[2016] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 7/2015

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

RICARDO WRIGHT v R

Patrick Peterkin for the appellant

Mrs Karen Seymour-Johnson and Mrs Natiesha Fairclough-Hylton for the Crown

29 September 2015 and 6 May 2016

P WILLIAMS JA (AG)

[1] On 2 May 2014, Ricardo Wright (the appellant) was convicted by Her Honour Mrs Grace Henry McKenzie, sitting in the Corporate Area Resident Magistrates' Court, for the offence of larceny from the person. On 9 July 2014 he was sentenced to a term of four months imprisonment at hard labour. On 29 September 2015 we heard his appeal against both his conviction and sentence.

[2] On 2 October 2015, the court announced that (i) the appeal is dismissed; and (ii) the sentence imposed below is to commence as of 2 October 2015. These are the promised reasons for this decision.

The background to the appeal

[3] The offence for which the appellant was charged and convicted took place on 7 February 2013 at West Street, downtown Kingston. It was at about 1:45 pm when Kerrian Williams and her daughter Darthesha Shephard were exiting a store on to the busy street. They both noticed a man coming from behind them. He came up beside them grabbed a chain from around the neck of Miss Williams and ran off.

[4] The ladies gave chase. Other persons joined in and started calling out "thief" as they ran along Pecheon Street, a police officer on duty saw them when he happened to look in their direction. One lady, said to him "Officer come help mi nuh dah man deh grab mi chain". This lady pointed up the road and when asked by the officer who it was, she pointed out a man running with a yellow and purple bag in his hand dressed in a blue and white stripe shirt and blue jeans pants.

[5] Special Corporal Fabian Williams was the officer and he noted this man running towards Darling Street with a crowd running behind him. Spl Corporal Williams along with Sergeant Neil Davis chased and caught up with this man at the intersection of Beckford and Pecheon Street. On catching up with him, Spl Corporal Williams shouted "police, stop". The man ran on to Beckford Street and Spl Corporal Williams called out to him again. The man stopped and Spl Corporal Williams held on to him.

[6] The man was the appellant. He was placed to lie on the ground and was searched. The bag he had been carrying was also searched. No chain was found. Spl.

Corporal Williams asked him for the chain and the appellant responded "mi nuh know bout nuh chain".

[7] In his defence the appellant elected to give an unsworn statement. He explained that he "sells eyeglass and fix watches on Orange Street". On 7 February he had gone to buy "eyeglasses" but had not got what he wanted. As he returned from the store he had gone to make the purchase, he was running back to his stall. He explained that he normally runs when he is shopping.

[8] As he ran along he heard some people saying "police". He recognized now a need to protect his stall before the police could get to it so he continued running. He heard a policeman shout at him to stop. He complied with the order and was told to lie flat on his belly. He then heard somebody saying "that's him". He was searched and nothing was found.

The Grounds of Appeal and Submissions

[9] When the appeal in this matter came on for hearing, Mr Peterkin, counsel for the appellant sought and was granted permission to firstly, amend the original grounds of appeal by adding a third ground and then to argue the amended ground which he submitted subsumed two of the others.

The grounds are as follows:

> "1. That the evidence led by the [C]rown was not sufficient to warrant a conviction.

2. That the decision of the learned Resident Magistrate was against the weight of the evidence.

3. That the learned [Resident Magistrate] erred in law when she failed to uphold the no case submission made on behalf of the appellant in relation to the inadequacy of the identification evidence.

4. That the sentence is excessive in the circumstances."

[10] The main thrust of Mr Peterkin's submissions was that the quality of the evidence as to the identification of the appellant as the person who had stolen the chain was such that he ought not to have been convicted on it.

[11] He noted that Miss Shephard gave evidence of seeing the robber's face for about two seconds. Miss Williams on the other hand gave evidence that from the time her assailant stopped to the time he grabbed her chain lasted "no time" and she then went on to say she didn't think it took two seconds. Further Miss Williams said from the time she first saw him to the time he grabbed the chain was about 15 seconds. When asked how much time she spent looking at his face she replied, "I didn't spend any time because I didn't consider…" but then went on to say two and a half to three seconds.

[12] Mr Peterkin submitted that the evidence to support the identification was very weak as the time the incident lasted seemed to have been very short with everything happening quickly, to the point where Miss Williams seemed very confused and uncertain in giving an account.

[13] Additionally, Mr Peterkin submitted, both witnesses did not know the appellant before and even though they claimed they did not lose sight of their assailant, there

was no evidence as to the distance that they were away from the person they were chasing and they are not able to account for where they were in the group that was giving chase that the police gave evidence about. Thus, he continued in his submissions that the identification evidence based on the duration of the sighting raised questions as to the opportunity of the eye-witnesses to identify the robber as they both described what would be considered a fleeting glance.

