

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 155/2008

**BEFORE: THE HON. MRS JUSTICE HARRIS, J.A.
 THE HON. MISS JUSTICE PHILLIPS, J.A.
 THE HON. MRS JUSTICE M^CINTOSH, J.A.(Ag)**

WILLIAM FRANCIS v REGINA

**Dr Randolph Williams for the Appellant
Mrs Karen Seymour-Johnson for the Crown**

3 May and 9 July 2010.

M^CINTOSH, J.A. (Ag)

[1] On 27 November 2008, in the High Court Division of the Gun Court, held in May Pen, in the parish of Clarendon, the appellant, William Francis, was convicted on an indictment which charged him with one count of illegal possession of a firearm and two counts of robbery with aggravation. That same day, he was sentenced to serve a term of seven years imprisonment at hard labour for the illegal possession of firearm and

fifteen years imprisonment at hard labour on each count of robbery with aggravation. All sentences were ordered to be served concurrently.

[2] He applied for leave to appeal his conviction and sentence and, on 24 August 2009, his application was granted by a single judge of this court.

THE TRIAL

[3] To set the arguments in the appeal in their proper context we begin with a summary of the evidence at the trial.

[4] Reliance was placed on the evidence of three witnesses as to fact but only one was able to give a full account of the incident which was alleged to have taken place on 29 August 2008, in a district known as Good Hope, in Kellits, Clarendon, at the residence of Margaret Mills-Pinnock ("Mrs Mills-Pinnock") and her family, including her son, Adolphus Pinnock ("Adolphus").

[5] The first witness called by the prosecution was Calvin Francis (no known relation to the appellant). He was the witness who provided the full account and could therefore be described as the main witness. However, we will first look at the incident from the perspective of the two complainants, Mrs Mills-Pinnock and her son, Adolphus before turning to the evidence of Calvin Francis ("Calvin").

[6] Their ordeal began at about 1:30 pm that day when, according to Mrs. Mills-Pinnock, two men armed with guns entered the room where she was and demanded money. She described them as one tall and one short and testified that the tall one was the one giving instructions to the short one on what he should do.

[7] She responded to their demand by giving them a bag containing forty thousand dollars (\$40,000.00) in cash and they also relieved her of a cellular telephone. She was then tied up and taped up by the short man on the instructions of the tall man and they moved towards another room where Adolphus was. She could not see them then but she could hear sounds coming from that room.

[8] Mrs Mills-Pinnock was unable to identify the men because their faces were "tied up" exposing only their eyes. She could not recall if they had on hooded shirts with the hood pulled up over their heads but they had something on their heads.

[9] Adolphus' evidence was that he was asleep in his bed when he was awakened by the presence of two men in the room. He too spoke of one man being short and the other tall and said they both had coverings over their mouths and heads, exposing only their eyes. They demanded money from him and he told them that he had none. They then took the laptop computer, the camcorder and five cellular telephones which were

in the room. After packing up the items in a bag, which was also taken from the room, the tall one taped and tied up his hands, his feet and his mouth and they left the room. He said they looked about the house and at one point he said the short one stood by the exit door looking out and then they left the house.

[10] He was able to free himself and free his mother who then telephoned the police on the one cellular phone which had been in another part of the house and so had escaped the notice of the men. Adolphus also telephoned his brother Carl Lee who rushed to the house and both brothers left, on foot, in search of the two robbers.

[11] Mr Lee testified, as did Adolphus, that they had questioned persons in the course of their search, had received information and eventually saw two men, one tall and one short, by some bushes. Adolphus noticed that the short man had the bag in which the stolen articles were packed and taken from the house. They recognized this short man as a person who was known to them as "Sound Howard". Adolphus had known him from school days. He would see him regularly and they would often take the same taxi.

[12] They had also called out the name "Willie" and the other man had responded by extending his open arms in a kind of gesture of acknowledgment but when they moved towards the men they ran. They

further testified that they went to a house in the neighbouring district of Fort George in the parish of Saint Ann where they spoke to persons there then returned to their home in Good Hope.

[13] Later, they received a telephone call and returned to the house in Fort George where the bag was returned to them with the laptop, the camcorder and four of the six cellular telephones which the robbers had taken from their home. Then, the following day, 30 August 2008, they were at home, at about 4:30 pm, when they received another of the stolen cellular telephones and a SIM card belonging to Adolphus, from a man known to them as "Daddy Roy".

[14] The investigating officer, Detective Corporal Leroy Taylor received the report of the robbery on 29 August 2008 and the following day, recorded statements from the complainants. Then, on 31 August 2008, he went to the home of "Sound Howard" but did not see him. He also went to the home of "Willie" but he too was not seen. He got information from Crime Stop on 2 September 2008 and, two days later, on 4 September 2008, he went to the lockup in May Pen where he saw the appellant and another man who was identified to him as Calvin Francis. The appellant told him that he was also called "Willie" and that his parents and his brothers lived in Fort George.

