JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 133/03

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)

REGINA
V
PETER SENIOR
CLAYTON BRYAN

Miss Carolyn Reid for Appellants

Mr. David Fraser Deputy Director of Public Prosecutions for the Crown

October 11, 12, 2004 and March 11, 2005

K. HARRISON J.A:

On the 26th June 2003, after a trial by jury presided over by Beckford, J in the Trelawny Circuit Court sitting in Duncans, the appellants Peter Senior and Clayton Bryan were both convicted of the crime of Wounding with Intent. Following their conviction, the appellant Peter Senior was sentenced to serve a term of imprisonment of fifteen years at hard labour on count 1 and nine years at hard labour on count 2. The appellant Clayton Bryan was sentenced to serve a term of imprisonment of nine years at hard labour on count 1 and twelve years

at hard labour on count 2. The sentences in respect of each appellant were ordered to run concurrently.

On October 12, 2004 we dismissed their appeals, affirmed the convictions and sentences and ordered that the sentences should commence as from September 26, 2003. We promised then to put the reasons for our decision in writing at a later date and now do so.

The case for the prosecution

The case for the prosecution was that on the 9th September 2002, at about 9:30 p.m. Barrington Watson and David Laing were riding their pedal cycles slowly along Brunt Hill Road, Trelawny. Clifton Barrett was walking between the two cycles and when they got to a street light, they saw six men coming from the opposite direction. Three of the men were walking ahead of the others. The witness Watson said, he was only able to identify three of them, namely, Peter Senior, Andrew Peete and Clayton Bryan. These three were walking together "side by side". The men, according to Watson "opened the road for them to ride through" and as he reached to where Senior was, Senior swung a machete at his left hand. He held out his left hand to block the blow and felt something sting him in the hand. He dropped his bicycle and whilst he was balancing himself, Senior came and chopped him again on the left shoulder. He was about to get up and Senior said to him:

"Boy mi wi kill you ennoh".

Watson said he ran off to a nearby gully and went under a tree. He felt his hands burning him and when he looked he saw that his left hand was chopped off. He was also bleeding at the shoulder. Before he ran off he had seen Clayton Bryan chop David Laing.

David Laing who also testified at the trial said as he rode towards the men they parted and he rode through. As he was passing them, the appellant Clayton Bryan chopped him on his right shoulder. He got off his cycle, ran into the bushes and whilst he was in the bushes he heard Barrington Watson shouting to him that Senior had chopped off his hand.

Clifton Barrett testified that he saw the appellant Senior use a machete and "chop off Watson's hand" which fell to the ground. He also saw the appellant Bryan chop David Laing on his shoulder.

Both Watson and Laing reported the incident to the police at Ulster Spring Police Station. The appellants were subsequently apprehended and charged with the offences of wounding with intent.

The Defence

In his defence, the appellant Peter Senior made a statement from the dock in the course of which he said he was walking along the road and on reaching a point in the dark, someone started to throw stones and bottles at him. He could not see anyone. He was hit on one of his sneakers and this caused a cut on his big toe. He saw when a man ran out of the bushes, cursed a bad word, and say:

"Boy, fowl wha feed a yard nuh hard fi ketch".

He stooped down because of the injury to his toe and heard this man calling to another man in the bushes. He heard when Broady (Clifton Barrett) say:

> "Come meck we beat the boy and tie him up and lef him a road side".

Barrett ran down on him and began pulling him but he got away from him. Whilst he was pulling away, he said his hand caught one of the men at a very vulnerable spot and this caused the man to drop a machete that he had in his hand. He picked up the machete and as the other man came down towards him he made a chop in the dark and ran. He said he was unable to say whom he had chopped. He recalled however, that he swung the machete and made a chop.

The appellant Clayton Bryan's defence was one of an alibi. He testified that he was walking along Brunt Hill Road at about 7:45 pm on 9th September, 2002. He was alone, and he saw David Laing and two other persons approach him. Laing accused him of "dissing" his friend Kathy and chopped at him with a machete. He said he was chopped on the little finger and he ran off. He made a report to the police at Ulster Spring Police Station and from there he went to Falmouth Hospital where he was treated for the injury he received on his little finger. He denied cutting Laing on his shoulder. He also denied that he was in the company of five other men on the night of the incident.

