NMU

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 216/06

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

DONALD FORBES
V.
REGINA

Mr. Leonard Green, instructed by Chen, Green & Co. for the Applicant.

Miss Paula Llewellyn, Senior Deputy Director of Public Prosecutions and Mr. Pearnel Charles Jr., Crown Counsel (Ag.) for the Crown.

February 20, 2008

(Oral Judgment)

COOKE, J.A.

1. The applicant was on the 7th December, 2006 convicted in the Western Regional Gun Court on indictment containing two counts for (a) Illegal Possession of Firearm and (b) Wounding with Intent. He was sentenced to five years and ten years imprisonment respectively; sentences to run concurrently. A single judge after due scrutiny of the transcript of the proceedings denied an application for leave to appeal. On the 20th February, 2008 the application for leave to appeal was renewed before us. It was again refused. We ordered that

the sentences should commence on the 7th March, 2007. We promised to put our reasons in writing, which we now do.

2. We will now set out a synopsis of the case presented by the prosecution.

(i) The virtual complainant Peter Thompston was on the 30th August, 2006 in his yard at 19 Crook Street, Savannah-la-Mar, Westmoreland. It was about 11 a.m. and he was cutting his yard and taking up the rubbish. While thus engaged he heard an explosion sounding like a gunshot. Coincident with the explosion Thompston felt a burning sensation on his left leg. He saw a hole where he felt the sensation – from which blood came. He looked up, for he was in a bending position while he performed his chores. He saw "Choppy with a gun trying to select a next one" by which the complainant explained to mean getting another round of ammunition in place. Thompston ran around his house and he heard another explosion. He further heard the applicant say "P..., I going kill off the whole Foster family". Thompston is related to the Foster family. It was his evidence that as between the applicant and the Foster family "them don't have a good relationship".

(ii) "Choppy" is the nickname of the applicant Thompston. He knew him for some twenty-six (26) years and would see him on a daily basis. The applicant lived some four houses away on Crook Street. They had worked together fixing "drain channel" on the roadside. Further they "Roast fish together and eat and drink together".

(iii) After the explosion Thompston looked up. The applicant was about ten to twelve feet away from him. Thompston said:

> "I see him whole face. First I see him eyes first; him nose and him mouth and I know him very good."

At the time of the shooting it was Thompston's evidence that the applicant had on a white mesh "marina" and a blue and white cap. Thompston's estimate of the time during which he saw the applicant was thirty seconds. He further said that the applicant rode away on a bicycle.

(iv) At about 11:30 a.m. that same day Cpl. Kirk Foster, while on mobile patrol in Savannah-la-Mar was contacted by telephone which prompted him to direct his course to 12th Street in that town. The applicant was seen riding a

bicycle. He was picked up by the police. The applicant was informed that he was wanted for questioning in respect of "a shooting that had occurred earlier that morning". It was Foster's evidence that at the time the applicant was reduced into custody, he (the applicant) had on "a white mesh T-shirt" and was wearing "a white and blue cap".

(v) On that same day Det. Cpl. Cleveland Fray swabbed the hands of the applicant and took the swabs to the Forensic Laboratory. Miss Monica Dunbar, a Government analyst subjected those swabs to examination and analysis. It was her opinion that in respect of the swabs pertaining to the back of the applicant's right hand there "revealed the presence of gunshot residue at elevated level".

3. The applicant abandoned the original grounds of appeal and he was granted permission to argue supplemental grounds. Ground (1) upon which Mr. Green expended most of his energy was couched as follows:

> "1. The learned trial judge's statement in his summation and reasons for judgment that,
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> > "having given (himself) myself the warning as laid down in Turnbull case about identification I find that thirty seconds is sufficient observation that an accurate identification could be made of this accused man." See p. 164.

