JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 127/2007 & 108/2009

BEFORE: **THE HON. MR JUSTICE HARRISON, J.A.**
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag)

ROHAN BROWN
VALENTINE BOWES **v** **R**

Dr Randolph Williams for the applicant Brown

Leonard Green for the applicant Bowes

Miss Sanchia Burrell for the Crown

7 and 8 June and 30 July 2010

BROOKS, J.A. (Ag)

[1] Messrs Rohan Brown and Valentine Bowes were, on 12 October 2007, convicted in the High Court Division of the Gun Court, being then held in the parish of Clarendon. They were each sentenced to serve five years imprisonment for the offence of illegal possession of firearm (count one), 12 years imprisonment for that of robbery with aggravation (count two) and three years imprisonment in respect of the illegal possession of ammunition (count three). The sentence for the illegal possession of

ammunition was, in each case, ordered to run consecutively to that imposed for the robbery, thus making a total of 15 years for each offender.

[2] A single judge of this court refused their respective applications for leave to appeal against the convictions and sentences, but they have both renewed those applications before us. Counsel for the applicants, both abandoned the original grounds of appeal that were filed and instead argued, with leave, supplemental grounds. Dr Randolph Williams, for the applicant Brown, made submissions on the following grounds:

> "1. The judgment of the learned trial judge on count 3 of the indictment is unreasonable there being no evidence that the applicant had knowledge that the co-defendant was in possession of ammunition.
>
> 2. The failure to put the applicant's good character in evidence denied him of a chance of acquittal.
>
> 3. The sentence is manifestly excessive."

[3] Mr Leonard Green, for the applicant Bowes, argued these grounds:

> "1. The learned trial judge failed to demonstrate in his reasons for judgment that he applied the proper criminal standard of proof in arriving at his verdict as it related to the specific offences in particular the offence of Robbery with aggravation and he failed also to demonstrate that he did not arrive at a verdict of guilt simply on the basis that he did not believe the accused Bowes.
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> 2. Not having determined the issue of guilt on the basis of recent possession the learned trial judge failed to have given himself the requisite warning on the critical matter of visual identification since the prosecution's case against the

accused Bowes depended entirely on what role he was alleged to have played in a robbery."

Before assessing these grounds, it is necessary to outline the evidence which was placed before the learned trial judge.

The Prosecution's Case

[4] The convictions arose from an incident which occurred on 18 May 2007. Sometime that night, Mr Myrie Simpson was sitting in his motor car along the roadway in front of his home located at Turtle Pond district in the parish of Clarendon. He noticed a Toyota Mark II motor car go past him and stop nearby, with its rear facing him. Two men alighted from it and after a short while, approached his vehicle.

[5] One of the men produced a gun and they both pulled him out of his vehicle at gunpoint. He noticed that the male driver of the Mark II was looking back in the direction of the transaction. He saw that man's face. His assailants started to "jook [him] up" with the gun. He was there for a while with the men. He said, "[m]e did deh deh a beg them, because I don't know what they were going to do". They let him go and he ran.

[6] Both men drove off in his car, following the Mark II. Mr Simpson made a report to the police and alerted his friends. Five minutes later, he was travelling with one of his friends, in a car heading in the direction in which the robbers had gone. Exactly one mile away, he saw his vehicle parked along the roadway. He examined it and discovered that his

ignition key and his music equipment, namely, an amp, a pre-amp and a CD player, had been removed from the vehicle and taken away. He had had the equipment installed that very day.

[7] Detective Corporal Leonard Jennings, at about 11:00 o'clock that very night, with the assistance of one of Mr Simpson's friends, "Steppy", mounted a road block at Pennants district in Clarendon. The procedure netted a white Mark II motor car with three men aboard. The applicant, Bowes, was the driver of that vehicle. One of the men (neither of these applicants), had in his possession a 9 mm pistol loaded with 13 rounds of ammunition. On the floor of the Mark II, in front of the front passenger seat was a piece of music equipment, others were on the rear seat. "Steppy" identified the equipment as belonging to Mr Simpson.

[8] Mr Simpson received a telephone call from "Steppy". This was after Mr Simpson had found his car. Following their discussion, Mr Simpson went to Pennants district. Half an hour after having been robbed, he saw the police with his assailants and the car in which they had travelled. His assailants and the driver of their vehicle (whom he said was the applicant Brown), were in a police jeep. He recognized them by their clothing, faces, and in one case, an earring that the man was wearing. He pointed them out to the police as the persons who had robbed him of his motor car. The applicant Bowes, he said, was the man who accompanied the

armed robber that had accosted him, as he sat in his car. Only one of the men spoke in response to the accusations. He was not one of the applicants, but a Mr Taylor, who, at the scene of the robbery, is said to have used the firearm to hit Mr Simpson.

