AMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 25/2008

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

KEFIAN BROWN v. REGINA

Leroy Equiano for the Appellant

Mrs. Caroline Hay & Ms. Dahlia Findlay for the Crown

March 23 and 26, 2009

COOKE, J.A.

1. The appellant was, on the 12th February 2008, convicted on three counts of an indictment which charged him with (i) illegal possession of firearm (ii) shooting with intent and (iii) wounding with intent. He was sentenced to 7 years on each of the first two counts and 9 years imprisonment on the third count. The sentences were to run concurrently. The trial took place in the High Court Division of the Gun Court.

2. The case for the prosecution was essentially grounded on the evidence of the virtual complainant Clive McKnuff. He recounted that at about 8:30 on the

morning of the 1st August 2007, he was standing in his yard in Bull Bay in the parish of St. Andrew. He heard "gunshot fired" after which he saw a man named "Danger" running down the road towards his premises. He described "Danger" as "an occupant" presumably meaning he lived on the same premises as the witness. "Danger" entered his premises. Then a man (the appellant) came into the yard with a shine gun, pointed this gun at him and fired, but 'it didn't ketch me'. This man passed him and said "oonu stab me friend", "pussy oonu stab me friend" to which McKnuff replied "I am a big man you know. I am a big man." The appellant continued the conversation by saying "the war just start because oonu stab me friend." A second man entered McKnuff's premises from the back of his yard. This man fired two shots at this witness, the second shot hitting him in the region of his groin. These two men were joined by a third gunman and the three men "link up" as they "come together coming to a congregation". McKnuff was taken to the Kingston Public Hospital where he was admitted and spent two weeks there. When he left the hospital he did not return immediately to live at his home in Bull Bay

3. McKnuff said he knew the appellant for about one month before the day of the shooting. He used to see him "well almost every day" "on the lane" which apparently is a lane leading from the road to the beach. McKnuff would traverse this lane "three times a day or four times." He would pass the appellant within touching distance. At times the appellant would be seen under an ackee tree with some girls. He also said that he saw the appellant "link up also with the

man who shot me more time." This man the witness named as one Rohan, o/c Killa. When asked if he knew the appellant by name, he replied that the girls around him "call him Scrappy and something like Beans." Immediately thereafter the witness was definitive that the appellant was called Beans (see p. 23 of the transcript). McKnuff said that the appellant sleeps at the house of his nephew's mother. This was 'on the lane' in close proximity to the ackee tree.

4. In respect of the opportunity which availed the witness to recognize the appellant, he said the shooting took place at 8:30 a.m. Thus the question of lighting should not be an issue. According to the witness, the appellant was on the premises for some twenty minutes. During this time there was a conversation between them. During the entire incident he saw the face of the appellant. He observed that the appellant had a tattoo somewhere by his hand in the region of the left elbow. It was the finding of the learned trial judge that the appellant did have a tattoo in that area. When he first saw the appellant on the road, the latter was some 20 ft away. When the appellant pointed the gun and fired at him he was a distance of 20 - 25 ft away.

5. McKnuff was cross-examined by a counsel of many years at the bar. At no time was this witness challenged as to the circumstances pertaining to which he founded his previous knowledge of the appellant – that the appellant was known to him before or that the appellant was on the scene. On page 44 of the transcript, this is recorded as coming from the appellant's counsel to the witness:

> "I am suggesting to you, Mr. McKnuff, that Kefian Brown is the one who said to Rohan that he shouldn't shoot you and kill you because you had nothing to do with the incident. Kefian said this to Rohan."

This suggestion was refuted by the witness. The "incident" mentioned in the suggestion above relates to the alleged stabbing death of one "Scatter" by a nephew of McKnuff. McKnuff did not give a statement to the police until the 16th September 2007. By this time McKnuff's nephew had been arrested for the murder of Scatter. The following suggestion was made to McKnuff at p. 49 of the transcript:

> "I am suggesting to you that you are here to tell lies on Kefian Brown because he was responsible for your nephew being locked up and charged for stabbing Scatter."

Again this suggestion was roundly refuted.

6. It is clear that at the close of the case for the prosecution, the defence did not raise through cross-examination the issue of mistaken identification. The thrust of the cross-examination was twofold. Firstly, that the appellant was present trying to protect the complainant, and secondly that McKnuff was actuated by malice. It is therefore quite impossible to appreciate the first ground of appeal which stated:

> "The Learned Trial Judge erred in law when he ruled that there was a case for the Applicant (sic) to answer because the identification evidence was tainted and should not have been accepted."

Mr. Equiano recognized the difficulty and soon understood that it would have been quixotic to pursue this ground.

