JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 115/2007

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag.)

FITZROY MASON v R

Oswest Senior-Smith for the applicant

Miss Kamar Henry and Mrs Andrea Martin-Swaby for the Crown

5, 7 and 14 May 2010

PANTON, P.

[1] The applicant was convicted in the Western Regional Gun Court, Montego Bay, on 20 July 2007 by Sykes, J. of the offences of illegal possession of firearm (count one) and assault (count two). He was sentenced to concurrent terms of imprisonment of five and two years respectively in respect of these offences. His application for leave to appeal did not find favour with the single judge so he has renewed the application before the court.

[2] On 7 May 2010 we refused the application for leave to appeal against the convictions. In respect of the sentence on count two for assault we granted the application for leave to appeal, treated the hearing of the application as the hearing of the appeal which we allowed, and reduced the sentence to one year's imprisonment. We ordered that the sentences were to run concurrently and to commence on 3 November 2007. The sentence on count two was reduced because section 43 of the Offences Against the Person Act provides for a maximum term of one year's imprisonment for this offence.

The prosecution's case

[3] The applicant and the main witness for the prosecution, Mr Mark Powell, are well known to each other. The applicant, who resided in England, engaged the services of Mr Powell in respect of the construction of a house in Montego Bay, St. James. A dispute developed between them as Mr Powell accused the applicant of not paying him what was properly due for the services rendered, whereas the applicant held the view that Mr Powell and his employees were responsible for the disappearance of building materials from the site.

[4] According to Mr Powell, on 30 August 2006 the applicant called him on his mobile phone and advised him that he was in Clarendon and was

on his way driving to Montego Bay to pay him $275,000.00 which was due to him. The applicant made five telephone calls while en route and, with directions being provided by Mr Powell, they arranged to meet in the square at Norwood. Due to a lack of trust, Mr Powell kept out of sight until the applicant's car had arrived and come to a halt in the square. The time was about 8:30 to 9:00 p.m. Thereupon, Mr Powell emerged from his hiding place and approached the applicant's car. The applicant emerged from the car and, with a handgun aimed at Mr Powell, asked him: "how much money me have fi you bwoy"? At this point in time, two other men came out of the rear section of the car. Mr Powell's girlfriend called him on his other mobile phone, inquiring where he was. He informed her that he was right beside the applicant who, according to Mr Powell, then inquired thus: "How much money mi owe you again"? Mr Powell responded, and the applicant said: "Who owe yuh $275,000.00. Mi no owe yu $275,000.00. Come, come over here, bwoy, come here." Some men who were gambling in the square fled the scene. Mr Powell also ran, and reported the matter at the Freeport Police Station the following morning.

[5] The report having been made, the police thereafter sought the applicant at an address at Bogue Housing Scheme, St. James. He was not seen until April 2007 when he was pointed out by Mr Powell to the police in the presence of Sergeant Everton Ferguson at the Freeport

Police Station. The sergeant informed the applicant of the complaint Mr Powell had made to the effect that he had been experiencing difficulty in collecting monies owed to him by the applicant, and that the applicant and other men had drawn guns on him. The applicant became angry and pointed at Mr Powell saying: "You a walk and tell people say mi owe you, mi no owe you and di only ting mi owe you is a gunshot inna you b.... c.... ." Upon being arrested and charged with the offences, he was cautioned. To the caution, he responded: "How unno no find mi wid no gun and unno charge mi fi gun".

The case for the defence

[6] The applicant gave evidence denying that he and others drew guns at Mr Powell in Norwood square; in fact, he said he did not know Norwood. He said that Mr Powell's claim that he, applicant owes him money is false, and that what Mr Powell is really seeking is compensation for injuries received at the hands of his (the applicant's) younger brother. The applicant denied seeing or conversing on the telephone with Mr Powell at any time on 30 August 2006. He also denied using the words attributed to him by Sgt. Ferguson at the time of his arrest. He said that what he said in the presence of the officer was that Mr Powell should have received a fat shot, instead of a chop (referring to the injuries inflicted by the applicant's brother in another incident). Under cross-

examination by counsel for the Crown, when asked what was a fat shot, the applicant responded: "I wouldn't know" (p.146 lines 20 and 21).