[9] Mr Simpson also saw his music equipment in the robbers' vehicle. The equipment was on the rear seat. He identified the items by the presence of his initials, which he had previously scratched on each piece.

[10] All three men were arrested and charged. Mr Taylor, who proved to be a member of the Island Special Constabulary Force, pleaded guilty to the offences perpetrated against Mr Simpson.

The Defence

[11] In his defence the applicant Bowes, who said that he is a mechanic, gave sworn testimony. He said that he had transported Mr Taylor to a "nine-night" in Clarendon and was transporting him back to Saint Catherine when Mr Taylor asked him to stop. At that time, he said, the applicant Brown was sleeping on the rear seat of the vehicle.

[12] The applicant Bowes said that when he stopped, Mr Taylor alighted and shortly afterward, he saw Mr Taylor drive up beside him in a vehicle which had been parked nearby. Mr Taylor indicated that he intended to take the vehicle to the police station. The applicant Bowes drove off, as

did Mr Taylor. Along the journey, Mr Taylor stopped the other vehicle and alighted from it. He indicated that it had developed mechanical problems. He took some audio equipment from the vehicle and placed it in the applicant Bowes' Mark II. The applicant Bowes then drove off, still with the intention of going to the police station to which Mr Taylor was directing him. The applicant Brown was still sleeping on the back seat, having awoken only briefly when Mr Taylor re-entered the car.

[13] It was on that latter journey that they were intercepted by policemen with drawn guns. The applicant Bowes said that Mr Simpson had pointed to Mr Taylor only, as the person who had robbed him. The applicant Bowes denied knowing that Mr Taylor had had a gun, or that he had robbed Mr Simpson.

[14] For his part, the applicant Brown, in an unsworn statement, said that he knew nothing about the robbery. He said that he was, at all material times, asleep on the rear seat of the Mark II. He awoke briefly when Mr Taylor exited the vehicle and again when Mr Taylor re-entered the vehicle. He was finally awakened when the police stopped the vehicle and took them all to jail. He said he knew nothing about any robbery.

[15] We now address the grounds of appeal.

Mr Brown's application

> ***Ground 1:*** The judgment of the learned trial judge on count 3 of the indictment is unreasonable there being no evidence that the applicant had knowledge that the co-defendant was in possession of ammunition.

[16] Dr Williams submitted that the evidence led by the Crown, at the trial, merely suggested that the applicant Brown looked on while the robbery was in place and thereafter drove away with them. This evidence, learned counsel submitted, could perhaps support convictions for illegal possession of a firearm and for robbery with aggravation but could not impute knowledge in the applicant that ammunition was in the firearm.

[17] Miss Burrell, for the Crown, submitted that, if it is accepted that the applicant knew that Mr Taylor was in possession of a firearm, then it was reasonable to infer that he knew that ammunition was in the firearm.

[18] We accept that Dr Williams' submission has merit. It is an accepted principle of the law concerning possession that where an item is concealed from view, the prosecution has to provide evidence of that "something more" from which knowledge of the existence of the item and an intention to possess it may be reasonably and inescapably inferred (see ***DPP v Brooks*** (1974) 12 J.L.R. 1374). Based on the facts stated

above, that "something more", does not seem to have been present in the case against the applicant Brown, or indeed the applicant Bowes.

[19] It is section 20(5) of the Firearms Act which fixes possession of a firearm in a person who does not have physical custody of that firearm but is, in certain circumstances, in the company of another, who has such custody. The section does not, however, extend that presumption to the possession of ammunition. It is apparent, therefore, that the Crown was unable to prove, or have had presumed, either the physical custody or the requisite intention, necessary for establishing possession of the ammunition, in either of these applicants.

[20] Based on that reasoning, the conviction in respect of count three must be quashed, not only for the applicant Brown but also for the applicant Bowes.

Ground 2: The failure to put the applicant's good character in evidence denied him of a chance of acquittal.

