of his visit. Here is the learned judge's account of what happened next:

> "... They meet a few feet at the end of the staircase but still yet on the corridor which forms a walkway for the shops downstairs. There is a conversation of some two to three minutes. Then anxious to get back to his work, Neil turns to ascend the stairs when he was suddenly grabbed from behind. He struggles and the assailant tries to take away his firearm, a .38 Taurus. He resisted. while he is resisting, a third person suddenly appears just behind Neil as demonstrated from the witness box and this person trains, what Neil regard, as a gun and orders, 'Pussy, drop the gun.' Quite understandingly Neil gives up the struggle and the person, the assailant takes away the gun from his holster. I get the impression it was in a holster, at which point the assailant says words to the effect, 'that a through mi know yuh why I don't kill yuh.' This time guns are trained on him and he runs up the stairs, he ascends the stairs and makes contact with his headquarters. That is the Prosecution's case."

The learned judge's reasoning was based on the evidence of Romeo Neil who described how he was wrestling with the person who grabbed him from behind. In his words:

> "It was after now wrestling with that person who I didn't know at the time, after wrestling with the person from behind, when I spin around I see the same person that I was talking to.

HIS LORDSHIP Yes.

Crown Counsel MISS GRAHAM: Now, when you say you spun around and you notice the same person, the same person who?

A: The same person, Roger.

Q. And how far were you?

HIS LORDSHIP: Yes.

MISS GRAHAM: How far were you from him at that time, after you spun around?

A: No, we are close up together because we are wrestling, at that time he didn't get the fire-arm."

He (Neil) whilst wrestling was holding on to his own firearm which was in his waist. It was while the wrestling was taking place that the third man pointed a gun at him and ordered him to drop his own gun. His evidence continues:

> " Shortly after I heard what the man mention, I release myself and hold up my hands like this (indicating).

Q: Yes, what happened next?

A: Roger relieved me of my firearm."

He described how Roger grabbed the firearm out of his waist, pointed it at him and said:

> " A through mi know yuh why mi nuh kill yuh, yuh know."

The defence was adduced by way of an unsworn statement. In that statement, the applicant acknowledged that he knew Neil and that he was posted at the Midway Mall as a guard at 7:00 o'clock. He further stated that he had a conversation with Neil as Neil complained that he had not been paid. He stated that he left the premises that night at 9:00 o'clock as he had to go to the hospital the next day for treatment as he had problems with passage of urine. This defence amounted to an alibi.

It is against this background that the grounds of appeal argued by Mr. Ashley must be examined. They are as follows:

> "1. That the learned trial judge mis-directed himself on the issue of identification and accordingly failed to warn himself of the dangers of acting upon uncorroborated evidence of visual identification; or to use language from which it could be construed that he acted with the requisite caution in mind."
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> 2. That the learned trial judge erred in law by failing to properly analyse and attach due significance to all the material weaknesses in the identifying witness' evidence.

> 3. That the learned trial judge erred in law by failing to take into consideration the issue of character which the accused had placed on the line."

As to ground 1, it is pertinent to cite the analysis of the evidence of the learned judge:

> " Now, a number of questions the court has to answer. Did the accused and the virtual complainant knew (sic) each other? Unhesitatingly and unequivocally the answer must be yes. The virtual complainant had seen him washing cars. The evidence of the accused is to the effect that they knew each other. Well, they were there talking to each other at 7:00 o'clock that night. The evidence of Neil is that he the accused said if I didn't know you or words to that effect I would shoot you. Having answered that question as yes, the next question, was there adequacy of lighting? My answer to that question is yes. There was this flood light on the premises and that flood light, I find as a fact, from about a chain away produced sufficiency of light to enable Neil to know who he was talking to. Was there adequacy of time? The answer to that question is also unequivocal yes, they were talking there for some two to three minutes and the behaviour of Neil is not insignificant. He says he came downstairs because he recognised who the person was who had entered the premises and that was the only reason why he came downstairs. and again the conversation which took place between Neil and the accused. They were on common ground talking about he being fired or words to that effect."

It is clear from this analysis of the evidence that the learned judge showed that he had the requisite caution in mind as adumbrated in the authorities cited as relevant to the issue of identification evidence before a judge sitting without a

jury. Two such cases were **R v Anthony Peryer & Everton Powell** SCCA 155 & 159/88 delivered 5th March 1990 and **R v Alex Simpson & R v McKenzie Powell** SCCA 23 & 24/90 delivered 5th December 1990.

