JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 53 & 66/04

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

PAUL YOUNG
LATTEN DaCOSTA
v
REGINA

Ravil Golding for the applicant Paul Young.

Aon Stewart instructed by Archer, Cummings and Co. for the applicant Latten DaCosta.

Miss Deneve Barnett, on Fiat, for the Crown.

October 21, November 13, and December 11, 2009

DUKHARAN, J.A.

1. The applicants Paul Young and Latten DaCosta were convicted on the 5th January, 2004 and sentenced on the 13th February, 2004 in the High Court Division of the Gun Court in Kingston, for the offences of illegal possession of firearm and shooting with intent. They were each sentenced to 10 years imprisonment for the illegal possession of firearm and 15 years imprisonment for shooting with intent, with the sentences to run concurrently.

2. The applicants were refused leave to appeal by a single judge of this Court who was of the view that the major issue was one of credibility, which was dealt with adequately by the learned trial judge. On October 21, 2009 we heard submissions on behalf of the applicants and reserved our decision until November 13, 2009 when we refused the applications and ordered that the sentences were to run from May 13, 2004. We promised then to put our reasons in writing and this we now do.

The Prosecution's Case

3. The following is an outline of the evidence on which the prosecution relied. The main witness for the prosecution was Deputy Superintendent of Police (D.S.P.) Derrick Knight. He testified that on the 8th June, 2001 at about 1:45 p.m., he was travelling in an un-marked police vehicle during a police operation in the Spanish Town Road area of Kingston. Constables Rohan Blackwood and Selvin Williams were in the vehicle he was driving. Having received certain information he led a party of policemen to the Tavares Gardens Community also known as Payne Avenue. He said he stopped by a big tree in front of Payne Avenue where he saw a group of five (5) men under the tree. He was about one chain away when he recognized both applicants and another man called Gabby whom he knew before, among the group of men. He knows the applicant Paul Young as "Rambo" and Latten DaCosta as "Latize". Constables Blackwood and Williams alighted from the vehicle. D.S.P. Knight said he immediately heard explosions and as he came out of his vehicle he saw both applicants with firearms, which he recognized as .38 revolvers. The applicants pointed the firearms in the direction of Constables Blackwood and Williams as well as the Superintendent who heard another round of

explosions. Both Blackwood and Williams were lying on the ground and he was behind a boulder. He said Blackwood and Williams returned the fire and the men ran and escaped into the Payne Avenue community. D.S.P. Knight said that before the firing started he had observed the men under the tree for about one (1) minute and during the exchange of gunfire about twenty to twenty-five (20-25) seconds. He said he knew the applicant Young for over five (5) years before the incident and would see him regularly. He would see him weekly and monthly. He also knows his mother and sister and that they all live in Tavares Garden. In relation to the applicant DaCosta, he knew him for about three (3) years prior to the incident and would see him frequently, sometimes twice per week and last saw him a month prior to the incident. D.S.P. Knight said he subsequently made a report to Detective Sergeant Carlos Bell at the Hunts Bay Police Station.

4. On the 27th October, 2001, D.S.P. Knight carried out another operation in the Tavares Gardens area. He said on entering the area he saw a group of men chasing two men whom he recognized as the applicants. The men escaped. Having received information, he went into an area called Sand Lane adjoining Payne Avenue. He went into a house and saw the applicant Young sitting on a bed in a room. He was sweating profusely and was dressed only in his underpants. He was taken into custody at the Hunts Bay Police Station where he was pointed out by D.S.P. Knight, to Detective Sergeant Carlos Bell, as one of the persons who had fired shots at him on the 8th June, 2001.

5. Detective Sergeant Bell who received reports from D.S.P. Knight, Constables Blackwood and Williams, said he prepared warrants for the arrest of 'Rambo' and 'Latize' (both applicants). On the 29th October, 2001 he went to the Duhaney Park Police Station where D.S.P. Knight pointed out the applicant Young as one of the persons who had fired shots at him. When arrested and cautioned Young said, "Mr. Bell, mi never fire nuh shot". On the 24th September, 2002 Sergeant Bell went to the St. Catherine District prison where he executed the warrant on the applicant DaCosta. When cautioned, he said, "Mr. Bell, mi never inna di shooting".