> the judge failed to illustrate or in any way demonstrate, that he had complied with the legal requirement to warn himself of the dangers associated with visual identification evidence. In as much as the learned trial judge is presumed to know the law in the Turnbull case there is nothing to suggest that he was applying it properly and in failing to so properly demonstrate his knowledge of the principle he deprives [sic] the Applicant of a fair trial."

4. We do not agree with this criticism. At page 136 of the transcript, the learned trial judge said thus:

> "I must be especially careful in assessing evidence of identification. The Turnbull judgement has lead (sic) to the adoption of substantially more critical evaluation of the testimony of witnesses who purport to identify a suspect as the perpetrator of offences and the acceptance by trial judges of the need for abundant care in dealing with that testimony. It is a fact that honest witnesses could make mistakes."

Then at pages 162-4 of the transcript the learned trial judge demonstrated his approach by reviewing the evidence with appropriate judicial scrutiny. He introduced this aspect of his summation with the words:

> "Now let us analyse the evidence now that I have gone through all of it."

He then proceeded to critically examine:

(a) The Forensic evidence.

(b) The circumstances of the identification at the time of the shooting.

(c) The evidence that the applicant was well known to the complainant.

(d) He took into consideration the evidence of the "clothing" at the time of the shooting which was "corroborated" by the accused man in his sworn evidence.

(e) He dealt with the evidence pertaining to the applicant riding a bicycle on that day.

(f) In a particular passage which bears repetition the learned trial judge said:

> "He gave evidence of how long he knew this person. Eat, drink, work, sees this person often. So he is saying when I saw this person I recognized him to be Mr. Forbes, o/c 'Choppy'. It begs the question, is it by accident, which I don't think so, that elevated level of gunshot residue which was taken within the hour, same day, from the accused man, was found on the back part back of the hand of the accused man? It's not by accident. Within an hour this was what was located. We are not talking trace level, elevated level and as I said before, the swabbing and the chain of custody of the swabbing and the test is in order."

We are therefore of the view that this ground fails.

5. Ground 2 was expressed as follows:

> "2. The learned trial judge wrongly accepted thirty (30) seconds as that period of time that the witness had to observe his assailant was when the witness demonstrated a much shorter time when tested under cross examination in court on his knowledge of what time he understood to be (sic) thirty seconds to be."

This ground can be regarded as an amplification of ground 1. When Thompston was being cross-examined, Mr. Green who also represented the applicant in the court below, used his watch to get from the witness what was his estimate of 30 seconds. It turned out on the evidence that on the timing of the watch,

Thompston stopped the watch after fifteen seconds. It must be recognised that witnesses of fact do not carry around stop watches with which to precisely record how much time elapsed during the unfolding of the event(s) to which they speak. It is for the trial judge or a jury to determine by an assessment of all the circumstances, whether or not the identifying witness can be regarded as reliable when there is deliberation as to the adequacy of time to make a correct identification. In this particular case, the learned trial judge having reviewed the evidence of Thompston as to what was taking place during the time of the shooting, including the activity of the applicant's effort to reload, accepted that it was some thirty seconds. The timing of the witness in court is, in our view, quite artificial and of scant probative value. What if Thompston had stopped Mr. Green's watch after three minutes had elapsed?

6. Ground 3 was in these terms:

> "3. The learned trial judge wrongly concluded that the evidence given by the Applicant that he was riding a bicycle in Savanna-la-Mar, around the time of the shooting, corroborates the complainant's case in circumstances where there is no evidence that there is anything peculiar about someone riding a bicycle in that town."

This ground is misconceived. All the learned trial judge was adverting to was that after the shooting the applicant had ridden away on a bicycle and the applicant himself in his sworn evidence said that he was riding a bicycle that morning.

7. The 4th ground of appeal sought to challenge the learned trial judge's treatment of the alibi defence raised by the applicant who at the trial called three witnesses in support. This ground, although not abandoned was rightly not pursued as it was without merit.

8. It is for the foregoing reasons that we refused the renewed application for leave to appeal and ordered that the sentences should commence as of the 7th March, 2007.