[2010] JMCA Crim 70

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 22/2009

BEFORE: THE HON MR JUSTICE HARRISON, JA
THE HON MRS JUSTICE HARRIS, JA
THE HON MR JUSTICE DUKHARAN, JA

MARK JONES v R

Bryan Moodie and Miss Danielle Chai instructed by Samuda and Johnson for the applicant

Mrs Ann-Marie Feurtado-Richards for the Crown

5 October; 12 and 24 November 2010

DUKHARAN JA

[1] The appellant was convicted on 5 March 2009 in the High Court Division of the Gun Court in Mandeville for the offences of illegal possession of firearm and two counts of robbery with aggravation. He was sentenced to 12 years imprisonment for illegal possession of firearm and 15 years imprisonment on each of the other counts, with the sentences to run concurrently.

[2] The appellant was granted leave to appeal by a single judge of this court.

[3] The conviction of the appellant arose out of a robbery which took place on 27 August 2008 in the parish of Manchester where it was alleged that Hugh Powell and Maxine Powell were held up and robbed of sums of money and valuables.

The Facts

[4] The case for the prosecution was essentially grounded on the evidence of Hugh Powell. He recounted that on 27 August 2008 at about 6:30 p.m. he and his wife Maxine Powell had left his wife's business place in Mandeville, Manchester. He stopped at an intersection and a car came from behind and bumped into the back of his vehicle. He alighted from his vehicle to investigate. The driver of the other car also alighted. Mr Powell enquired of him why he had crashed into the back of his car. According to Mr Powell, the driver for the most part kept shuffling and talking about how his vehicle was damaged and the bonnet of his car was dented. Shortly after, Mrs Powell came out of the car. Mr Powell said he had observed an occupant in the front passenger seat of the other car. Suddenly that person came out of the car and pointed a gun at his wife and said if he tried anything he would shoot her. A third person came out of the back of the other car, who Mr Powell described as a slim, half-Indian little fellow. He proceeded to remove items from the car including Mrs Powell's handbag which contained cash and cheques. The man with the gun told the half-Indian man to search Mr Powell who took from his person, credit and debit cards, cash and his cellular phone. Both the gunman and the half-Indian man ran back to the car they had exited, followed by the driver who Mr Powell said is the appellant. The appellant drove away with the

other men. Mr Powell remembered two digits of the licence plate number of the car that the appellant drove away which, he said, were 2 and 4. Mr Powell and his wife made a report at the Mandeville Police Station.

[5] The following week Mr Powell said he was driving his car in the Mandeville area when he saw the appellant in the vicinity of a book shop in the same car that had bumped into the back of his car. He said the appellant was wearing the same head gear the night he was robbed. He was also able to get the licence number of the vehicle, which was 2480 EG. He made a report of his observation to the police at the Mandeville Police Station.

[6] Mr Powell said that at the time of the incident when he was robbed he was able to see the face of the appellant quite clearly. He was about eight feet away and the whole incident lasted about six minutes. He said he was assisted by the headlights of passing vehicles to see the appellant's face. He said nothing was obstructing his view of the appellant.

[7] On 16 October 2008 Mr Powell identified the appellant at an identification parade at the May Pen Police Station as the driver of the car that had bumped into his car on the day of the incident.

[8] In cross-examination, Mr Powell said he saw some distinctive markings on the face of the appellant. When he identified the appellant on the identification parade, he said, those markings were still on his face.

[9] Mrs Maxine Powell gave evidence and supported the narrative given by Mr Powell. However, she was unable to point out the appellant at the identification parade. She sought to give an explanation to the court that she had seen the appellant on the parade but was scared. She said she also saw the marks on his face.

[10] Constable Dwayne Kerr testified that he got the initial report from the Powells and subsequently on 11 October 2008, having got information, he apprehended the appellant and took him into custody. He subsequently arrested him and charged him and on caution, the appellant made no statement.

[11] The appellant in his defence denied any involvement in the robbery. He said, in evidence, that on 27 August 2008 he went home before 4:00 p.m. He lives with his aunt, his cousins, a brother and his aunt's children who were all there when he went home. He said he goes home every day before 4:00 p.m.

Grounds of Appeal

[12] In addition to the original grounds 1 and 2, Mr Moodie sought and was granted leave to argue supplemental grounds. They are as follows:

> "(1) Unfair Trial.
>
> (2) The sentence of fifteen (15) years imprisonment with hard labour is excessive having regard to the evidence.
>
> (3) The learned trial judge erred in failing to consider or properly consider the dangers inherent in relying on the uncorroborated evidence of visual identification

particularly under circumstances where this was the only evidence capable of grounding a conviction in this case.

