JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 64/2007

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag.)

DEMOY SHIRLEY v R

Mr Everton Bird for the appellant
Mr Kenneth Ferguson for the Crown.

18, 20 November 2008 and 2 July 2009

MORRISON, J.A.

Introduction

1. At the conclusion of the hearing of this matter on 20 November 2008, the appeal was allowed, the appellant's conviction and sentence were set aside and a verdict of acquittal entered. These are the promised reasons for our decision (with apologies for the delay).

2. On 20 April 2007, after a trial before Donald McIntosh J in the High Court Division of the Gun Court for the offences of illegal possession of a firearm and shooting with intent, the appellant was convicted on both counts. He was sentenced to 10 years imprisonment at hard labour on each count and it was ordered that the sentences should run concurrently.

The facts

3. The case for the prosecution against the appellant was based primarily on the evidence of two eye-witnesses, both of whom were police officers. A third witness, also a police officer, was the investigating officer.

4. Although the witnesses were not called in this order, the real starting point is to be found in the evidence of Detective Constable Wayne Miller who was on 25 October 2005 doing duty as a school resource officer (in plain clothes) in the Safe School Programme on the North Street campus of Kingston College. At about 8:00 a.m. on that day, he was in the company of the Vice Principal (conducting what he described as "routine checks") when, on the basis of information received, they proceeded to the area of the perimeter wall to the south of the school premises where a group of schoolboys was gathered. While there, Constable Miller heard two explosions and then saw a man come over the south perimeter wall onto the school premises with a pistol in his hand. As a result, Constable Miller immediately activated his two-way radio and called for assistance, after which the gunman went across the back of the school premises to the eastern perimeter wall where he climbed one of two trees in that area. Constable Miller then heard two more explosions from the direction of the trees, whereupon Detective Corporals Reid and Blackwood arrived

on the scene, and spoke to him briefly before proceeding in the direction where the gunman was. Constable Miller, who was behind the other two officers, then heard several shots coming from the same direction and when he looked in that direction he observed that the gunman "was firing at us", whereupon his colleagues returned the fire. He then observed the gunman "running towards the southern perimeter wall while we gave chase...[and] then saw him going over the wall."

5. Constable Miller's evidence was that when he had first seen the gunman coming over the wall he was about 25 metres away from him. According to the Constable, he had a good view of the gunman and was able to determine that he was not wearing a shirt and was dressed in "a dark colour jeans shorts, jeans looking shorts". At the point at which the gunman was seen firing shots at the police officers, he was approximately 50 to 60 metres away and Constable Miller again had a good view of him, because the action was all taking place in "a clear open area". The gunman, he said, had been known to him for about six to seven months before and he had during that period seen him on two occasions, the most recent being some five months before. He was known to Constable Miller only by an alias, which was 'Ageable', and the appellant was identified in court by Constable Miller as this person.

6. Cross-examined, Constable Miller was invited to refresh his memory from his police statement and agreed with the suggestion that he had not said anything in the statement about the appellant climbing, being in or jumping from a tree at any point. He stated that he was right behind his colleagues while the shots were being fired and that he himself was armed that day, though he did not fire his gun. Although he was in a position to observe the other officers clearly, he did not notice either of their firearms being "jammed".

7. On the morning of 25 October 2005, Corporal Rohan Reid, accompanied by Corporal Michael Blackwood, were on mobile patrol proceeding in an easterly direction along North Street, when he overheard a radio transmission from Constable Miller. He accordingly proceeded immediately to the Kingston College compound, where himself and Corporal Blackwood were taken by Constable Miller to the rear of the compound and their attention directed to the eastern end of the playfield where a man was seen approximately 60 or 70 metres away, "on the trunk of a tree which was closest to the perimeter wall of the compound". All three officers then proceeded towards this man, who "immediately jumped from the tree with a firearm in his hand, which he pointed in our direction... and fired two shots in my direction". Corporal Reid, who was at this point about 40 to 50 metres away from him, immediately "got flat" and returned fire in the direction of the gunman,

who was at this time "now running in the direction of the southern end of the playfield". Corporal Reid got up and went in pursuit of the gunman, who was still firing shots in his direction. On reaching the southern end of the playfield, the gunman climbed into (another) tree and, while climbing from the tree onto the perimeter fence, fired another shot in his direction. As he was about to return the fire, he realised that his firearm had "jammed", as had that of Corporal Blackwood as well. The gunman jumped over the perimeter fence and made good his escape, despite a subsequent general search of the area by Corporal Reid and his colleagues.