[7] The applicant called Mr Thomas Rose, a builder who lives in Kellits, Clarendon, to give character evidence on his behalf. He duly testified that the applicant was a "very good person" who was not known to tell lies.

The Judge's findings

[8] The learned trial judge took into consideration the evidence of the applicant's previous good character. However, having carefully recounted and assessed the evidence, he expressed satisfaction that he was sure that Mr Powell saw the applicant in the square at Norwood on the night of 30 August, 2006, and that the applicant and two other men were armed with guns, and that the applicant pointed his gun at Mr Powell.

The grounds of appeal

[9] Learned counsel, Mr Oswest Senior-Smith sought, and was granted, leave to argue four supplementary grounds of appeal as follows:

> " (i) The learned trial judge failed to apply the usual directions concerning the law on the issue of identification.
>
> (ii) The learned trial judge arrived at a verdict which, respectfully, was

unreasonable and unattributable to the evidence particularly as there was no evaluation of certain material factors which may have impacted the credibility of the virtual complainant.

(iii) The applicant was deprived of a fair trial as a result of the decension (sic)of the learned trial judge into the arena of the proceedings.

(iv) The sentences were manifestly harsh and excessive having regard to all the circumstances."

[10] In respect of ground (i), Mr Senior-Smith submitted that the case depended substantially on the correctness of the identification made by Mr Powell, and that it was uncorroborated. The learned trial judge, he said, did not advert to the special need for caution as regards the accuracy of the evidence of identification. As a result, he said, the applicant had lost the protection of the law. He referred to the oft-cited case of ***R v Turnbull & Others*** [1977] Q.B. 224; as well as ***R v Donaldson*** (1988) 25 JLR 274, ***R v Cameron*** (1989) 26 JLR 453 and ***R v Leroy Barrett*** (1990) 27 JLR 308. He placed great reliance on the judgment of Carey, J.A. in ***Donaldson*** (supra) at page 280 C - I which reads:

> "In a case tried without a jury, the Privy Council decision in ***Chiu Nang Hong v Public Prosecutor*** [1964] 1 W.L.R. 1279 is apt. There the Board interfered with a conviction for rape where contrary to the conclusion of a trial judge sitting with a jury, that there was corroboration of the victim's allegation of lack of consent, when there

was not. Their Lordships then said this at page 1285:

> 'Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should in their Lordship's view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed'."

Carey, J.A. then continued:

> "We think that we should follow this rule and state in positive terms that a judge sitting alone in the trial of any sexual offence, should state or make it clear in his summation (which is for the benefit not only of the parties before him, but also for the assistance of this Court in the event of an appeal) that –
>
> (a) he has in mind the dangers of convicting on the victim's uncorroborated testimony;
>
> and
>
> (b) nevertheless, he is satisfied, so that he feels sure, that she is speaking the truth.
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> The incantation of the correct formula may well be irrefragable proof that the judge is conscious of his responsibility to give a reasoned judgment. We

return to ***R. v. Dacres*** (supra) where he said at page 12:

> 'By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and when there is a conflict of evidence, his method of resolving the conflict. The judge would have had the benefit of the speeches of Counsel, and it is to be remembered that in the Gun Court all accused persons are entitled to legal aid and are legally represented, and we do not think Counsel could fail to draw the judge's attention to any aspect of the case ...'.

> It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorize the summation as a reasoned one."