The Grounds of Appeal

Before us, Miss Reid was granted leave to argue a number of supplemental grounds of appeal. The original grounds of appeal were abandoned.

The identification issue

Peter Senior

Ground 1 of the Supplemental Grounds

> 1. The learned trial judge omitted to direct the jury that the quality of the lighting could have impacted on the ability of the prosecution witnesses to see and therefore would affect the quality of their evidence in regard to the whole incident as well as identification.
>
> In the alternative, the learned trial judge failed to point out what were weaknesses in the identification evidence and to analyze them and their likely effect.

Ground 1 of the Addendum to Supplemental Ground

> 1. The learned trial judge's directions on inconsistencies and discrepancies were inadequate, in that, she failed to assist the jury by relating the law to the evidence and how such matters were to be approached. This failure amounted to a non-direction which prejudiced the Claimant/Appellant's defence.

Clayton Bryan

Grounds 2 and 3 of the Supplemental Grounds

> 2. The learned trial judge failed to give adequate directions on the law of identification, in that, she failed to point out that even in recognition cases witnesses have been known to make mistakes in the identification of close friends and relatives.

> 3. The learned trial judge's directions on inconsistencies and discrepancies were inadequate, in that, she failed to assist the jury by relating the law to the evidence and how such matters were to be approached. This failure amounted to a non-direction which prejudiced the Claimant/Appellant's defence.

The above grounds can be conveniently dealt with together and are summarized hereunder. The complaints were that:

1. There were conflicts in the evidence as to lighting on the scene.
2. The directions lacked analysis on weaknesses in relation to the identification evidence.
3. The learned trial judge failed to adequately direct the jury that even in recognition cases, witnesses have been known to make mistakes; and
4. The learned trial judge's directions on inconsistencies and discrepancies were inadequate.

In both her written and oral submissions, Miss Reid argued that the credibility of the witnesses who purported to have identified the appellants was a live issue. It was even more important she said where Bryant's defence was one of an alibi. She submitted that there was conflict in the evidence in relation to the lighting conditions. She argued that the evidence revealed on the one hand, that there was a street light in the vicinity where the men were seen, and on the other hand, coming from the same witnesses, the area was dark. She further submitted that the learned trial judge ought to have pointed out these

weaknesses and their impact to the jury, rather than merely rehearsing the evidence with the comment:

> "You determine that, because it is important when you come to deal with the question of identification."

Miss Reid also argued that the jury was not told that in cases of recognition of close friends and relatives that witnesses can make mistakes. In the circumstances, she submitted that the directions to the jury were deficient. She also submitted that this direction ought to have been given since there were multiple discrepancies in the testimony of the witnesses as well as inconsistencies concerning the opportunity to see and recognize the appellants.

Mr. Fraser, on the other hand, submitted that the warning given by the learned trial judge on identification was sufficient. He argued that the key components of the warning, that is, the need for caution before relying on the identification evidence, and the reason for the caution in that, the jury has to be satisfied both that, the witness is honest and also accurate, were emphasized by the learned trial judge.

On the state of the evidence, it is clear that the critical issue in the case was one of visual identification. Although it was a case of recognition, it was imperative that the learned trial judge give the jury the warning prescribed in ***R v Turnbull*** [1976] 63 Cr. App. R 132; ***Shand v R*** (1995) 47 WIR 346; and ***R v Elvis Martin*** SCCA 151/97 (unreported) delivered 6th July 1999. In ***Shand*** in the course of delivering the judgment of their Lordships' Board, Lord Slynn of Hadley said at page 351:

> "The importance in identification cases of giving the Turnbull warning has been frequently stated and it clearly now applies to recognition as well as to pure identification cases. It is, however, accepted that no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury. The cases in which the warning can be entirely dispensed with must be wholly exceptional, even where credibility is the sole line of defence. In the latter type of case the judge should normally, and even in the exceptional case would be wise to, tell the jury in an appropriate form to consider whether they are satisfied that the witness was not mistaken in view of the danger of mistake referred to in Turnbull."

In the instant case the learned trial judge recognized that the issue of identification was a live one, and at page 25 of the transcript, the learned judge directed the jury on the special need for caution and the reason for it. She stated:

> "That is because it is possible for an honest witness to make a mistaken identification. An apparently convincing witness can be mistaken, so can a number of apparently convincing witnesses".