8. Corporal Reid's estimate of the duration of the entire incident was one and a half minutes, during which time he had a clear view of the gunman's "whole body from his face right down". Even when the gunman was running and firing shots in his direction, Corporal Reid testified, he had a clear view of his face and body and had had an unobstructed view of his face for more than 10 seconds. He recognized the gunman as someone whom he had known for some three years previously and whom he had seen on several occasions (including an occasion in which he had had to transport him to the hospital when he was shot and injured by some men in the area). He too knew the gunman only by the alias 'Ageable' and he also identified the appellant at trial as that person.

9. Cross-examined, Corporal Reid estimated the distance between the two trees as 150 to 170 metres and the height of the southern perimeter wall at about 14 feet. He denied a suggestion put to him by counsel for the defence that he had told the investigating officer that the incident had in fact taken place on the compound of St George's College, prompting an intervention from the trial judge for the purpose of advising counsel that, while Kingston College did have a perimeter fence to the south, St George's College on the other hand, which bordered North Street on the south, had none.

10. Both Constable Miller and Corporal Reid gave evidence of having made a report later on the morning of 25 October 2005 to Detective Sergeant Vinnell Samuels at the Kingston Central Police Station. Sergeant Samuels testified that as a result of having received this report he commenced investigations, with a person, also known to him as 'Ageable', as the object. In October 2006 he received information that led him to the Kingston Central Police Station lock-up, where he saw and spoke to the appellant, cautioned, arrested and charged him for the offences of illegal possession of firearm and shooting with intent, arising out of the incident at Kingston College on 25 October 2005. When Sergeant Samuels was cross-examined, it turned out that during the course of his year-long investigation he had not visited the scene "at the said time", had not searched for or found any shells and had not

collected statements from any member of staff or student of Kingston College. Although he was himself uncertain as to when exactly he collected statements from Constable Miller and Corporal Reid, it was clear from their evidence that statements were not taken from them until some time after the appellant had been apprehended, that is, more than a year after the incident.

11. That was the case for the Crown. The appellant in his defence made a brief unsworn statement from the dock, in which he asserted that on 25 October 2005, he was in the country with his cousins and that he was working at the time. In short, he set up an alibi.

12. On this evidence, as already indicated, the trial judge found the appellant guilty on both counts and imposed the sentences referred to in paragraph 1 above.

The appeal

13. The appellant's application for leave to appeal against his conviction was considered by a single judge of this court on 25 July 2008, when it was granted on the basis that the trial judge had not dealt adequately with the issue of dock identification. When the appeal came on for hearing, the appellant's counsel, Mr Everton Bird, sought and was granted leave to argue five supplemental grounds of appeal which were as follows:

1. The evidence adduced by the prosecution in proof of the allegation that an incident of shooting at Corporals Reid and Blackwood occurred and that the Applicant was the shooter, did not reach the objective standard of proof beyond reasonable doubt and the guilty verdict returned by the learned trial judge sitting as judge and jury was accompanied by a failure to take or to take adequately into consideration the want or absence of evidence on germane issues affecting the prosecution case.

2. The evidence of identity adduced by the prosecution was of a poor or weak quality and inconclusive, which ought properly to have resulted in the defendant being acquitted as there was no other evidence adduced capable of supporting the purported visual identification by Corporal Rohan Reid and Constable Wayne Miller.

3. The learned trial judge misdirected himself on the facts and was wrong in law as the version of the incident which he found to have occurred conflicted with the story told by Corporal Rohan Reid and Constable Wayne Miller, who in their turn gave two different accounts of what they alleged to have occurred despite the fact that from their evidence, they had viewed the alleged incident from the same or substantially the same vantage point or perspective.