[11] Mr Senior-Smith also placed emphasis on the following passage from the judgment in ***R v Leroy Barrett*** (supra) at page 313A - D:

> "It is absolutely necessary that trial judges within our jurisdiction must take the most careful note of the decisions of the Privy Council on the issue of visual identification evidence. This kind of evidence must be placed in a special category and rendered special treatment. It is insufficient to rely on a warning as to personal experience of jurors in mistakenly identifying strangers or old friends. More comprehensive directions must be given. Jurors should be told that where the

> prosecution's case is supported wholly or substantially by uncorroborated evidence of visual identification they should approach the case with the greatest caution because there are certain inherent, grave and serious risks associated with visual identification evidence. These grave risks are that experience inside the Courts has shown that persons have been wrongly identified by honest, respectable, responsible and positive witnesses who had ample opportunities for observation and who made strong impressions in the witness box. However positive the witness, there is the strong possibility that he might be mistaken for a number of reasons. Consequently if their verdict is to be one of guilt, based on evidence of visual identification they must distinguish between the apparent honesty of the witness and the accuracy of the evidence which he gives. After this general warning the judge might call to mind personal experiences of jurors to reinforce the dangers of acting upon uncorroborated visual identification evidence. Judges at trial might very well adopt a practice of directing jurors from prepared statements on this aspect of the law."

[12] Having cited those judgments referred to above, Mr Senior-Smith submitted that at the end of the summation, notwithstanding the effort of the learned trial judge to have underlined some of the material pertaining to identification and although no particular formula is required, the authorities oblige the learned court to have given demonstrably a warning as to the danger of relying on un-corroborated identification testimony. No warning in substance was herein given. Accordingly, the summation is, respectfully, he said, impugned and the applicant thereby imperiled. He referred to page 180 of the transcript, and added that

although the learning of the judge's mind can be distilled, the directions there given are "respectfully inadequate".

[13] Miss Henry in response submitted that it is necessary for a learned trial judge to give an identification warning only where identification is the central or is a substantial issue in the case. Given how well the witness and the applicant knew each other, and how events unfolded on the night in question, there was no real possibility of a mistaken identification. The central issue, she said, was one of credibility. She referred to the evidence of the five telephone calls and the arrangement to meet in Norwood square as well as the conversation between the witness and the applicant in the square. In the light of all this, she said, there can be no doubt that it was the applicant who was in the square. She further submitted that even if a warning on identification was desirable, the judge's failure to give it would not render the conviction unsafe. She said that the judge's assessment of the evidence was done with great care and there really was no room for doubt or error in respect of the identification of the applicant.

[14] In view of the criticism of the judge's summation, it is necessary to look at how he dealt with the question of identification. At page 180 of the transcript, he said:

> "So, the point of this evidence is to deal with the question of identification, to show that the accused (sic) – the key witness, Mark Powell, knew the accused man before the incident. Well, the case that developed does not seem to be in dispute at this point, but he has evidence put in by the Crown as prior knowledge to show that the risk of mistaken identification is much reduced because this witness had made contact with the accused man before the night of the incident and there was further evidence of driving around Montego Bay to get discount to deal with the construction. So, all evidence put forward is to show that the witness is unlikely to be mistaken when he says this is the man that he saw on the 30th of June (sic) 2006, with a firearm."

And at page 181(lines 2-12):

> "Also, the whole evidence about the lighting and the distance that the witness reached up to the accused man is evidence to show that at the time of the incident the area was well lit and again that the opportunity to see and make a positive identification was present and that the circumstances were such that even if the accused man had this firearm, it was not a case where he was being shot or shot at, but sufficient to enable him to make an identification of Mr. Mason."

These passages show without doubt that the learned trial judge was fully conscious and aware of the need to ensure that no mistake was being made as regards identification, before a verdict adverse to the applicant could be arrived at.