[15] The officer said he told both men that he was investigating the robbery at Good Hope and that he would be placing them on an identification parade. It was then that Calvin asked to speak to him alone and, following up on what he was told, Detective Corporal Taylor made arrangements for a confession statement to be recorded from him. This was done. Thereafter, he charged Calvin with the offences of illegal possession of a firearm and robbery with aggravation to which he pleaded guilty on his appearance before the court and was sentenced.

[16] He also charged the appellant, William Francis, with the offences for which he now stood trial. Detective Corporal Taylor further testified that on 8 October 2008, he collected a witness statement from Calvin, in the presence of his attorney-at-law and confirmed in cross examination that an identification parade had been held on which the appellant was the suspect though, understandably, none was held in relation to Calvin.

[17] We turn now to the evidence of the prosecution's main witness. Calvin testified that on the day in question he was at home when at about 10:00 a.m. he responded to a request from a friend named Shabba which caused him to leave his home intending to accompany his friend to a stated destination. As he walked along he saw the appellant whom he referred to as "Willie" and whom he had known before for about one year, during which time he would see him coming and going in the district

where he lived. The appellants' parents also lived in the district. He had walked ahead and noticed that his friend had stopped to talk to the appellant. Then his friend told him to walk along with the appellant as he was going elsewhere and would soon meet up with them.

[18] Rain came down and the appellant suggested that they shelter in a building nearby. He noticed that the top section of the building which was at road level was unfinished. The rest of the building was below road level. When they went into the building he saw that the appellant had a bag at his side from which he pulled a firearm, pointed it at him and said, "Shabba said \$500,000.00 downstairs. Ah it mi carry yu fi use yu fi go fah". Calvin said the appellant then removed another firearm from the bag and gave it to him. The appellant had "tied up" his own face and gave Calvin a piece of white cloth to "tie up" his face telling him that he would kill him if he did not do as he was told. Calvin said he told the appellant that before he allowed that to happen he would kill him first and attempted to pull the trigger of the gun he was given but concluded that it was an imitation firearm because it did not respond.

[19] He further testified that the appellant told him to walk before him to the downstairs section of the house and instructed him to tell anyone he encountered not to move. Accordingly, when he saw a lady downstairs he told her not to move. The appellant then said to the lady, "Give me

the money," and pushed him aside. The lady threw a plastic bag to the appellant and he placed it in his bag then told Calvin to tape her up, supplying him with the tape. He had not done a good job of the taping and the lady was able to pull the tape, so the appellant put down his gun on top of a barrel, held her and taped her up himself.

[20] After retrieving his firearm from the top of the barrel, they left that room and the appellant called his attention to another room in which he said there was a boy asleep on a bed. They entered the room and the appellant "boxed" the boy, waking him up. He demanded money from the boy and when told that there was none, he ordered Calvin to take up a laptop computer and about five cellular telephones that were in the room. He said he took up the items because "ah order mi a work by so mi have fi do weh him say" and he put the items including a camera in a bag which he believed belonged to the boy who appeared to him to be a schoolboy.

[21] He gave the bag to the appellant who then told him to tie up the boy but he declined, telling the appellant to do it himself. At this point the appellant put the gun which he was holding, on the bed and proceeded to tie up the boy. While he was so engaged, Calvin said he left the room but the appellant came after him and asked, "Weh yu a go", pointing the gun at him. Calvin then returned to the room, because, as he said, the

appellant had a gun and "memba say when dat deh shot ketch you a dead you a go dead". The appellant finished tying up the boy and, as they left the room, Calvin said he noticed another lady in a room sleeping. The appellant was going to wake her but he said, "Oh God my youth leave the people dem and come". The appellant persisted and when he went into the room Calvin said he escaped by running up the steps and out of the house but as he ran he saw that the appellant was coming behind him.

[22] He said he was on his way home when he saw and spoke to Shabba. He had also spoken to the appellant, telling him that he was going "to talk" whereupon the appellant told him that if he talked he would kill him. Notwithstanding what the appellant told him, Calvin said that when he reached home he called Crime Stop and spoke to someone, then packed a bag and went first to Spanish Town then to Portmore. He later explained that he called Crime Stop because he did not want to be a wanted man. He saw the appellant again on 1 September 2008, downtown Kingston. They were on opposite sides of the road and he called the appellant on his cellular phone, telling him that he was on his way to him.

[23] A police officer arrived and they had a discussion after which he Calvin, went across the street to the appellant. They talked and when the

appellant spoke of leaving he suggested that they have a drink. This they did right at the roadside and as they drank other police officers arrived. The appellant was held and they were both taken to the police station.