The Defence Case

6. Both applicants gave sworn testimony. Latten DaCosta said that on the 8th June, 2001 at about mid-day, he was walking on Waltham Park Road, he stopped and was speaking to Troy Francis when D.S.P. Knight and Constable Blackwood stopped and searched them. Nothing was found on him, but a spliff of ganja was found in Francis' pocket. He denied that he was at Tavares Gardens on the date of the incident and that he was under a tree with other men. He denied firing any shots at the police and that he is not called "Latize". Troy Francis testified on his behalf and said, on the day of the incident DaCosta had come to his home. He said the time when the incident is alleged to have occurred, he was at his gate at upper Waltham Avenue with other persons, including the applicant DaCosta. He said he was smoking a 'spliff' when a police car drove up. He was taken by the police to the Hunts Bay Police Station and then released. He returned home where he saw DaCosta and others.

7. The applicant Paul Young testified that on the 8th June, 2001 he was not in Tavares Gardens. He denied firing shots at the Police. He said he was at his grandmother's house in Gregory Park, St. Catherine, doing plumbing work from 7:00 a.m. until after 5:00 p.m. He also denied that he is called "Rambo".

Grounds of Appeal

8. Mr. Golding for the applicant Young, sought and was granted leave to argue supplemental grounds of appeal. They are as follows:

> (1) The evidence of identification as it relates to the applicant Paul Young was of a fleeting glance nature and in the particular circumstances was unreliable thus rendering the verdict of guilty unsafe; and
>
> (2) The sentence imposed by the learned trial judge was manifestly excessive in all the circumstances, having regard to the applicant's antecedents, mitigating evidence, the period already spent in custody and his age at the time the offence was committed.

9. Mr. Golding submitted in ground 1 that the quality of the identification evidence was poor. It was at most, a fleeting glance opportunity that the witness D.S.P. Knight had of identifying the applicant. The twenty-five seconds the witness said he had of identifying the men during the exchange of gunfire would have been under traumatic circumstances. He also further submitted that D.S.P. Knight, who had to get behind a boulder, could not under those hazardous conditions during a "gun battle" been able to properly identify the men who were shooting at the time. He further submitted that the learned trial judge failed to address this weakness in her analysis of the identification evidence. Counsel was also critical of the one minute period the witness said he had to

observe the men before the firing started, as they were in a semi-circle, which made it difficult for the witness to have made a proper identification. This, he said, was not addressed by the learned trial judge.

10. In ground 2, counsel submitted that the sentence imposed by the learned trial judge was manifestly excessive in all the circumstances. He said the learned trial judge failed to give sufficient regard to the character evidence, as well as the age of the applicant at the time the offence was committed and the number of years he had spent in custody before the matter came to trial.

11. Mr. Stewart for the applicant Latten DaCosta filed no supplemental grounds but relied on the original grounds filed by the applicant. They are as follows:

> (a) Misidentity by the Witness – That the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.
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> (b) Lack of Evidence – That the prosecution failed to provide to the Court any form of substantive or forensic evidence to justify the charges against me.
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> (c) Unfair Trial – That the evidence upon which the learned trial judge relied for the purpose to convict lacked facts and credibility thus rendering the verdict unsafe and unsound in the circumstances.
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> That the learned trial judge did not give credence to my defence testimonies which would have verified my innocence.
>
> (d) Miscarriage of Justice – That the prosecution erred in law in convicting me on charges that I knew was false and cannot be substantiated or justified.

12. Mr. Stewart in adopting the submissions of Mr. Golding also challenged the name of the persons on the warrant prepared by Detective Sergeant Bell. He said an identification parade ought to have been held for the applicant as both D.S.P. Knight and Detective Sergeant Bell knew him by different aliases. He further submitted that D.S.P. Knight gave no evidence of having identified the applicant before trial and this resulted in a dock identification. This, he said, was never addressed or dealt with by the learned trial judge in her summation. D.S.P. Knight said he knew the applicant as "Latty Zee", while Detective Sergeant Bell said he knew him as "Latty Zel".

13. On the issue of sentence, Mr. Stewart also submitted that the sentence was harsh and manifestly excessive, in that the learned trial judge failed to have regard to mitigating factors such as his age and good antecedent report and character evidence given on behalf of the applicant.

14. Miss Barnett for the Crown submitted that there was sufficient evidence on which the learned trial judge came to her findings. There was no dispute that D.S.P. Knight knew both applicants for a number of years before the incident. She further submitted that the identification of the applicants by D.S.P. Knight was not under difficult circumstances. Even if the period of twenty-five seconds during the exchange of gunfire was discounted, there was ample opportunity of seeing the men before and during the firing. The learned trial judge did warn herself when she analysed the evidence as to the time the witnesses were able to make a positive identification.