4. The time-honoured right of the Applicant to receive a fair trial of the issues before the court was denied and the expectation of a fair trial frustrated by the high degree of bias displayed or exhibited by the learned trial judge in favour of the prosecution witnesses and the evidence adduced by them and his failure to give any or any adequate consideration to the Defence case.

5. The learned trial judge erred on the facts and was wrong in law by advising himself that such

> evidence as was given by Constable Wayne Miller, Cpl. Reid Corporal Vinnell Chambers as to knowledge of the accused prior to the day of the alleged incident having been so adduced placed an evidential burden on the defendant to disapprove or challenge whatever is adduced by the witness.

14. In addition to these grounds, Mr Bird was at the commencement of the appeal given leave to argue a further supplemental ground in the following terms:

> "The learned trial judge erred in arriving at a verdict of guilt based on visual identification, as well as dock identification".

15. In support of the grounds of appeal, Mr Bird very helpfully provided us with skeleton arguments in admirable detail (running into some 21 pages), which he further supplemented by full and careful oral submissions during the hearing of the appeal. On ground 1, Mr Bird pointed out that, although all three police officers who gave evidence testified to having known the appellant before as 'Ageable', there was no evidence of any warrant having been prepared for his arrest. He also complained that on his own admission, the investigating officer had neither visited the scene of the alleged incident, collected any spent shells, nor taken any statements from staff (in particular, the Vice –Principal) or students at the school; neither had any work been done on the scene by scene of crime personnel. Despite the fact that Corporal Reid's evidence was that his hands had been swabbed and his firearm taken and submitted to the

forensic laboratory for examination, there was no evidence of the results of such examination. The fact that statements were not written by/ taken from the witnesses until more than a year after the incident and after the arrest of the appellant had deprived the appellant of the opportunity at trial to cross examine the witnesses on any discrepancies between any description of the gunman given shortly after the incident and the actual appearance of the appellant. In all these circumstances, Mr Bird challenged the adequacy of the evidence adduced by the prosecution to support a finding of guilt to the requisite standard.

16. In ground 2 (and in the further supplemental ground), Mr Bird challenged the quality of the identification evidence, which was indeed the central issue in the case. He pointed to the absence of an identification parade (describing it as "baffling"), submitting that this was a case in which a parade should have been held, particularly given the lapse of time between the incident and the apprehension of the appellant, and the fact that no witness statements were taken until after his arrest. He also submitted that there were "fundamental weaknesses" in the identification evidence, which had not been fully explored and analysed by the trial judge.

17. On ground 3, Mr Bird complained that the trial judge had failed to appreciate and reconcile the differing accounts given by the two police

eye-witnesses, despite their having "viewed the alleged incident from the same or substantially the same vantage point or perspective."

18. On ground 4, Mr Bird submitted that the trial judge had "adroitly sidestepped, ignored or explained away fundamental inconsistencies in the prosecution case" and pointed to a number of instances in which, in his submission, the judge had "arrogated unto himself a measure of omniscience or a higher level of cognizance" in rationalizing various deficiencies in the Crown's case. As a result of all of this, Mr Bird submitted, the appellant had been denied the substance of a fair trial.

19. And finally on ground 5, Mr Bird submitted that the trial judge had attributed an unwarranted significance to the police evidence of having known the appellant before the incident as 'Ageable' and had erred in implying that the appellant was under a duty of some sort to challenge or contradict that evidence. As regards Sergeant Samuels, Mr Bird observed that his alleged prior knowledge of the appellant was of absolutely no moment, given that he had not been a witness to the alleged incident.

20. Mr Kenneth Ferguson, in a conspicuously fair and balanced response on behalf the Crown, accepted that there were material discrepancies between the evidence of Constable Miller and Corporal Reid and that this was a case of identification in difficult circumstances.

He also accepted that this was a proper case for an identification parade to have been held and that, in any event, some comment from the trial judge on the failure to hold a parade was indicated. He conceded that specific weaknesses in the identification evidence had not attracted the judge's consideration in his summing up.