7. The appellant gave sworn evidence. He stated that about 8:00 a.m. on the day of the shooting he received a phone call from one of his friends requesting him to follow him to visit the cousins of that friend. He complied and went into the "Scheme" which was across from Beach Road. He said he was not at McKnuff's yard at the time of the shooting. He returned to his community some minutes after 11 a.m. The "Scheme" is a ten minutes walk away from the appellant's community. The appellant said he knew McKnuff but not as someone to talk to as the latter "don't really speak to people." By his evidence, in raising the defence of alibi, he put in issue the correctness of the identification evidence of the complainant. The second ground of appeal was as follows:

> "Having ruled that there was a case to answer in summation the Learned Trial Judge's (sic) failed to demonstrate that she appreciated or recognized the dangers inherent in dock identification and the weaknesses in the identification evidence."

8. The appellant contends that in his case an identification parade should have been held. In **Goldson (Irvion) and McGlashan (Devon) v R** (2000) 56 WIR 444, their Lordship's Board said at p. 449 j – 450:

> "Their Lordships consider that the principle stated by Hobhouse LJ in **R v Popat** at p 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."

In this case, it was accepted that the appellant was known to the witness McKnuff, who outlined the circumstances in which he came to know him. In his evidence the appellant said he knew the complainant and was aware of where he (the complainant) lived. When asked why an identification parade was not held, the investigating officer answered that:

> "the complainant knew the accused before the date of the offence and he has given sufficient information concerning his accusers" (p 119 of the transcript)."

9. It would seem therefore that the holding of an identification parade in this case would not have served any useful purpose. However, it was incumbent on the learned trial judge to subject the evidence of the complainant to scrutiny especially in respect of his credibility. In her comprehensive review of the evidence, the learned trial judge said at p. 200:

> "So the prosecution's case must therefore be revisited to see whether it satisfied the tribunal of fact until it feels sure that this accused has been correctly identified as one of the three men who with firearms in their possession and on a common enterprise invaded Mr. McNuff's premises that morning, when the accused shot

> at him and one of his companions shot and injured Mr. McNuff, and as mentioned at the outset, the court must bear in mind or rather the tribunal of facts must bear in mind that morning. Mr. McNuff has identified Mr. Brown as one of the men known to him as Scrappy and Beans. The accused said that he is not known as Scrappy though he is known as Beans and that Mr. McNuff is at least mistaken or that he has implicated him wrongfully out of spite or malice or ill-will because he was instrumental in the arrest of his nephew for the murder of the accused man's friend, one Scatter. The court must therefore treat with the evidence of identification with special caution even though this is really a case of recognition of a person known before the incident."

At the conclusion of her review, the learned trial judge pronounced that she accepted Mr. Clive McKnuff as a witness of truth and rejected the alibi defence of the accused. The approach of the learned trial judge cannot be faulted in respect of her treatment of the issue of identification.

10. Tyler McKnuff, the then teenaged son of the complainant gave evidence on behalf of the prosecution. He did not identify the appellant in court. The appellant contends that although he called the name "Scrappy" as being involved, the fact that he did not point out the appellant is a serious weakness in the evidence of identification. This is how the learned trial judge dealt with the evidence of Tyler McKnuff at pps. 201 - 203:-

> "Firstly, it is the contention of the defence that the report of the witness, Tyler McNuff, was the first report received by the police and he has come to this court and testified that none

> of the three men he saw that morning is before the court in this trial. That is indeed correct but Tyler McNuff gave a very unconvincing glance around the courtroom before giving that evidence and that must clearly be taken for what it was – an attempt to deceive the court. He was clearly not prepared to look at all the persons in the courtroom and give a truthful answer."

After analyzing the evidence to show that Clive McKnuff was much more familiar with the appellant than his son the learned trial judge expressed her assessment at pps. 202 – 203 as follows:-

> "In my view, Tyler's inability to identify the accused in the dock does not destroy the Prosecution's identification evidence as the complainant's evidence is of sufficient strength and cogency to satisfy the tribunal of fact after bearing the warning in mind that the complainant is not mistaken when he maintains that the accused was involved in the incident that morning and was part of the joint enterprise."

The learned trial judge cannot be faulted for her treatment of this aspect of the evidence.

11. There is the complaint that the only name given to the investigating officer was "Scrappy" and that the mention of the name "Beans" was first mentioned only in court. This is inaccurate as on page 92 of the transcript the investigating officer said: –

> "names he gave me were Scrappy o/c Beads (sic). Rohan Clarke o/c Killa and o/c Dan, Dan"

In any event the name of the appellant in this case does not take on its usual significance as the identification evidence is not centered on a name but rather on the knowledge of the complainant as the person whom he was accustomed to seeing 'on the lane' and who sleeps in the house of the mother of his nephew.

12. It is only left to be said that the appeal is dismissed and the sentences are affirmed. The sentences will commence on the 12th February 2008.