[15] At page 204, having completed the review of the evidence, the learned trial judge posed this question to himself:

> "So, what do I make of all of this mass of evidence? Well, there's no doubt that the witness and Mr. Mason, they know each other. The question is, was he, Mr. Mason, up in what's the name of the place? Norwood Square, yes." (lines 1-6)

Thereafter, the learned trial judge proceeded to indicate whom he believed and what were his findings of fact. There is no proper basis for challenging or criticizing this approach by the judge. In relation to identification, he said:

> "As far as the evidence of prior identification is concerned, I am satisfied so that I feel sure that Mr. Mason was known to the witness, Mr. Powell, beforehand, so there's no question about that as far as the incident, identification on the night of the incident. I am satisfied so that I feel sure that the place was indeed well lit, the light had been exposed on the shop and at the stall and the vehicle was indeed in the Square and where, he says, where the witness said it was." (p. 210 lines18-25; and p. 211 lines 1-4)

He continued:

> "This is not identification under difficult circumstances, perhaps a bit frightening, but not difficult. This is not a case of blazing gun battle and persons going here and there ... He is in close proximity to someone who was known to him in a well lit square.
>
> I accept this evidence that there was this plan to meet up in Norwood Square and so the witness was approaching the car, he was actually- this was really in pursuance of an agreement, a prior agreement to meet. So he is really looking out for this individual and so this is a matter now, that, in my view, would enhance the identification under

those circumstances." (p 212 line 24 to p 213 line 14)

[16] The learned trial judge clearly demonstrated a full grasp of the facts of the case and of the issues that required resolution. The central issue was the credibility of Mr Powell. Nevertheless, the judge gave more than ample consideration to the question of identification. In the circumstances, he cannot be properly faulted. There is really no merit in this ground of appeal.

[17] Ground 2:

> "The learned trial judge arrived at the verdict, which respectfully, was unreasonable and unattributable to the evidence particularly as there was no evaluation of certain material factors which may have impacted the credibility of the virtual complaint."

In support of this ground, Mr Senior-Smith submitted that the learned judge did not properly address the inconsistency in the evidence of Mr Powell so far as the number of persons in the car was concerned. He said that the judge should have juxtaposed this discrepancy beside the others, along with the state of the relations between the parties, the absence of a corroborating witness and the witness' unreliability as to time as well as the fact that no gun was recovered.

[18] Mrs Henry in response submitted that the learned trial judge had adequately dealt with the inconsistencies in the prosecution's case as well as general areas of weakness and possible motives or reasons advanced by the applicant for Mr Powell to fabricate the allegations against him.

[19] It is surprising that Mr Senior-Smith thought it of moment that no gun was recovered. Surely, he could not have expected that the prosecution would have been blessed with such good luck, given the lapse of time between the incident and the arrest of the applicant – a period of several months. So far as the witness' faulty estimate of time is concerned, that would not have determined whether he saw the applicant, or was conversing with him on the telephone, on the night in question.

[20] It is inaccurate to say that the learned trial judge did not properly address the inconsistency in the evidence of Mr Powell so far as the number of persons emerging from the car is concerned. This is how the judge dealt with it at page 209:

> "So that I do not accept Mr. Mason's account at all. Nonetheless, one still has to examine the case for the Prosecution and look at the inconsistencies and what do we have here? In my own mind, in the context of this particular case, whether it is three or two men who came out of the car, that doesn't matter because nothing turns on the number of men that came out of the car. ... Mr. Powell did not purport to identify any of those men. What he is saying is

> that the man who came out on the driver's side was the accused man. 'That is the man that I know. That is the man that I saw, that is the man that I saw with the gun and the other men came out.'
>
> So, whether it is two or three, it is neither here nor there. This is not a case, for example, because of the number of persons, the view obscured the number of men who came out. He couldn't be sure out of which door the accused man came. This is not one of those cases. So, whether it is two or it is three, is of really no moment in this particular case ..."

Taking everything into consideration, this ground was without merit.

[21] Ground 3:

> "The applicant was deprived of a fair trial as a result of the decension (sic) of the Learned Trial Judge into the Arena of the proceedings."

Mr Senior-Smith complained that the role of the learned trial judge in the trial was less than orthodox . He said that the transcript "is replete and at times in sustained portions, with interventions" by the judge. The interventions, he submitted, were such that the judge was unable to undertake a proper evaluation and assessment of the evidence and this, in his view, resulted in unfairness to the applicant. As an example of the judge's intervention he said that the judge placed undue emphasis on the actual telephone instrument used by the witness, although the prosecution showed no interest therein. The judge, he said, unwittingly used the presence of the phone instrument for identification.

