JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 2/09

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MRS. JUSTICE McINTOSH, J.A.(Ag)

DWIGHT HIGGINS v R

Roy Fairclough instructed by Garth E. Lyttle & Company for the appellant.

Miss Winsome Pennicooke for the Crown.

6 May 2009

ORAL JUDGMENT

SMITH, J.A.

This is an appeal from the verdict of the Resident Magistrate for St. Andrew by which she convicted the appellant Mr. Dwight Higgins on two counts of an indictment, each count charging assault occasioning bodily harm. The appellant was convicted on July 5, 2007 and sentenced to a fine of $100,000.00 on each count.

The matter arose out of an incident in 2004 in which two (2) police officers were hit down by a vehicle. The police officers had stopped the vehicle having observed a road traffic breach and they spoke with the driver about this breach which had occurred some minutes before the driver was stopped. The driver came out of the vehicle and there was

some conversation between him and the police officers. The driver returned to the vehicle. The police officers directed the driver to pull over to the curb wall but instead he drove off and in so doing hit the police officers. They were injured. One was dragged for a distance. They were the virtual complainants in the assault charges for which the appellant, who was the driver, was indicted and convicted .

There is no dispute that the appellant appeared in the Traffic Court for the corporate area in answer to five (5) tickets brought against him for breaches of the Road Traffic Act and that these charges were dismissed after he had left court. The appellant was arrested on suspicion of attempted murder arising from the hitting down of the police officers. About two days after his arrest, he was placed on an identification parade at the Half Way Tree Police Station where the two police officers who were hit by the vehicle were witnesses and each identified the appellant as the driver of the vehicle which had hit them down.

At his trial, the two police officers testified and their evidence was more or less consistent with the outline that we have just given. They had seen the driver and it was the appellant. When stopped, he emerged from the vehicle and after some swearing he asked the police who had stopped him if he (the police) did not see him. When originally stopped, the vehicle had come down on and had hit the police officers. Mr. Fairclough pointed out that no count was preferred for that contact. The

driver declared that he was Dwight Higgins, a policeman stationed at Denham Town Police Station.

The defence at the trial denied that the appellant was the driver. He said that the vehicle identified as the one being driven at the time was his, but had been stolen at the relevant time and had not been restored to his possession up to that time. The defence further alleged that on the day of his appearance at the Traffic Court the two (2) complainants were in uniforms and were seen in the precinct of the court pointing at the appellant at the time of his arrest. One of these witnesses he knew before from the time they were both stationed at the Mobile Reserve Unit and the other he recognized at court as being the second uniformed officer he had seen in the precinct of the Traffic Court. Also, at trial, issue was made of the line up of volunteers on the parade being prisoners from the cells at the Half Way Tree lockup and not police officers as the defence claimed is the approved pool when members of the force are placed on parade.

The Resident Magistrate accepted the evidence of the prosecution and found that the circumstances of distance, lighting, time for observation and absence of obstruction were favourable to a good identification. She found that the **Turnbull** standard had been satisfied. As Mr. Fairclough correctly observed, the case resolved itself into an identification issue in that the accused at trial insisted he was not the

driver at the time. The appellant, through his lawyers, sought to impugn the integrity of the identification parade in two respects. The first complaint was that the Resident Magistrate failed to give herself the **Turnbull** warning. The **Turnbull** warning is intended primarily to deal with the "ghastly risk" in cases of fleeting encounters (per Lord Widgery CJ in ***R v Oakwell*** 66 Cr. App R.174). Clearly, it does not apply to every case involving minor problems as those referred to in this case. However, a long list of authorities has established that a **Turnbull** warning should be given when a defendant denies that he was present at the commission of the offence. The cases also show that the guidelines should not be applied inflexibly. No particular form of words is required. The basic principle, of course, is the need for caution when the issue turns on visual identification and it must appear that the Resident Magistrate's mind was adverted to the danger of mistaken identity. Thus, the approach of the judge will depend on the evidence in the particular case. In some cases, a **Turnbull** warning appropriately modified will suffice.