The Issues

15. The main issues in this case were the correctness of the identification of the applicants and the credibility of the witnesses. It is trite law that whenever the case for the prosecution depends wholly or substantially on the correctness of the identification of an accused which the defence alleges to be mistaken, it is the duty of a trial judge (sitting without a jury) to demonstrate an appreciation of the need for caution. See **R v Turnbull** [1977] Q.B 224; [1976] 2 All ER 549.

16. On the issue of identification, the learned trial judge had this to say at page 254 of the transcript;

> "It is necessary, however, for me to decide whether or not these two accused men who are before the Court had been correctly identified by Deputy Superintendent Knight. The issue of the identification of the persons he said he saw standing with the other men under the tree, on the day of the incident is paramount. The correctness of the identification by recognition of those persons he said he saw with guns are (sic) crucial. I must warn myself of the danger of convicting the accused men on the evidence of identification of D.S.P. Knight in respect of the persons he said he saw at Payne Ave who fired guns ...."

17. It is clear from the above passage that the learned trial judge approached the identification of the applicants with caution as required by law.

18. In an analysis of the identification evidence, the learned trial judge went on to say at page 255 of the transcript;:

> "Both men were standing under the tree with a group of other men in a semi-circle, they were facing Deputy Superintendent Knight, he said he could have seen their

> faces clearly, nothing was blocking his vision, he said he had the men under observation for about a minute. He said they were about a chain away from him.
>
> ... he said when he heard the second set of explosions he saw their faces for about twenty to twenty-five seconds.
>
> ... they were about a chain away."

19. In **Jerome Tucker & Linton Thompson v Regina** SCCA NOS. 77 & 78/95 a decision of this Court delivered on the 26th February, 1996, it was held that a period of eight seconds was sufficient time for observation so that an accurate identification could be later made. This was a recognition case in which the witness had known the applicant for four years.

20. It is quite clear that the length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence. In the instant case D.S.P. Knight knew both applicants before the incident. He knew Young for five years and that he lives in Tavares Garden. He also knew members of his family. In relation to DaCosta, he had known him for three years prior to the incident and had seen him frequently. The applicants have not denied that they know D.S.P. Knight.

21. Mr. Stewart contended that since DaCosta was described by an alias, i.e. "Latize", an identification parade ought to have been held, as the applicant was being pointed out for the first time in Court. In **Carl Brissett v The Queen**, Privy Council Appeal 50/93 delivered on the 29th November, 1994, Lord Griffiths delivering the opinion of their Lordships Board, addressed the question of dock identification thus:

> "it is well established that although a judge has a direction as to whether or not to allow a dock identification he should as an almost invariable rule refuse to allow an accused to be identified by a witness for the first time when he is in the dock: see R v Cartwright (1940 1v Cr. App. R. 219 and R v Fergus (1992) Crim. LR 363. The reason for this is that the very presence of the accused in the dock will suggest to the witness that it is the person who committed the crime."

22. It is clear that in dock identification, a judge has a discretion whether or not to allow it. In the instant case this was never alluded to by the learned trial judge in her summation. However, as stated, the applicant DaCosta was previously known to D.S.P. Knight. We are of the view that no useful purpose would really have been served in the holding of an identification parade.

23. This was a case where the incident occurred in broad daylight. There was nothing that obstructed the view of the identifying witness, D.S.P. Knight. He knew both applicants for some time prior to the incident. Even if one were to discount the time he first observed the men to a few seconds, and while he was under gunfire, to even half of the twenty to twenty-five seconds, we are of the view that there was sufficient time for him to have made a correct identification of the applicants.

24. The learned trial judge assessed the demeanour of the witnesses and addressed the credibility of the witnesses. She rejected the evidence given by the applicants and found the Crown's witness to be truthful.

25. On the question of sentence, both applicants were sentenced to 10 years imprisonment for the illegal possession of firearm and 15 years for shooting with intent with sentences to run concurrently. Counsel for both applicants have complained that the sentences are harsh and manifestly excessive. The learned trial judge had the benefit of the antecedents of the applicants' teachers and coaches who gave evidence on behalf of the applicants. The sentences imposed by the learned trial judge are in keeping with the normal range of sentencing for those offences.

26. Persons who engage the security forces of this country in an exchange of gunfire must expect long sentences of imprisonment when convicted. As the learned trial judge said, it is persons in the age group of the applicants who are involved in gun related incidents and who are terrorizing the society.

27. Accordingly, we refused the applications for leave to appeal and ordered that the sentences are to commence as of 13th May, 2004.