The learned judge thereafter directed the jury to examine the circumstances in which the identification was made by reminding them of the length of time, distance, lighting conditions and whether the men were previously known to the witnesses.

The first point to note is that the identification of both appellants was by way of recognition. In relation to Peter Senior and Clayton Bryan, Watson said he knew each one for about eight years. He would see Senior every evening when he visited his "baby mother." Laing said he had known Bryan for about

two years before the incident. He saw Bryan at least twice per week and he would see him in the company of Senior. He had known Senior for a period of eight years before the incident.

Second, the incident occurred at approximately 9:30 pm but the witnesses said they were able to see. There were street lights burning in close proximity to where the incident had occurred and there was full moon.

Third, the encounter between the witnesses and appellants occurred at close quarters and this had provided a good opportunity for the witnesses to identify their attackers.

Fourth, both Watson and Laing saw the faces of the appellants between one minute and four minutes respectively.

When all of the above factors are taken into consideration we are of the opinion, that the learned trial judge adequately directed the jury with regard to the quality of the identification evidence as well as the dangers in relying upon this evidence.

Counsel for the appellants complained that although the learned trial judge pointed out certain contradictions and discrepancies to the jury they were not given any adequate assistance how they should apply the law to the areas of discrepancies and contradictions. We are not in agreement with these submissions. The learned trial judge had critically analyzed the evidence and assisted the jury in relation to weaknesses in the identification evidence. The authorities have made it abundantly clear that there is no need for the trial judge

to list the weaknesses in drawing the jury's attention to aspects of the evidence nor is there a need to refer to all of the discrepancies: see ***R v Michael Rose*** (1991) 46 WIR 213; ***R v Fray Deidrick*** SCCA 107/99 (unreported) delivered 22nd March 1991. The learned trial judge had in fact highlighted both the internal differences in the evidence of the witnesses as well as the effect these differences would have on the credibility of the witnesses. At page 12 of the transcript the learned trial judge said this:

> "You had witnesses for the prosecution saying different things. So, that is what I am saying to you, that you will expect differences, but at the same time if the differences are such that you cannot accept it, then that is a different matter, but differences you will accept because we are different."

After reminding the jury that each witness might have seen and observed differently the learned trial judge said:

> "... but at the same time you have to look at the entire evidence and if what you see is so different and you don't know what to believe, then it means that the prosecution has not satisfied you so that you feel sure".

We are also in agreement with Mr. Fraser when he submitted that a summation which omitted the use of the words "mistakes are made in recognition cases" is not deficient. We are of the view that the warning does not have to take on any particular form of words: see ***R v Shand*** (supra). We are further of the view that the evidence of identification in the instant case was of good quality. The appellants were identified by three witnesses who knew them before for an extended period and had seen them frequently. The learned trial

judge had warned the jury that it was possible for an honest witness to make a mistaken identification and that an apparently convincing witness or a number of apparently convincing witnesses can be mistaken. Lord Lowry had stated inter alia, in ***Michael Beckford and Others v Regina*** (1993) 42 WIR 291:

> "The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely, is he right or could he be mistaken?"

We do not find any merit in these grounds of appeal hence they fail.

The self defence issue

Peter Senior

Ground 2 of the Supplemental Grounds

> "2 The learned trial judge failed to give any or any adequate directions in accordance with the principles laid down in ***Solomon Beckford v R*** (1998) AC 130."

Clayton Bryan

Ground 1 of the Supplemental Grounds

> 1 That the learned trial judge erred in law, in that, she removed from the consideration of the jury the issue of self-defence, which was available to the Claimant/Appellant. This failure amounted to a misdirection rendering the conviction unsafe.

Counsel for the appellants conceded that the ground relating to self-defence on behalf of the appellant Bryan, could not be pursued because his defence was one of alibi and it did not arise on the prosecution case.

The appellant, Senior, made a statement from the dock which stated inter alia, that he was walking along the road when he was attacked with stones and bottles thrown by persons. One of the stones caught him on the top of his sneaker, burst it, and caused a cut on his big toe. He then heard Clifton Barrett say:

> "Come meck we beat the boy and tie him up and lef him a roadside."

Barnett then ran down towards him and pulled him but he got away from him. Whilst he was pulling away from Barrett his hand caught Senior at a very vulnerable spot. He said that the machete Senior had "line up" on his foot fell from his hand after he was hit. He took up the machete and whilst one of them was coming down on him he swung it and made a chop in the dark. He said he did not know whom he chopped but he chopped and then ran.