(4) The learned trial judge failed to address or adequately address his mind to the weaknesses of the identification evidence, namely, that one of the complainants failed to identify the accused at the identification parade, the discrepancies between the description (sic) the complainants and the physical appearance of the accused, the lack of supporting evidence, the dock identification of the appellant and the poor quality of the identification evidence.

(5) The learned trial judge failed to adequately or at all, treat with the Appellant's Defence."

Submissions

[13] Mr Moodie argued grounds 3 and 4 together and submitted that although the learned trial judge correctly identified the issues related to identification, he failed to apply the directions to the instant case. He challenged the weaknesses of the identification evidence and particularly the inadequacy of the lighting: the complainants, he said, were only able to see the appellant by the lights of passing vehicles; his head was held down shuffling around, and he was wearing a peakless cap. Counsel further submitted that the complainants gave only a generic description of the appellant, stating that he was of medium built, dark complexion, he had 'bulge' eyes, and a big belly with a cap on his head. However, both complainants gave evidence that at the identification parade they were able to identify the appellant based on the fact that he had some dark marks or blotches on his cheeks. Neither of them mentioned this distinctive feature of the appellant when describing the assailant to the police.

However, both complainants, when asked to look at the appellant in court, admitted he did not have any dark marks on his cheeks. Counsel submitted that despite these weaknesses the learned trial judge convicted the appellant on the basis of uncorroborated visual identification evidence which was not particularly strong. In addition, he allowed the appellant to be identified, by one of the complainants, for the first time in the dock.

[14] On grounds 1 and 5 it was submitted by counsel that the learned trial judge made unfair comments in relation to when the appellant was arrested and cautioned and that he also failed to deal adequately or at all with the appellant's defence. He submitted that in relation to the defence of alibi, the learned trial judge's directions were also lacking. He further submitted that the learned trial judge in his summing up not only dismissed the appellant's defence out of hand, but made a mockery of it and ridiculed the appellant's contention that he was at home at the time of the robbery by saying, "He goes home every day at about 4:00 p.m., what a nice guy. ..." Counsel submitted that this provided further evidence that the appellant was not given a fair trial.

[15] Counsel for the Crown submitted in relation to grounds 3 and 4 that the learned trial judge gave himself the necessary warning in relation to the issue of identification. She further submitted that from the outset the learned trial judge recognized that identification was the main issue. He addressed his mind to the strengths and weaknesses of the identification of the appellant. She further submitted that the

learned trial judge addressed the issue of discrepancies and considered the credibility of the witnesses, in particular the evidence of Mr Powell who identified the appellant.

[16] Counsel for the Crown submitted that there was no dock identification by Mrs Powell as she was not asked at the trial to point out the appellant. At no time did the learned trial judge rely on her evidence as to the identification of the appellant.

The Issues

[17] The main issues to be determined in this appeal are the correctness of the identification of the appellant and the credibility of the witnesses. It is trite law that where identification is a live issue, the trial judge has a duty to properly direct the jury on the evidence adduced: see **R v Turnbull** (1976) 63 Cr. App. R. 132 which laid down the guidelines as to the directions which ought to be given in disputed identification cases. In cases where a judge sits alone without a jury, the requirement for the judge to warn himself as to the need for caution is not diminished. The judge therefore must demonstrate that he has acted with the requisite caution in mind.

[18] It is the evidence of the Powells that they did not know, and had never seen any of their assailants before the day of the incident. The learned trial judge gave a detailed analysis of the evidence and was cognizant of the dangers inherent in evidence of visual identification. He gave himself the requisite warning when he said at page 115 of his summation:

> "This Court must warn itself of the special need for caution before convicting any accused in reliance on the evidence of visual identification ..."

The learned trial judge went on to highlight the guidelines as set out in **R v Turnbull**.

[19] Counsel for the appellant submitted that the learned trial judge had highlighted the issues related to visual identification but he went on to state that he had failed to apply those issues to the instant case. On the issue of lighting, the learned trial judge highlighted the fact that the witnesses were aided by motor vehicle lights and were able to see the appellant's face. The learned trial judge found that both witnesses described the men for the police that same night with the descriptions being basically the same. The description they gave was that the appellant had on a beige-coloured head wear, which they called a cap, and which they said was low, covering his head and that he was stocky and tall, with a protruding belly and bulging eyes. However, they had failed to mention in their report to the police that the appellant had black blotches "somewhere on his face on both cheeks". It is quite clear from the evidence that the appellant was pointed out on the identification parade with blotches on his face. However, at trial there was the absence of these marks. It is also significant that Sergeant Michael Berry who conducted the identification parade saw these blotches while the appellant was on the parade. In **R v Donald Bailey** (1990) 27 JLR 536 the appellant was charged with rape. The Crown's case rested solely on the evidence of the complainant, who when describing her attackers to the police did so in very vague terms. At the identification parade, the men on parade were requested to laugh so that