[24] In cross-examination Calvin agreed that he had told the prosecuting attorney that when they entered the room and the demand was made of the lady for money, the appellant had taken back the gun he had given him and never returned it. So he was asked about his statement to the police where he had said that he told Willie "to leave the lady and come" and had run outside with Willie running behind him and that it was when he stopped running that Willie had taken the piece of cloth and the gun from him. However, he did not recall telling that to the police even after his statement was shown to him. He agreed that he had robbed the occupants of the house but said he had been forced to do so and, on pleading guilty to the resulting charges, he was sentenced to pay a fine for which he had gotten time to pay.

[25] He said he told the police that the appellant had threatened to kill him if he talked and if it was not in the statement which the police recorded it must be that they did not write it down. It was not read back to him. When asked about things said at the trial that were not in his statement to the police, Calvin said "the police tell me say must break down the conversation shorter". He told the police officer what he told

the court but the police officer did not write it down. He was not wearing a jacket with a hood which was pulled over his head. He did tell the police about Shabba and the \$500,000.00 and about the appellant telling him that he had no choice after pointing the gun at him but it must not have been written down.

[26] Calvin agreed that when he went into the room and saw the lady, it was he who told her to hand over the money and she had said that she had no money. Where he accepted that matters put to him were not included in his statement, he explained that this was because of the indications he received from the police officer recording the statement that he need not tell everything. It must be noted here however, that in cross examination Detective Corporal Taylor was asked about this assertion and he denied that he had ever told Calvin to leave out areas of the statement. Nor did he fail to write any of what was related to him.

[27] At the close of the prosecution's case, counsel for the defence submitted that the appellant ought not to be called upon to answer the charges, pointing to the several omissions from the statement to the police and discrepancies and inconsistencies on the evidence adduced by the prosecution but this did not find favour with the learned trial judge who ruled that there was a case to answer and indeed there is no complaint about this ruling. The appellant thereafter elected to give an

unsworn statement in which he told the court that Calvin was lying on him. He was not there "when dem things go on ... when dem go on wid dem robbery".

[28] The defence then called Michael Graham, the Sergeant of police who had conducted the identification parade on which Carl Lee was the witness. It was revealed that not only had Mr Lee failed to identify the appellant who was the suspect on the parade but he had mistakenly pointed out one of the volunteers.

That was the case for the defence.

THE GROUNDS OF APPEAL

[29] Two grounds of appeal were filed with the appellant's application. However, at the commencement of the hearing of his appeal, his attorney-at-law, Dr Randolph Williams, sought and was granted leave to argue three supplemental grounds in lieu thereof. In the end, the third ground was not pursued and only supplemental grounds one and two were argued. We turn now to those two supplemental grounds.

GROUND ONE

"The learned trial judge omitted to warn himself of the special need for caution and the reasons for such caution before convicting on uncorroborated evidence of visual identification."

[30] Dr Williams submitted that as the main witness was an accomplice and, the appellant, in his unsworn statement, had denied that he was present, it was necessary for the learned trial judge to have addressed the issue of identification and give himself a **Turnbull** warning but he omitted to do so and, in fact, did not address the issue in his summation at all. Dr Williams pointed out that the learned trial judge spoke only of examining the evidence of the accomplice carefully "based on the warnings and the caution" and in the clear absence of an identification warning, the conviction is unsafe and ought not to be allowed to stand.. He further submitted that in these circumstances an order for retrial would not be appropriate.

[31] We do not agree that an issue in this case was the correctness of the appellant's identification as one of the robbers who invaded the home of Mrs. Mills-Pinnock and her family and robbed them of their valuables. Calvin spoke of his prior knowledge of the appellant and that was never challenged. At no time did the defence indicate that they were not known to each other or that they were not known to each other sufficiently for Calvin to be able to say that he was in his company on 29 August 2008, at the material time.

[32] Calvin referred to him as Willie and there was his unchallenged evidence that he even had the appellant's telephone number as he had

telephoned him on 1 September 2008, just before the appellant was apprehended by the police. Dr Williams' submission that there was no evidence as to how the appellant was taken into custody was incorrect. There was evidence from Calvin that he met with the appellant that day and that they were even having beers together when the police came on the scene. According to his unchallenged evidence, Calvin had played no small part in the apprehension of the appellant at which time he also was taken into custody.

[33] It is clear to us that, in the circumstances of the instant case, the issue was one of credibility and not identification. The learned trial judge as tribunal of fact had to determine whether or not he believed Calvin when he testified that the appellant was the other participant in the robbery. He was therefore not required to address his mind to the **Turnbull** guidelines and we accordingly find this ground of appeal to be entirely without merit. Ground one therefore fails.

GROUND TWO

"The evidence of the witness/accomplice implicating the appellant conflicts with the evidence of the other prosecution witnesses and is inconsistent with his statement to the police. The learned trial judge in his reasons for judgment did not indicate how he reconciled those discrepancies and inconsistencies."