The learned trial judge generously described the unsworn statement of the accused as evidence, but that statement was not tested by cross examination. At its highest if it raised a doubt in the judge's mind about the Crown's case or if the learned judge believed it, the accused would be entitled to an acquittal.

The learned judge had no doubt about the Crown's case and he rightly saw the issue thus:

> "... So in the circumstances, I do say that strictly speaking this is not an 'identification' case. I say also that it is not also a 'recognition' case. as counsel put it to the virtual complainant that he was lying, what this court has to decide is whether or not Neil is lying and I am satisfied so that I feel sure that he is speaking the truth. But this is not the end of the matter. In the view of this court, when the accused came on to the premises and engaged in conversation, it was a ploy, it was to lull him so that the unknown accomplice could come unaware, thus rob Neil of his firearm."

By his language the learned judge demonstrated that he was aware of the features that he ought to take into account as regards identification even when both parties were known to each other. We find no reason to agree with the criticism of the learned judge's reasons as submitted by counsel.

As regards the second ground, the learned judge was satisfied to the extent that he felt sure about the conditions of the recognition since the

accused admitted he was there. The difference was as to time. The learned judge regarded this as a matter of credibility and found that Neil was a witness of truth.

As to the 3rd ground, it is difficult to ascertain from the accused's unsworn statement that his character was in issue. Nor was any evidence led as to his character. Perhaps it is necessary to advert to section 9 (e)(f) of the Evidence Act to show how character can become an issue in a criminal case. It reads:

> 9(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.
>
> (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless
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> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
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> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character or the nature or conduct of the

> defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
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> (iii) he has given evidence against any other person charged with the same offence."

In the recent case of **Berry v The Queen** Privy Council appeal No. 40/90 delivered 15th June 1992, Lord Lowry reviewed the law on character evidence. It must be borne in mind that Berry gave sworn evidence and his character was in issue on the matter of credibility. The passage runs thus:

> " The appellant then complained the trial judge had failed to direct the jury adequately with regards to the appellant's previous good character in that he failed to point out that this is primarily relevant to the question of credibility. While the historical survey of Viscount Simon L.C. in **Stirland v Director of Public Prosecutions** [1944] A.C. 315, 324-6 is both interesting and instructive, the modern case law all points the same way on this point: see **R. v Bellis** [1966] 1 W.L.R. 234, **R. v. Falconer-Atlee** [1973] 58 Cr. App. R. 348, **R. v. Marr** [1989] 90 Cr. App. R. 154, **R. v. Cohen** [1990] 91 Cr. App. R. 125 and **R. v. Berrada** (Note) [1989] 91 Cr. App. R. 131. The last three cases are also authority for the proposition that it is proper, though not obligatory, for the trial judge to tell the jury that, as well as going to credibility, good character is relevant when considering whether the defendant is the kind of man who is likely to have behaved in the way that the prosecution alleged. But the primary point, one now has to accept, is credibility. The Crown admitted that the judge's direction as to the effect of good character was flawed in the manner contended for by the appellant but, adopting the view of the Court of Appeal, while admitting the error, contended that it had caused no injustice.

> Their Lordships, however, did not feel able to accept this conclusion. Such case as the defence were able to make depended, like the defence in some of the cases cited above, almost entirely on the appellant's credibility if it was to have any prospect of success and therefore the misdirection was material. Had this been the only ground of complaint, their Lordships might have reached a different conclusion on the appeal."

In this case the accused's character was not put in issue at all so the need for the judge's reasons on this aspect of the matter did not arise. The appellant's protection was the presumption of innocence and no complaint has been made on that issue. Be it noted that although the learned judge erred with regard to the issue of character in **Berry** (supra), if that had been the only complaint the implication was that, Their Lordships would have applied the proviso. In any event, it is difficult to determine how credibility could be resolved in favour of an accused if the Crown's case emerges triumphant after cross examination and the accused fails to go into the witness box.

Conclusion

The single judge Patterson JA who considered this case rightly ordered that sentence was to run from 20th July 1993 because no grounds of appeal were filed. We treated the application to appeal as the hearing of the appeal and reserved judgment because of the issues of law raised. In the event, we have dismissed the appeal and affirmed the conviction and sentence.

Because of the delay in this case, so that the appellant suffers no disadvantage, it is ordered that the concurrent sentences of four and seven years will run from 20th July 1993.