[21] Dr Williams submitted that the applicant Brown was entitled to a good character direction based on the fact that he had no previous convictions. He submitted that the applicant Brown was denied such a direction by virtue of the fact that his counsel below (not Dr Williams), failed to, properly and fairly, put before the learned trial judge, the information about the absence of previous convictions. It was not, on Dr

Williams' submission, judicial error, which resulted in the failure to give the character direction.

[22] Dr Williams submitted that despite the applicant Brown having elected to give an unsworn statement, had his counsel properly discharged counsel's duty to him, he would still have been entitled to a direction that, being a man of good character, he was unlikely to have been involved in such offences. This was a case, submitted Dr Williams, in which that direction would have been important in the applicant Brown's favour, bearing in mind the fact that the applicant Brown was not involved in the attack on Mr Simpson.

[23] A comment on the matter was requested of defence counsel. He submitted an affidavit in response. In it, learned counsel confirmed that he did receive instructions that the applicant had no previous convictions. He also confirmed that he did not put the applicant's good character in issue. His candid explanation was that he "was not aware at that time that it was necessary".

[24] Miss Burrell submitted that, in complaints about the absence of a good character direction, the crucial question to be answered is whether the result would have been different if the character evidence had been led, or the appropriate direction given. Learned counsel submitted that the contest was between the sworn testimony of Mr Simpson and the

unsworn statement of the applicant. In assessing that contest, said counsel, the learned trial judge would have been entitled to, and in fact did, accept the evidence of Mr Simpson. In the face of the strength of the prosecution's case, she submitted, the limited evidence about the absence of any previous convictions would not have changed the result.

[25] The issue of the responsibility of defence counsel at a trial of a person charged with a criminal offence, has, in recent times, been the subject of a number of eminent judgments. Not the least of those is that delivered in ***Michael Reid v R*** SCCA No. 113/2007 (delivered 3 April 2009). The salient principles were set out by Morrison JA, who handed down the judgment of this court. Those principles were succinctly expressed at paragraph 44 of the judgment. As it is relevant to resolving the issue raised by this ground of appeal, we quote from the paragraph.

> "In our view, the following principles may be deduced from the authorities to which we have been referred:
>
> (i) While it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel, can lead to the conclusion that there may have been a miscarriage of justice...
>
> (ii) Such a breach of duty may also include a failure to advise, in an appropriate case, if necessary in strong terms, on whether the accused person should make an unsworn statement from the

dock, give sworn evidence, or say anything at all in his defence...

(iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged...

(iv) On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be of relevance and will ordinarily, in the absence of other factors, be accepted by the court...

(v) **The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed.** The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted..." (Emphasis supplied)

[26] There is no evidence before us of any failure on the part of the defence counsel below, to properly advise the applicant concerning his

election whether or not to give sworn testimony. The only substantive element to the present complaint, therefore, is that the statement, "I have no previous convictions", however framed and/or presented, was not conveyed to the court. In the words of Morrison JA, quoted above, this failure "will not automatically result in an appeal being allowed". In looking at the impact that the error must have had on the trial and verdict, the relevant evidence must be considered.

[27] Dr Williams submitted that "[i]n the absence of the presumption arising from the propensity direction there is nothing to counter-balance the prosecution evidence identifying the applicant as the person who was sitting in the driver's seat of the Mark II motor car". We agree that there may have been nothing to counter-balance the prosecution's strong case on identification. It does not necessarily follow that that situation was improper. On none of the accounts is it suggested that there was any other person in the Mark II but the applicant Bowes, Mr Taylor and the applicant Brown. Mr Simpson identified the applicant Bowes as one of the persons who accosted him. He identified him, in part, by the earring which he was wearing at the time. It was, therefore open to the learned trial judge to find, firstly, that there was a man sitting on the driver's seat at the time of the robbery, secondly, that that man was looking back in the direction of where the robbery was taking place, thirdly, that the Mark II drove off and the two robbers followed in Mr

Simpson's car, and fourthly, that Mr Simpson properly identified the man in the Mark II, to be the applicant Brown.

[28] The applicant Brown's continued presence with the robbers, they having stopped Mr Simpson's vehicle and looted its music equipment, was ample evidence for the learned trial judge to find that this applicant was not an innocent passenger in the Mark II, but a willing, cognizant participant in the events involving Mr Simpson and his car, that night. We agree with Miss Burrell that the evidence was so strong, that, even with the benefit of a good character direction, the verdict would have been the same. This ground must, therefore, fail.

Ground 3: The sentence is manifestly excessive.