[22] Miss Henry for the Crown agreed with Mr Senior-Smith that the judge at times descended into the arena, "particularly during the course of the examination-in-chief of the complainant where he asked the witness quite a number of questions." However, she submitted that the test as to whether there was a fair trial cannot be determined by looking at the number of interruptions but rather "the crucial question is whether when the conduct of the trial, including the summing-up is looked at as a whole, there is a real possibility that there has been such unfairness or denial of justice that the convictions are unsafe": ***R v Mitchell*** [2003] EWCA Crim. 907.

[23] According to Miss Henry, the number of questions seemed to have been due to the loquacious nature of the witness Powell, "rather than a concerted attempt by (the learned trial judge) to advance the prosecution's case." In any event, she said, the interventions by the judge did not fall into any of the categories that would, according to the authorities, result in the quashing of the convictions. Miss Henry also noted that there was no hostility shown by the judge to the defence, nor was there any interfence with the conduct of the defence.

[24] The conduct of a trial is a very important feature of the administration of justice. Hence the behaviour of the learned trial judge must be above reproach. He must not be seen as taking sides. In ***Jones v***

National Coal Board [1957] 2 All ER 155 at 159 A-B, Denning, L.J. stated the role of a judge thus:

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?' His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role."

And at page 159 G - H:

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well."

[25] In ***R v Stephenson*** (1974) 12 JLR 1681, the headnote reads:

> "The applicant was convicted of murder in the Home Circuit Court. During the cross-examination of several prosecution witnesses the trial judge frequently interrupted the applicant's attorney in such a manner as to make it impossible for him to do his duty in conducting the defence. When the applicant gave evidence on oath the trial judge subjected him

> to questioning to such an extent as to make it impossible for him to give his evidence in his own way. Thereafter, in his summing-up, the trial judge made observations on the applicant's evidence calculated to invite the jury to disbelieve that evidence. On appeal against his conviction it was contended on behalf of the applicant that in view of the foregoing he was effectively denied a fair trial and that in such a circumstance there could be no question of the proviso being applied, nor should a new trial be ordered.
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> **Held:** (i) that the appeal would be allowed as the applicant was, indeed, denied a fair trial by reason of the unwarranted conduct of trial judge and, accordingly, although the case presented against the applicant was very strong, the proviso would not, in the circumstances, be applied ***R. v. Hulusi and Purvis*** (1974) 58 Cr. App. Rep. 382 applied.
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> (ii) that in the particular circumstances of this case a new trial would be ordered since it was clear that on a fair consideration of the admissible evidence a jury could properly return a verdict adverse to the applicant."

In delivering the judgment of the court, Edun, J.A. quoted in □xtensor extracts from the transcript of the proceedings and at page 1689 I – 1690 A said:

> "It is quite clear to us from a consideration of the above extracts of the evidence that not only was the applicant effectively prevented from telling his story in his own way but that the jury were invited to disbelieve the defence. Not only did the trial judge make it impossible for defending attorney to do his duty in conducting the defence but what is more alarming is that the trial judge descended into the well of the court and 'slugged it out' with the defence."

[26] The abovementioned cases show how the court views interruptions and interventions by a judge. In the instant case, there is nothing to support the view that the trial judge conducted the proceedings in a manner that was unfair to the applicants. It is noted that the interventions by the judge were limited to the early segment of the examination-in-chief of the witness Powell. It may well be that the judge should have allowed counsel for the Crown to conduct the examination-in-chief without interruption. However, the questions that he posed were not aimed at taking sides. In addition, there was no interruption of the defence, and the applicant was allowed to tell his own story in his own way. The complaint is therefore without merit, and fails.

[27] The foregoing are the reasons for our decision announced on 7 May 2010 and set out at the commencement of this judgment.