[14] Mr Peterkin submitted that based on information Miss Williams gave in her statement to the police, the question must be asked whether she saw her assailant at all. During the trial Miss Williams had been confronted while being cross-examined with her statement in which there was a section that was inconsistent with the evidence she gave under oath. This inconsistency became an exhibit. In her statement was the following:

> "I felt someone grab on to my gold chain which I was wearing around my neck. I then turned and saw a man wearing a blue striped shirt, short blue jeans and clutching a yellow and purple bag in his left hand, he was also sporting a corn rolled [sic] hairstyle. I then realized my chain was gone from my neck".

[15] At trial she gave evidence that she had seen her assailant from he was coming behind her, then he had passed closest to her daughter and came sideways, looked in her direction, "stopped a little front way" and then grabbed the chain. She maintained that she "saw him full" when he grabbed the chain. When he had "stopped a little front way" she had looked at his face. This was an inconsistency which, in Mr Peterkin's opinion, suggested that Miss Williams ought not to be believed when she said she saw

who grabbed the chain. Further the question then arose as to whether Miss Shephard had an opportunity to see the assailant, given that the ladies had been walking side by side.

[16] Mr Peterkin submitted further that in the situation as described in the exhibited portion of Miss Williams' statement, the chase would not have provided any further evidence to support the poor identification, as from the inception the two witnesses had not known who the robber was.

[17] Mr Peterkin noted that although the appellant was held immediately, when he was searched the gold chain was not found on him and there was no explanation as to how the appellant was able to dispose of the chain. He submitted that the fact that the subject matter was not found on the appellant in the circumstances described, presented a situation where the evidence was insufficient to warrant a conviction as the focus of the Crown witness was a chase of a person dressed in a particular manner, and the opportunity to identify their assailant was limited.

[18] Mr Peterkin's contention that the evidence presented by the prosecution relating to the identification of the assailant was manifestly inadequate and weak to sustain a conviction gives rise to the question whether the evidence on which the conviction had been founded was insufficient and therefore, the submission of the no case should have succeeded. He referred to the oft cited judgments of **R v Turnbull** (1976) 63 Cr App Rep 132 and **Daley v R** [1993] 43 WIR 325 to buttress his submission that despite how honest the learned magistrate thought the witnesses were, the fact that there were

inherent weaknesses in the identification evidence meant that the no case submission should have been upheld.

[19] On the matter of the sentence imposed, which Mr Peterkin submitted was excessive, counsel noted that the antecedents of the appellant are impeccable and he has no previous convictions. A social enquiry report was done which shows that the appellant is not irredeemable and from all the information counsel submitted, the appellant would benefit from a non-custodial sentence.

[20] For the Crown, Mrs Seymour-Johnson submitted that the magistrate demonstrated in her summation a careful review of all the evidence and analysed all the relevant issues of law before coming to the decision in her verdict. She further submitted that the magistrate having found the witness to be credible and reliable and having accepted that the applicant did grab the chain from the neck of Miss Williams and was chased and apprehended within close proximity to the scene of the incident within a short space of time, as well as having found that the witnesses identified the applicant on the scene and at the station and having rejected his account, was entitled to find the appellant guilty of the offence based on the totality of the evidence.

[21] Mrs Seymour-Johnson made reference to aspects of the magistrate's summation and findings which she said demonstrated the fair manner in which the issue of identification was dealt with. She submitted that the magistrate carefully combed through the evidence as to identification of the witnesses and found that the women had observed the face of the appellant for a short time. However she married the fact

that they both made observations of his hairstyle, clothing and bag prior to the chase, that there was nothing that obstructed their view of him with the fact that throughout the chase they never lost sight of the appellant and that they had observed his apprehension and identified him to the police on the scene and at the station, to justify her finding that in the circumstances the identification in this case was one that she could rely upon.

[22] Counsel submitted that the magistrate also clearly demonstrated her understanding of the law and facts and found that in relation to the requirements stated in the **Turnbull** principles, the evidence before her did not come up short of the standard. Mrs Seymour-Johnson further submitted that the magistrate was correct in her finding that there was sufficient evidence to establish the offence as charged in the indictment and that the witnesses for the Crown could not be said to have been so destroyed under cross examination as to render their evidence unsafe and unreliable.

Discussion and Analysis

[23] The crucial issue at the trial was that of visual identification. The issues which are raised by the grounds of appeal and the submissions can be collectively dealt with by considering how the Resident Magistrate dealt with and resolved this crucial issue. The first question to be considered, given the thrust of the complaint by Mr Peterkin, is whether the evidence adduced by the Crown was so manifestly inadequate that the appellant ought not to have been called upon to answer the offence for which he had been charged.