[34] It is the contention of Dr Williams that the conflicts between Calvin's evidence and that of the other prosecution witnesses concern matters of substance and the learned trial judge ought not only to have resolved them but to indicate in his summation how he had done so. This he had failed to do, saying only that he found Calvin to be a truthful witness.

[35] He further argued that the explanation given by Calvin for the material omissions from his statement to the police, having been contradicted by Detective Corporal Taylor, it was incumbent upon the learned trial judge to show how this was resolved.

[36] Dr Williams also regarded as material what he referred to as an omission from Calvin's evidence in that there was no mention by him of the encounter by the bushes which was related by Adolphus and his brother, Carl Lee. It was also significant that Carl Lee had failed to point out the appellant on the identification parade as the tall man seen in the bushes with Calvin whom they knew before.

[37] In our view, the judge's summation ought not to be fragmented but must be looked at as a whole in order to fully appreciate how he dealt with the issues. Although he did not employ any formula or use any particular words to demonstrate how he treated with the discrepancies, inconsistencies and omissions identified in the evidence of the

prosecution's main witness, it is clear from his review of the evidence, that he did assess them.

[38] He pointed out certain material discrepancies including, he said, "the question as to whether or not Mr. William Francis took the gun from him [Calvin], after he went into the first room", which is something that is not supported by the evidence of the other witnesses and then went on to say, (at pages 183-184):

"And I remind myself of the fact that Mr. Calvin Francis, being an accomplice, this is a situation in which the court has to be very cautious because of the danger of convicting someone largely on the uncorroborated evidence of an accomplice and in this case, in my view, there was no corroboration, that Mr. William Francis was the person who was involved with Mr. Calvin Francis in this case."

[39] The learned trial judge clearly had in mind the discrepancies and inconsistencies as well as the omissions and was assessing them in the context of the evidence of an accomplice which required very cautious treatment and, at page 187 of his summation, he spoke of examining Calvin's evidence carefully "based on the warnings and the caution". He was plainly referring to the warning and the caution that he had just given himself in relation to the evidence of an accomplice.

[40] In that same context he continued:

"I was aware of the fact that accomplices will exaggerate, leave out things. I also was

cognizant of the fact, that Mr. Calvin Francis kept on saying that some of the things he left out because the police told him not to put in everything, something the police denies. After observing Calvin Francis he was quite loquacious and I could understand in terms of his evidence, it could have been very difficult to have him go in an ordered way, however, I can't speculate in relation to this but I observe the witness and I found him to be a witness of truth."

[41] In other words, what the learned trial judge was clearly saying was that Calvin was an accomplice. Accomplices are given to exaggerations and omissions. There were these discrepancies and inconsistencies in the prosecution's evidence as between this accomplice and the other witnesses but at the end of the day, after observing him carefully and after careful consideration of his evidence, bearing in mind the warning of the dangers of acting on the uncorroborated evidence of an accomplice and the caution regarding accomplice evidence, he was satisfied to the required standard that he could rely on Calvin's evidence.

[42] Further, the learned trial judge's finding that Calvin was a truthful witness must also have been influenced by his earlier observation that "there was no indication that anything had been promised to him based on the fact that he gave evidence at all" and "importantly,... from a very early stage he made a report indicating that he was involved in this situation" (see page 184).

[43] He also had for his consideration the evidence of Mrs. Mills-Pinnock which offered some support to Calvin's evidence, in that, it was her observation that the tall man was giving instructions to the short man as to what he should do. The disparity in their heights was plainly obvious to the court and Calvin was seen to be the shorter of the two.

[44] It seems to us that it would have been entirely reasonable for the learned trial judge to accord no significance to the evidence as to what transpired after the robbery with any discrepancies, inconsistencies and omissions it may have contained. For instance, he indicated (at pages 185-186), that the sighting of the two men in the bushes "of itself would not be sufficient to forge the robbery with aggravation" and that the matter was to be determined on the evidence of what transpired at the house in Good Hope.

[45] Ultimately, the learned trial judge believed Calvin's evidence and concluded that the appellant was the person who went in the premises with him, was with him when Adolphus and his mother were robbed and that both had firearms in their possession (see page 188). As the tribunal of fact the learned trial judge was entitled, in assessing Calvin's creditworthiness, to place reliance on his observation of Calvin's demeanour and we, having not had that advantage, are in no position to arrive at any other conclusion. We see no reason to disturb his conclusions. It is

therefore our view that ground two is also without merit and ground two also fails.

[46] Accordingly, the appellant's appeal against his conviction is dismissed and his convictions are affirmed. His appeal against sentence seems to have been abandoned as no grounds were filed or arguments advanced in that regard. His appeal against sentence is therefore also dismissed and his sentences are affirmed with the order that they commence from 27 February 2008.