21. We propose to deal firstly with the issue of identification (which arises directly from ground 2 and the further supplemental ground, as well as from, to some extent, grounds 1 and 5) as the prosecution's case rested entirely on the correctness of the identification of him by the two police eye-witnesses as the man who had fired shots at them on the Kingston College compound on the morning of 25 October 2005. There is therefore no question that the case called for a full and careful warning, in accordance with ***R v Turnbull and Others*** [1976] 3 All ER 549, highlighting the special need for caution before convicting in reliance on the correctness of identification evidence, and examining closely the circumstances of the identification, with particular reference to specific weaknesses in the identification evidence. In addition to ***Turnbull*** itself, any number of decisions of the Privy Council and of this court can now be cited in support of this requirement (see, for example, ***Junior Reid et al v R*** (1989) 37 WIR 346).

22. With regard to a judge sitting without a jury, in ***R v Carroll*** (1990) 27 JLR 259, 266, Rowe P described it as "...the settled practice of this Court to examine the summation of the trial judge sitting alone to determine if he has heeded his own warning as to corroboration where that is the relevant issue and as to visual identification as the decided cases show." And in ***R v Alex Simpson, R v McKenzie Powell*** (SCCA Nos. 151/88 & 71/89, judgment delivered 5 February 1992), Downer JA considered the duties of the judge conducting a trial as judge of law and in fact in the High Court Division of the Gun Court and stated the following (at pages 3-4):

> "Merely to utter the warning and yet fail to show that the caution has been applied to the analysis of the evidence, will result in a judgment of guilty being set aside. The best course in delivering the reasons is to state the meaning expressly and apply the caution in assessing the evidence."

23. As to the question of the necessity for an identification parade in cases of disputed identification, in ***Goldson & McGlashan v R*** (2000) 56 WIR 444, 448, Lord Hoffman said the following:

> "Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade. On the other hand, [counsel] accepts that if the accused is well known to the witness, an identification parade is unnecessary and could...be positively misleading".

24. Lord Hoffman went on to provide the following guidance (at pages 449-50):

> "Their Lordships consider that the principle stated by Hobhouse LJ in ***Reg. v. Popat*** [1998] 2 Cr. App. R. 208, 215, that in cases of disputed identification "there ought to be an identification parade where it would serve a useful purpose", is one which ought to be followed. It follows that, at any rate in a capital case such as this, it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness."

25. This guidance was recently applied by this court in ***Tyndale & Fletcher v R*** (SCCA Nos. 13 and 23/06, judgment delivered 24 October 2008) and also referred to with approval by the Board in its recent decision in ***John v The State of Trinidad & Tobago*** (Privy Council Appeal No. 66 of 2007, judgment delivered 16 March 2009, especially at paragraphs 14 - 19).

26. The decision of the Board in ***Pop v R*** (2003) 62 WIR 18 (an appeal from Belize) confirms that the fact that no identification parade was held in a case in which it would have served a useful purpose does not render the evidence of a witness identifying the

defendant for the first time in the dock (a dock identification) inadmissible. However, in such a case, the trial judge must go on to make it plain to the jury that this kind of evidence is undesirable in principle and that the normal and proper practice in such circumstances is to hold an identification parade, given the dangers inherent in a dock identification (due to the absence of the safeguards usually offered by an identification parade and the considerable risk, when a witness is invited to identify the perpetrator in court, that his evidence will be influenced by seeing the accused sitting in the dock, usually under police guard – see ***Holland v HM Advocate*** [2005] UKPC D1 at [47]). The judge should also explain to the jury the potential advantage to the defendant of an inconclusive parade in a case of disputed identification (see generally ***Pop,*** paragraph 9).

27. In ***John***, Lord Brown of Eaton-Under-Heywood described ***Pop*** (at paragraph 20) as a case which involved "...unsatisfactory recognition evidence and dock identification...", it being a case in which the witness who identified the accused as the gunman "only made the link between the man he knew simply as 'R' and the accused because of an improper leading question by prosecuting

counsel - see paragraphs 7 and 10 of the judgment". It was that factor, coupled with the failure to hold an identification parade (in circumstances in which one should have been held under Belize, law) which called for the directions referred to in the foregoing paragraph.