[24] The relevant principles governing the approach to a submission of no case were laid down in the well known and often cited case of **R v Galbraith** [1981] WLR 1039. The principles were revisited by the Privy Council in **Director of Public Prosecutions v Varlack** PCA 23/2007 delivered 1 December 2008. Lord Carswell, delivering the judgment of the court, said at paragraph 21:

> "The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to found in the judgment of Lord Lane CJ in **R v Galbraith** [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the Defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present concerned with the drawing of references."

[25] The principles governing the duty of the trial judge in cases where the prosecution relies on evidence of identification have been laid down in the iconic case of **R v Turnbull** by Lord Widgery CJ. The passage which is most often quoted, which it is unnecessary to repeat here, is found at pages 137 to 138. It culminates with the following pronouncement:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to the correctness of the identification."

[26] As urged by Mr Peterkin in his submissions, the observations of Lord Mustill in **Daley v R** also provides useful guidance, at page 334 he stated:

> "By contrast, in the kind of identification case dealt with by **R v Turnbull** the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as **R v Turnbull** itself emphasized, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence under the **Turnbull** doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

[27] An examination of the evidentiary material which was before the magistrate at the close of the prosecution's case is necessary. There was evidence from the two eye-witnesses that not only did they notice their assailant from before the grabbing of the chain but that they had given chase and not lost sight of him until he was apprehended. The evidence of the police officer is that he had observed the appellant being chased and having been advised as to what the fleeing man had allegedly done, he too gave chase and held the appellant. At the close of the prosecution's case therefore the issue of identification was that the person who grabbed the chain was chased upon having grabbed it, and was held without leaving the sight of the victim.

[28] The possible weakness in this sequence of events was the failure of the recovery of the stolen chain from the thief who had been chased and held in the circumstances described. This issue was addressed by the learned magistrate in her analysis of the

case. The test at this point is whether the evidence furnished by the Crown was such that, if it is found to be credible a reasonable jury could have convicted on it. The learned magistrate, without doubt, had sufficient material for her to have formed the view that a prima facie case had been made out against the appellant. Her decision to reject the submission of no case in the circumstances cannot be faulted.

[29] In her review of the entire case before arriving at the decision, the learned magistrate commenced by a careful analysis of the evidence presented by the prosecution. She concluded that there were two diametrically opposed versions before the court, one from the prosecution and the other from the defence. She properly identified the central issue before the court as one of identification and posited the following:

> "Did the prosecution witnesses correctly identify this accused man as the thief or are they mistaken? The defence is claiming that this was a case of mistaken identity or that in the alternative the prosecution witnesses are lying."

[30] She then went on to demonstrate her appreciation of the approach required in matters such as this where the case against the appellant depends wholly on the correctness of the identification made of him. She gave herself the appropriate warnings and then proceeded to carefully examine the circumstances under which the identification of the appellant was purportedly made, while bearing in mind any weaknesses in the identification evidence.

[31] In her analysis and findings on the evidence she expressed an awareness of the need to be particularly cautious in her approach to the evidence of identification,

recognizing that there is always the possibility of a witness albeit honest, being mistaken in his/her identification of the accused.

[32] She conducted a commendably thorough analysis of the evidence given by the two eye-witnesses. Significantly she recognized the inconsistency between Miss Williams' evidence and her statement in relation to whether she saw the man she says is the accused before he grabbed the chain. She said:

> "I am mindful that in most instances when a witness is giving evidence, more details are usually elicited from the witness that that which in [sic] contained in the witness' statement. I also take note of the witness' adamance that she told the police she saw the man before he grabbed the chain, but that this was not recorded in the statement. It does not necessarily mean that because this bit of evidence is not mentioned in her statement, she is lying. What is significant however is that the witness is saying in her evidence as she said in her statement, that she did see the man she says is the accused when the chain was removed from her neck and before he ran. It is not a situation where she said in the statement that she never saw the man before he took flight. I do not find this inconsistency therefore to be so material, as to destroy the witness' credibility or the reliability of her evidence."

[33] We cannot say that the learned magistrate was incorrect in finding that this inconsistency did not destroy the witness' credibility or the reliability of her evidence given the clear and structured way she resolved the issue.

[34] Another inconsistency which the learned magistrate identified was in relation to the length of time Miss Williams said she observed this man before he ran. The learned

magistrate noted that Miss Williams had spoken of the time being 15 seconds at one point and at another saying about two seconds. She then stated:

> "I do not find inconsistency to be fatal. I believe she did have the opportunity of seeing the man when the chain was taken from her neck and before he ran and that this man is the accused. I find that the witness at the time observed his face, his hairstyle, the clothes he was wearing and the bag he was carrying. I find that her view of him was a quick observation, but that his observation of him was sufficient for her to have kept him in view as he ran. I accept her evidence that as he ran, she never lost sight of him."