[29] Dr Williams submitted that the imposition of consecutive sentences was against the principle that, in the absence of exceptional circumstances, such sentences should not be imposed where the offences are part of a single transaction. Learned counsel also submitted that the sentences imposed on the applicant Brown, were disproportionate to his participation in the offences, as found by the learned trial judge.

[30] Bearing in mind our finding in respect of count 3, the issue of the consecutive sentences is now otiose, in respect of these applicants. It is noted, however, that this court outlined, in the case of ***Regina v Walford***

Ferguson SCCA No. 158/1995 (delivered 26 March 1999), what is the current approach to that issue. That approach is that where the offences committed, are a part of a single transaction, then, as a general practice, all the sentences should run concurrently. The approach has been applied even in appeals where the convictions involve the possession and use of firearms.

[31] On the question of the failure to distinguish between the applicants in imposing sentence, we do not accept that the learned trial judge did not demonstrate that he treated with the applicant Brown according to his circumstances. The learned trial judge articulated that the applicant Brown had had fewer opportunities than his co-offenders. He stated his recognition that the applicant Brown was not involved in the assault on Mr Simpson. He, however, was of the view that the same sentence should be imposed as in the case of the others. In addressing the applicant Brown, he stated his reason at page 203 of the record:

> "The Jamaican people have a right to better than [the type of behaviour meted out to Mr Simpson] the sentence is going to be the same as the persons standing near you because everybody who participates in something like that is equally destructive to the society and let this be a clear message to persons in your state."

[32] Although there is no distinction between the respective sentences, we cannot say that the sentences imposed were manifestly excessive.

They were consistent with the usual sentences for those types of offences. We, therefore, would not disturb the two sentences which remain.

Mr Bowes' application

> ***Ground 1:*** The learned trial judge failed to demonstrate in his reasons for judgment that he applied the proper criminal standard of proof in arriving at his verdict as it related to the specific offences in particular the offence of Robbery with aggravation and he failed also to demonstrate that he did not arrive at a verdict of guilt simply on the basis that he did not believe the accused Bowes.

[33] Mr Green complained that the learned trial judge, in arriving at his verdict of guilt, merely said that he preferred the evidence of Mr Simpson. Learned counsel submitted that the proper approach would have been to reject the defence and then return to the Crown's case to determine whether it met the standard which the prosecution is obliged to achieve.

[34] In support of his submission, Mr Green pointed to page 174 of the transcript of the summation. There, the learned trial judge, after recounting the applicant Bowes' statement that he did not know that Mr Taylor had a firearm, said:

> "I totally reject that. That is not true. I find in fact that he was with Taylor when Taylor used that same firearm and as the witness Simpson said, jook him with it and in fact used it to hit him in the head and relieved him of his motor vehicle with it."

Learned counsel submitted that it was not enough for the learned trial judge to say that he believed Mr Simpson.

[35] We find that Mr Green is not on firm ground. The learned trial judge demonstrated, very early in his summation, that he was aware of the requisite standard of proof, of where the burden of proof lay and of the appropriate approach to assessing the respective cases placed before him. At pages 162-3 of the transcript, he is recorded as saying:

> "...one has to look very carefully at the evidence of the virtual complainant because **in our law, it's the Prosecution's duty to prove it's (sic) case until the Tribunal of Fact is sure and satisfied of the guilt of the accused.** It is a burden that rest (sic) on the Prosecution and it never shifts, it stays right throughout the case with the Prosecution and **even if one disbelieves for whatever reason what the defence puts forward one then proceeds to look at and examine closely the Prosecution's case to say whether they have in fact satisfied the burden that our jurisprudence placed on them...**" (Emphasis supplied)

[36] The learned trial judge was true to the task which he appreciated that he had to perform. He reviewed the evidence of all the witnesses, as well as the unsworn statement of the applicant Brown. At page 178, at the end of reviewing the applicant Bowes' testimony, the learned trial judge said:

> "I totally reject that story. I find that in his cross-examination there were features in his cross-examination – and just to put it at its lowest end, did not assist him. There were areas in his cross-examination, not only in his demeanour but the way he answered the questions, but the answers to those questions; in my view did not assist him in any measure."

At page 180, at the end of reviewing the applicant Brown's statement, the learned trial judge said:

> "In fact, his testimony is to the effect that at the, (sic) when the robbery (sic) going on, when Taylor came out of the car he was asleep. I totally reject that. I accept he was looking back..."