28. In ***Pipersburgh & Robateau v R*** (2008) 72 WIR 108 (another Belize appeal), the Privy Council made it clear that the duty of a trial judge to give proper directions on the special dangers of a dock identification without a prior identification at an identification parade is separate and distinct from the duty to give the now traditional ***Turnbull*** warning on the approach to visual identification evidence in general. As Lord Rodger of Earlsferry emphasised (at paragraph 15), the two issues, though related, "...are different and, where they both arise, the judge must address both of them."

29. Both ***Pop*** and ***Pipersburgh & Robateau*** were also applied by this court in ***Tyndale & Fletcher*** (supra), and referred to with approval by the Privy Council in ***John***.

30. There is no question that Donald McIntosh J fully appreciated that identification was the central issue in the case. Despite making

it plain, virtually from the outset of his directions on identification, that he did not place "any weight at all on the statement made by the accused man from the dock", the judge also stated that it was "...for the prosecution to prove that he was there and he was on the scene...by placing before the court the evidence which is credible evidence which is of a calibre that this court can act upon and evidence which erases any doubts about where he was on the 25th day of October in the year 2005."

31. The judge then went on to warn himself in general (and unexceptionable) ***Turnbull*** terms about the need for caution in approaching evidence of criminal identification. However, it does seem to us that he did not approach the exercise of applying the caution to the actual evidence with the kind of care that was obviously called for in the circumstances.

32. For instance, the judge observed that "One of the features in this case is that the witnesses, whether they be Reid, Miller or Samuels, all say they knew the accused personally before the 25th of October". He was obviously impressed by the fact that this evidence was, as he put it, "unchallenged". While this was indeed

the evidence, it nevertheless appears to us that a more detailed analysis of what the witnesses actually said might have presented a more balanced picture.

33. In the first place, the claim to prior knowledge of the appellant by SergeantSamuels was plainly completely irrelevant for identification purposes, since he was not a witness to the alleged offences. In addition, it is not at all clear from the transcript of his evidence that Sergeant Samuels had said that he knew the suspect both by the alias 'Ageable', "and also the name of Shirley, Demar [sic] Shirley". What Sergeant Samuels actually said, in answer to Crown Counsel's enquiry as to who was the subject of the investigation commenced by him after receiving a report from Constable Miller and Corporal Reid, was "It was a man, the man sitting in the dock, Demar [sic] Shirley otherwise called 'Ageable'".

34. Secondly, the evidence of Constable Miller, it will be recalled, was that he had known the gunman by an alias for "...probably about seven months, six months" and that he had seen him twice before over that period, most recently five months before the incident. In the case of Corporal Reid, his evidence was that he

had known the gunman, again by an alias, for some three years before, that he had seen him on several occasions, including once when he had transported him to the hospital, and that he had last seen him about two months before the incident. In terms of the judge's conclusion that the gunman was known to all the witnesses before, there were obvious differences in the potential value of the evidence of Constable Miller and Corporal Reid (with the former being much closer to the borderline than the latter). These differences, it seems to us, might have attracted some analysis from the judge in order to determine whether it was safe to proceed on the unqualified basis of prior knowledge in all the circumstances.

35. Further, leaving aside for the moment, the differences between the evidence of Constable Miller and Corporal Reid (which are the basis of Mr Bird's ground 3), it is clear that their identification of the gunman could only be described as identification in very difficult circumstances. Both policemen, in their account, were being fired upon by a man who was running away from them. According to Corporal Reid, his immediate reaction (in accordance with his training) when he was fired upon was to "get flat" and return the fire (a maneuver, incidentally, not referred to at

all by Constable Miller, who was supposedly right behind him, in his evidence). He was nevertheless able to make a positive identification, despite the fact that the entire incident lasted for no more than a minute and a half and he actually had sight of the gunman's face for approximately 10 seconds. Added to all of this, was what must have been the absolutely terrifying realisation by Corporal Reid that, in attempting to return the gunman's hostile fire, both his firearm and that of his colleague Corporal Blackwood (who was not called as a witness) had jammed at the same time (a startling coincidence, also not remembered by Constable Miller).