[35] It can be seen from the above that the learned magistrate conducted a proper consideration of the evidence. Her findings on this issue cannot be disturbed.

[36] The learned magistrate demonstrated her appreciation of the significance of the evidence that the stolen chain was not recovered from the appellant although he was apprehended shortly after it was taken and in circumstances where he was in the view of his victims from the time of its taking. She said:

> "I must indicate that the possession of the chain at the time of apprehension is not an ingredient of the offence which is required to be proved by the prosecution. No doubt the recovery of the chain would have strengthened the prosecutor's case and provide evidence of recent possession. However, the fact that the chain was not recovered, is not fatal to the prosecutor's case. I find that on the evidence, there was ample opportunity for the accused to have disposed of the chain. There was a chase, I find, which took place for some ten minutes, during which the accused was in full flight, so the situation was fluid and dynamic and this to my mind provided the opportunity for the accused to have disposed of the chain without detection."

[37] The learned magistrate in considering this issue made very clear her thought process in resolving it. It cannot be said that she was plainly wrong in making her findings and arriving at the conclusion that she did.

[38] In our opinion there was ample evidence which the learned magistrate as the tribunal of fact could have accepted the case presented by the Crown that the appellant was in fact the person who had stolen Miss Williams' chain. In the final analysis, we found no merit in the submissions made on behalf of the appellant.

The Issue of good character

[39] Mrs Seymour-Johnson in her submission candidly observed that there was evidence of good character which was elicited and relied upon by the applicant in his unsworn statement. He had said:

> "Your Honour, I am innocent Maam I have never stolen a chain in my entire life. I rather to be hustling or selling rather than to steal chain. I am not a thief your Honour."

[40] Mrs Seymour-Johnson noted that the magistrate had failed to give the directions on good character. However, she submitted that in the circumstances, based on the nature and quality of the evidence, this is an appropriate matter in which to apply the proviso in section 14(1) of the Judicature (Appellate Jurisdiction) Act, there being no miscarriage of justice.

[41] The appellant did seemingly put his character in issue when he stated that he had never stolen a chain in his entire life and that he was not a thief. He therefore may

have been entitled to, at the very least, directions as to his propensity or the likelihood of his having committed the offence for which he was charged.

[42] The learned magistrate in examining his case noted that he had given an unsworn statement and stated that she made no adverse finding against him for that fact. She also expressly reminded herself of the burden and standard of proof. She rejected his unsworn statement and went back to the prosecutor's case to see whether the evidence presented left her in a state where she felt sure of his guilt. The magistrate did not however warn herself in the terms required for a good character direction.

[43] It is clear from the authorities that the absence of a good character direction is not necessarily fatal to the conviction. This court in **Chris Brooks v R** [2012] JMCA Crim 5 considered the consequence of the failure to give a good character direction in an appropriate case. Morrison JA (as he then was) conducted a concise review of the authorities at paragraphs [54] to [56]. He went on at paragraph [57] to posit the following:

> "The test is therefore whether, having regard to the nature of and the issues in the case and taking account the other available evidence, a reasonable jury, properly directed, would inevitably have arrived at verdict of guilty."

[44] The quality and cogency of the evidence presented by the Crown in the instant case was such that the outcome would have been the same had the learned magistrate given herself the proper direction.

Sentence

[45] The learned magistrate set out the very detailed basis for the sentence of four months' imprisonment at hard labour. She took into account his age, his personal circumstances and the information from the social enquiry report and she noted it did not contain anything really adverse to the appellant. She also treated the appellant as having no previous convictions, as the convictions for ganja which were recorded against him were to be viewed as of a different nature from this offence and therefore was not taken into account.

[45] However, she found, and quite properly so, that this was a serious offence, one which involves dishonesty, which type of offence is far too prevalent in our society. She noted that the complainant had suffered a loss as the chain was not recovered. She concluded:

> "I do not agree that a suspended sentence is adequate in the circumstances, as to impose a suspended sentence might send a wrong message to society, given the prevalence of these types of offences. A sentence must be imposed that serves not only to punish the accused, but one which will also act as a deterrent, and serve to rehabilitate him. I have considered all the sentencing options available to me and I am aware that a custodial sentence should be my last resort, but in the circumstances of this case, I think that a short custodial sentence is most appropriate. This should serve to sober the accused so that he never walks this path again."

[46] We found that the learned magistrate took the appropriate approach in taking into account all the relevant circumstances. In the circumstances the sentence of four months' imprisonment at hard labour could not be said to be manifestly excessive.

Conclusion

[47] It is for the foregoing reasons that the court found that there was no basis for interfering with the verdict and sentence of the learned magistrate. Accordingly, as indicated in paragraph [2] above, we dismissed the appeal, affirmed his conviction and sentence, and ordered that his sentence should commence on 2 October 2015.