After reminding himself about the dangers of mistaken identifications, the learned trial judge continued, at pages 180-1:

> "Having so cautioned myself and bearing all that in mind, (sic) am convinced I can rely on the evidence of the virtual complainant. I find both accused men guilty on all three counts of this indictment as charged."

[37] The learned trial judge did give reasons for accepting the evidence of Mr Simpson. At page 164, he said about Mr Simpson's testimony:

> "...I had the opportunity of looking at him the way he reacted under cross-examination by experience[d] counsel and I believe him. I believe that it is the two persons first of all that came to him...."

Later, at page 168 of the transcript, the learned trial judge said:

> "...And [Simpson] went to the extent of describing Bowes with an earring. Interestingly, because when one looks at how a case is conducted, especially when you have experience and senior counsel knows it, there was no point of putting anything to this man, that Bowes for example is not a man that had on an earring that day, nothing like that was put."

In our view, these are matters which a tribunal of fact may properly ruminate upon. It cannot be said that the verdict was obviously and

palpably wrong. On the contrary, the prosecution's case was a strong one. There is no merit in this ground of appeal and it must fail.

> ***Ground 2:*** Not having determined the issue of guilt on the basis of recent possession the learned trial judge failed to have given himself the requisite warning on the critical matter of visual identification since the prosecution's case against the accused Bowes depended entirely on what role he was alleged to have played in a robbery.

[38] On this ground Mr Green submitted that the learned trial judge did not demonstrate that he had given cognizance to and applied the doctrine of recent possession. In the absence of that demonstration, counsel submitted, the failure to give a full "Turnbull warning" is fatal to the conviction. He relied for support on the case of ***R v George Cameron*** [1989] 26 J.L.R. 453 at 457 (H-I), in which Wright JA said, in the context of the requisite summation on the issue of identification, that a trial judge:

> "...must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind...."

[39] Despite that correct statement of the law, we do not agree that the learned judge, in the instant case, failed in his duty. He certainly did not maintain "inscrutable silence". It must be borne in mind, that which was before the learned trial judge. Not only did the applicant Bowes accept that he was in the vicinity when Mr Simpson's car was taken but Mr Simpson gave reasons for identifying him as one of the two persons who

had accosted him. The learned trial judge, at page 165 of the transcript outlined the opportunity which Mr Simpson had:

> "...Simpson's testimony was that...there was a street light there and he was separated by some 17 feet from the street light and he described that light to be a (sic) orange light and he could see by it and he says importantly when the men were travelling from the car on foot he (sic) passed him as he sat in his car and he was looking through his windshield at them. One can well imagine this it was late in the night, car stop (sic), it is reasonable you would be viewing carefully as our country is now to see who it is that is passing you and he says he observed them for some 30 seconds in those circumstances....They stood up beside him, and he demonstrated, on either side and he tells us where the street light was..."

At page 167, the learned trial judge noted that Mr Simpson testified that he had seen the faces of his assailants, had described their clothing, had observed that the applicant Bowes wore an earring and that although he did not know them before, he saw them again a half an hour after the robbery. As outlined above, the learned trial judge stated his reasons for believing Mr Simpson. He also, at page 172 of the transcript, addressed the fact that some items of equipment were retrieved.

[40] In addition to those matters, the learned trial judge addressed his mind to the question of the possibility of mistaken identification. The learned trial judge said, at page 180 of the transcript, albeit immediately after dealing with the identification issue concerning Mr Brown:

> "...I find that the light and opportunities as provided were adequate. I caution myself about the (sic), about

> this thing of seeing and persons coming to say that they saw who did what, that the Court has to be very cautious because of horrendous mistakes that have been made, what other persons, honest and quite convincing say, I see and identify persons doing particular things, when in fact it turns out subsequently that no such thing, that, in fact what they are alleging was incorrect...."

The language was not classic "Turnbull", and we recognize that there is no set formulation to be used. In light of the fact that this decision did not turn solely on unsupported identification evidence, if there be any deficiency in the direction, it is not fatal to the conviction.

Conclusion

[41] Based on the above, the applications for leave to appeal against the convictions and sentences are granted. The hearing of the applications is treated as the hearing of the appeals and the appeals in respect of the convictions are allowed to the extent that the convictions, in respect of count three in each case, are quashed, the respective sentences for count three, set aside and verdicts of acquittal substituted. The appeals in respect of the other sentences are dismissed. It is ordered that the sentences in respect of the remaining counts shall run concurrently, in each case and shall be reckoned as having commenced on 12 January 2008.