36. All of these matters called for detailed consideration and analysis, which in our view they did not receive from the trial judge, leading us to conclude that, although the judge did give himself a standard ***Turnbull*** warning, it has not been demonstrated that he applied the caution which it enjoins to his assessment of the evidence in this case.

37. Donald McIntosh J does not appear to have addressed his mind at all to the question of whether an identification parade ought to have been held in this case. As already noted, he

accepted the evidence of the three prosecution witnesses that the appellant had been known to them personally before 25 October 2005. We have already commented on this evidence (see paragraph 33 above).

38. But in addition, there were some other unusual (and unsatisfactory) features of this case which we cannot leave out of account. The first is the fact that neither of the two eye-witnesses gave a statement to the police implicating the appellant until after he had been taken into custody a year after the event (and, no warrant having been obtained for his arrest, it is not known in what circumstances). The trial judge's comment on this, with which we entirely agree, was that this was "...slackness on the part of the police officers and they ought to be reprimanded for this type of behaviour." However, we are unable to dismiss it, as he did, on the basis that they made a "report", the content of which remains unknown, to Sergeant Samuels on the morning of the incident. In this regard, the question of what description was given at that time might obviously have been an important area of legitimate enquiry by the defence at the trial.

39. The second unsatisfactory feature of the alleged prior knowledge of the gunman was that the witnesses were all only able to refer to him by the alias 'Ageable' only, thus making it of some importance, in our view, to provide a connection or link in the identification evidence between the man who the witnesses claimed to have seen firing shots at them and the appellant, Demoy Shirley (which was, as has been seen, a relevant factor in the Board's conclusion that an identification parade should have been held in ***Pop***, which was also a case of supposed recognition – see paragraph 27 above).

40. In these circumstances, this was clearly not a case in our view in which it could be said that the identifying witnesses "had provided the police with a complete identification by name or description", neither could it be said to be "incapable of serious dispute," (per Lord Hoffman in ***Goldson & McGlashan***, at pages 448 and 449-50) that the appellant was previously known to the witnesses. In other words, this is a case in which, in our view, an identification parade would plainly have served a useful purpose and ought to have been held. That being so, an additional warning on the dangers of dock identification, in keeping with ***Pop*** and

Pipersburgh & Robateau (see paragraphs 26 – 28 above) was also required in this case.

41. This conclusion suffices to dispose of the appeal and we accordingly do not propose to spend any time on the other grounds, particularly in the light of Mr Ferguson's frank and very proper concession (see paragraph 20 above). But with regard to ground 4, however, we should say that we do not consider that there is any evidence that in his conduct of the trial the judge displayed a "high degree of bias", or indeed bias to any degree, as Mr Bird contended.

42. Nevertheless, we cannot help observing that there can be an obvious threat to the appearance of a fair trial, albeit unwitting, when a trial judge supplies, gratuitously, information (or an opinion) that really ought to come, if it is considered necessary at all, from a witness, whether as to fact or expert. The trial judge's chastisement of counsel in respect of the differences in physical layout between St George's College and Kingston College is one example, while the following extract from his summing up provides another:

> "Defence Attorney did try to raise collateral issues. For instance, she mentioned the fact that

> the police officers said their guns were jammed which she no doubt would like to ascribe to the fact that the accused man was not shot, and it does seem to me that what she does not understand is that you can shoot at a bar door while you are in a bar and still miss the bar door, it happens lots of time, especially when persons are in a firefight. Shooting somebody who is shooting back at you is not as easy as it appears in movies. It is not as easy as when persons are on the range and at the best of times it takes a lot of fire power to shoot somebody who is shooting at you."

43. These are the reasons for the decision of the court which is set out in paragraph 1 of this judgment.