The following factors are important in this case:

(1) The two witnesses identified the appellant on the identification parade;

(2) The learned magistrate accepted the evidence of the witnesses that the driver of the car identified himself as Dwight Higgins of the Denham Town Police Station;

(3) The vehicle involved in the incident belonged to the appellant; and

(4) The magistrate rejected the appellant's evidence that his vehicle was stolen on January 9 and was recovered on January 31, 2004 and was not in his possession at the material time.

In the circumstances, the magistrate was entitled to ask herself, having rejected his evidence that the car was not in his possession: Why is he lying? Is it to bolster a true defence, or is it recognition of guilt and an attempt to mislead? These are some of the questions the magistrate was entitled to ask. We note that she did not take that route. At page 51 of the transcript, the magistrate identified the important issue for her determination:

> "The issue to be decided in this matter is the identity of the driver of the offending vehicle at the material time. If the record is carefully examined there is no denial that the vehicle that hit the complainant's was the accused's vehicle. What is disputed is that he was the driver."

And then she went on to say that she was sure the complainants were speaking the truth when they said they were struck by a vehicle and sustained injuries.

At pages 52-53, the judge further stated:

> "On the crucial question of the identity of the driver of the vehicle at the material time the Court examined the quality of the identification evidence presented. The evidence presented is

> that the vehicle stopped, and the driver alighted swearing that Constable Dean should have seen him and moved out of the road. He also said that he was a police officer attached to the Denham Town Police Station and gave his name as Higgins. The driver then returned to the vehicle and was instructed to pull over the vehicle to the curb. Both complainants were present throughout this exchange. They spoke to and observed the driver. The incident occurred at about 5:20p.m. at the intersection of Kings House Road and Hope Road. There was no evidence of any obstruction that prevented the witnesses from seeing the driver or that he was wearing any device that could shield his identity. At 5:20 pm there would have been sufficient lighting to allow for clear view. Standing as before where the complainants were, at the window of the offending vehicle and seeing the driver when he alighted from the vehicle, the Court found that they were sufficiently close to him and observed him for sufficient time to be able to identify him."

At page 54 she said this:

> "The Court in all the circumstance(s) took the view that the **Turnbull** standard had been satisfied, in the circumstances of this case, the lighting, the time observation, the distance between the parties. In addition there is the evidence of the name and station to which he was attached that was given by him at the material time."

We see nothing wrong with the magistrate's approach to the issue of identification. She clearly addressed her mind to the risk of mistaken identity. That aspect of the appeal cannot succeed.

The second complaint is that the magistrate erred in concluding that the identification parade was properly conducted and that no

material irregularity capable of impugning the exercise was found on the evidence. In this regard, Mr. Fairclough made the following point. The opportunity was provided for unfair assistance, directly or through third parties, to be given to the witnesses by persons present in the precinct of the court.

But the evidence of the appellant is that he saw the witnesses pointing at him, not that he saw some third party pointing him out to the witnesses. That, we think, is important to note. The court has held the identification of an accused to be proper where sometime after the incident the virtual complainant saw the person who he claimed to have committed the offence and pointed out that person to police officers and the person was consequently arrested. See for example ***R v Trevor Dennis*** 15 JLR 249. In ***Garnet Edwards v R*** S.C.C.A. No. 29/03 delivered April 25, 2006, the witness was driving in a particular area and saw the person who he claimed, had committed an offence against him. He drove around until he saw a police officer, told him what he had observed and pointed the person out. The Court held that such an identification was satisfactory and dismissed the appeal.

Where there has been identification in the vicinity of the court, such identification is not necessarily nugatory. The issue would be what weight and value are to be attached to the identification of the accused person in the vicinity of the court room. In the case of ***R v Locksley Carrol*** SCCA

No. 39/89 delivered 25 June, 1990, the court had to consider the weight and value to be attached to the identification evidence where there was confrontation in the vicinity of the court room. In the case of ***R v Palmer*** SCCA No. 17/91 delivered 30 June, 1994 the court had to deal with a similar complaint.