the complainant could see their teeth. She then identified the accused who had a gold-capped tooth. The evidence of the accused and that of his dentist was that the tooth was capped some six weeks after the assault. It was held that the jury required the most precise directions as to how to approach the glaring weakness in the Crown's case, where the witness who could originally manage only a general description of the most unhelpful character, could at the identification parade and the trial rely upon a significant distinguishing feature of the appellant. As this weakness could irredeemably undermine the veracity of the witness and as the jury received no guidance on this, the only conclusion was that the verdict was unreasonable and unsupported by the evidence. This case however is distinguishable from the instant case. The learned trial judge had this to say at page 133 of the transcript:

> "What is more, even in this court, where there are no blotches or black spots on the cheeks of the accused, the witness looking at him, says, "Yes, I am sure that this is the man," and to all intents and purpose, he must have done a bleaching job. But there is no doubt that the man he identified at the identification parade ... is the accused man now in the dock."

[20] It is quite clear that the description given to the police cannot be termed as generic. The description given to the police by the complainants was never challenged by the defence at trial.

[21] At no point during the trial was there a dock identification of the appellant. The female complainant did not point out the appellant at the identification parade or in

court. There was therefore no necessity for the trial judge to mention a dock identification as one was not done.

[22] The complaint in ground 3 is that the learned trial judge failed to consider the dangers inherent in relying on the uncorroborated evidence of visual identification. It was held in **R v Denzil Dawes** (1990) 27 JLR 539 (C.A.) that in a situation in which the sole evidence against the accused rests on uncorroborated visual identification evidence, it is the duty of the trial judge to demonstrate an awareness of the cautious approach that ought to be taken. Forte, JA (as he then was) said at page 540:

> "The learned trial judge, though recognizing that he had to examine the circumstances under which the opportunity for identification of the assailant presented itself, did not either expressly or impliedly demonstrate any awareness of the cautious approach that ought to be taken in acting upon the uncorroborated evidence of visual identification because of the inherent dangers that exist in so doing."

[23] It seems clear, in our view, that the learned trial judge embarked upon a detailed analysis of the identification evidence. At page 132 of the transcript, the learned trial judge said:

> "It seems to me that upon a close scrutiny, careful examination, detailed search of the evidence of identification, that the prosecution has placed before this court convincing evidence of visual identification ..."

The learned trial judge was indeed aware of what was required in closely analyzing the identification evidence. In our view, grounds 3 and 4 fail.

24. In grounds 1 and 5, it is quite clear that the defence of the appellant was one of alibi. At page 96 of the transcript the appellant was asked in cross examination;

> "Q. Who was at home with you at 6:30?
>
> A. Everyone who live there.
>
> Q. Everybody was there?
>
> A. Everyone who live at the house."

25. The learned trial judge said at page 136 (of the transcript):

> "Of course, Defence (sic) having raised an alibi it is not for the prosecution, for the Defence to prove it. It is for the, sorry, it is not for the Defence to prove it, it's for the prosecution to prove (sic) it, and the prosecution can only prove (sic) it by placing before the tribunal of fact credible, probative and reliable evidence which negatives the evidence of alibi ..."

The learned trial judge indicated that he did not accept the appellant as a witness of truth and that his evidence did not raise in the mind of the tribunal any reasonable doubt. The court found the prosecution's witnesses to be truthful and reliable witnesses.

26. Although the learned trial judge made a comment about the appellant's failure to say anything when arrested and cautioned, he made it clear that the appellant did not have to say anything. This is what the learned trial judge said:

> "... in this court the accused man was a loquacious witness, eager to talk and full of talk and notwithstanding a caution

> that he need not say anything, certainly it would seem to me at the time when he was told that he was involved in a robbery of two elders, that a man as loquacious as he is would have bound to at least make a token protest, but he doesn't have to say anything ..."

The learned trial judge assessed the evidence and demeanour of the appellant and made it clear as to where the burden of proof lay. In our view, the learned trial judge gave adequate consideration to the alibi of the appellant and rejected his defence of alibi.

27. Counsel for the appellant submitted that the sentence imposed was manifestly excessive in the circumstances. In our view, the sentences imposed by the learned trial judge were within the range of sentences for firearm offences of a similar nature. We see no reason to disturb the sentences imposed.

28. Accordingly, we are of the view that the appeal should be dismissed and the convictions and sentences affirmed with the sentences to commence from 5 June 2009.