On the prosecution's case the appellant was the attacker so, self-defence, did not arise for consideration on their case.

Miss Reid argued on the other hand, that it would appear from the account given by the appellant, Senior, that he delivered a chop in the dark because he had apprehended an attack. She submitted that in these circumstances, the learned trial judge did not adequately address the issue of self-defence as it relates to mistaken or honest belief and that this was a non-direction which amounted to a misdirection in law. In the course of her submissions however, Miss Reid quite properly admitted that she faced a difficulty with regard to the absence of directions on mistaken or honest belief

having regard to the decision in ***Solomon Beckford*** (supra). She argued nonetheless, that whatever the defendant puts forward as his defence, whether it be in a sworn or unsworn form, these were matters which the jury had to consider.

In ***Beckford's*** case their Lordships in the Privy Council, expressed the view that there is an obvious danger that a jury may be unwilling to accept that an accused who relies on a plea of self-defence held an honest belief if he is not prepared to assert it in the witness-box and subject it to the test of cross-examination: and I quote from Lord Griffiths who delivered the opinion of the Board:

> "Now that it has been established that self-defence depends upon a subjective test their Lordships trust that those who are responsible for conducting the defence will bear in mind that there is an obvious danger that a jury may be unwilling to accept that an accused held an "honest" belief if he is not prepared to assert it in the witness-box and subject it to the test of cross-examination."

Where the defendant makes an unsworn statement from the dock however, the jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it: see ***Director of Public Prosecutions v Leary Walker*** 1974) 21 WIR 406.

Here is how the learned judge directed the jury on the statement made by the appellant, Senior, at page 10 of the transcript:

> "Now, what you heard from Peter Senior was a statement. It has not been tested under cross-examination, so it is not evidence. Evidence is what comes from the witness box, but you give the statement what weight you feel it deserves. You have not seen him answer questions under cross-examination, so you give the statement that he has given to you what weight you think it deserves."

It is abundantly clear that the **Beckford** direction must only be given where there is a question as to the nature or existence of an attack; when it is clear on the defence that the appellant was being attacked, the jury would not be assisted with a direction on honest belief: see ***R v Daisy Robinson and Others*** SCCA 27 & 28/98 (un-reported) delivered 11th April 2003 and ***R v Derrick Wolfe*** SCCA 94/91 (un-reported) delivered 31st July 1992.

We are of the view, after a careful examination of the facts presented at the trial that the learned trial judge was not required to give directions in relation to honest belief as the evidence of the two accounts of the incident was correctly left to the jury to choose between them. On the Crown's case, the appellant was the attacker and on the appellant's case, he was under attack. There was no third possibility of the appellant harbouring a mistaken belief that he was under attack which would have necessitated a direction on honest belief. This ground therefore fails.

The common design and aiding and abetting issues

Peter Senior

Ground 2 of Addendum to the Supplemental Grounds

> 2. The learned trial judge failed to give any adequate directions on the law of common design/aiding and abetting, and to relate the law to the evidence, in the result, not assisting the jury to see that there was no evidence of a common design/aiding and abetting, and how to approach their task in such an event.

Clayton Bryan

Ground 4 of the Supplemental grounds of appeal

> 4. The learned trial judge failed to give any adequate directions on the law of common design/aiding and abetting, and to relate the law to the evidence, in the result, not assisting the jury to see that there was no evidence of a common design/aiding and abetting and how to approach their task in such an event.

Counsel for the appellants, quite wisely, did not pursue these two grounds of appeal.

The Sentence issue

The single judge in granting leave to appeal had expressed the view that the sentences imposed upon the appellants were excessive. Although the terms of imprisonment of 15 years and 9 years respectively for Senior, and 9 years and 12 years in respect of Bryan may appear to be lengthy, we can find no justifiable basis for interfering with the sentences imposed. The learned trial judge had taken a number of factors into consideration including the respective ages of the appellants and the fact that they had no previous convictions. In our view, the evidence revealed an unwarranted attack upon two innocent victims which resulted in the loss of limb in respect of one and serious injury to the shoulder of the other.

It was for the above reasons that we dismissed their appeals and made the orders referred to at the outset.