As we said before, there is no evidence of any assistance being given to the witnesses. They were not assisted in identifying the accused person. The learned judge rejected the evidence of the appellant that the two witnesses pointed him out in the precinct of the Traffic Court. It has not been shown to us that that finding is obviously and palpably wrong. That aspect of Mr. Fairclough's submission cannot be accepted.

The other point raised is that failure to include among the volunteers any colleagues of the suspect is an irregularity .

At page 33 of the transcript the judge stated:

> "I do not agree in this case that the other volunteers should not have been prisoners. If it was requested by the suspect that persons other than prisoner(s) be volunteers in the parade, then prisoners would not be used. There is a rule that says that if the suspect is a police officer then police officers should be used as volunteers in the parade, but in this case he was in custody and so similar persons who were in custody were used."

Then at page 50 of the transcript, she said:

> "The identification parade was properly conducted by the inspector and the suspect exercised his right to select the participants in the

> presence of his counsel. No material irregularity capable of impugning the exercise was found on the evidence before the Court."

Breach of a regulation is not necessarily fatal; the critical question is whether the parade was conducted fairly. We are of the view that in this particular case, this breach would not be fatal, assuming there was such a breach.

Another point raised by Mr. Fairclough was that excluding the suspect's counsel from the area of the line up as well as restricting the suspect's counsel to the witness side of the parade was a denial of the suspect's right to be advised by counsel. As to where counsel should be positioned, it does not appear that the regulations address this issue. But in ***R v Graham and Lewis*** (1986) 23 JLR 230 where the police had failed to secure an attorney to represent the suspect on the parade, and this was clearly a breach of the 1977 regulations, this court held that the rules were merely procedural and not mandatory. The fairness of the parade was not affected in that case because two justices were present. In this case, we do not know whether or not justices were present. Since the regulations require that they be present and no challenge was made by Mr. Lyttle at the parade, and in cross-examination nothing was put to the witnesses as to the absence of any justices, I think this court cannot on principle hold that the regulations were breached. In any event, the absence of justices in this case would not, we think, invalidate the

parade. Such a breach would only affect the weight of the identification evidence.

In ***R v Cornwall and Halloway*** 54 WIR 33 it was also held that the absence of the suspect's attorney-at-law did not necessarily invalidate the parade. In this particular case, we are of the view that the confining of Mr. Lyttle to the witness side of the parade did not affect the fairness of the parade.

Another point raised by counsel for the appellant was that the un-cautioned suspect who was un-assisted by counsel was asked whether he was satisfied with the arrangement. In the cases I referred to, this aspect of the complaint raised by Mr. Fairclough was dealt with to a certain extent.

In this particular case, it should be noted that the appellant was a police officer therefore he would know his rights. His lawyer at the end of the parade instructed the suspect, now the appellant, to complete the identification form. The signing of the parade form indicates that there was no dispute with the conduct of the parade. At page 32 of the transcript the officer who held the parade, after identifying the accused, said:

> "Where the witness was, is a separate building from the parade room. Both witnesses were in the CIB office before the parade. After the first witness identified the suspect he was sent to a separate room from the other witness."

We agree with Mr. Fairclough that where evidence of the conduct of the parade is led, it is desirable to give evidence that from where the witnesses were they could not see the parade and they could not hear what was being said on the parade. With respect to Mr. Fairclough, we think however, that the fact that such evidence was not led would not vitiate the parade. We have seen that where the suspect did not have a lawyer, and this was in breach of the regulations, the court having examined the circumstances, concluded that the breach did not invalidate the parade. The evidence is that the suspect's attorney-at-law was on the witness side of the one way mirror. If anything had gone wrong that would have affected the fairness of the parade, we are quite sure that he would have so indicated to the officer.

Mr. Fairclough contends that the suspect was exposed before the parade. The suspect he said, was at large and could have been seen by the potential witnesses. We do not think this is a valid complaint. Before the appellant was arrested, the files were sent to the Director of Public Prosecutions for ruling. All that time before the appellant was ultimately charged, he would have been at large. It would be impossible for the police to prevent potential witnesses from seeing him. We do not think there is merit in that aspect of these complaints.

We are of the view that the appeal should be dismissed and the conviction and sentence affirmed.