JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 1/2015

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

CONROY PRINCE v R

Dwight Reece instructed by Reece & Reece for the appellant

Miss Sasha-Marie Smith for the Crown

28 July 2015 and 22 January 2016

SINCLAIR-HAYNES JA (AG)

[1] Mr Conroy Prince (the appellant) was tried and convicted in the May Pen Resident Magistrate's Court for the offences of assault occasioning actual bodily harm and unlawful wounding. He was accused of battering Fritz Frazer (the complainant), also known as "Keeno", with a piece of wood for allegedly breaking into his house. His defence was alibi. On 28 July 2015 we heard and allowed his appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal. We promised to put our reasons in writing. This is a fulfilment of that promise.

The Crown's version

[2] On 31 January 2010, at about 8:00 am, the complainant, whilst walking in the Sandy Bay community with some empty coal bags in his hand, saw the appellant on a field playing football. The appellant ran towards him. He, the complainant, did not know the appellant was going to hit him. As the appellant approached him, the appellant held his hand in the air and began hitting him with a piece of wood, which was about 7 feet long. He first noticed the wood when the appellant held it up to hit him.

[3] The appellant administered a blow to the left side of his head. In attempting to avoid the blow to his head, the complainant held up his left hand. The wood connected to his right hand and wounded same. The appellant accused the complainant of leaving Sandy Bay and returning to break his house. The complainant's evidence was that, in accusing him, the appellant said: "ah dead yuh fi dead". After that utterance, the appellant administered several blows to his left side. He was beaten on his upper and lower ribs. Terrified, he lay in excruciating pain.

[4] Mr Dwight (the appellant's relative) and Mr Tubby rescued the complainant from the appellant. He crawled to a shopkeeper called "Skinny Guy" and persons assisted him to the police station and to the hospital.

[5] Dr Sheldon Brown and Detective Sergeant Margaret Collins testified on behalf of the prosecution. Dr Brown confirmed that the complainant's injuries were consistent with blows inflicted by a blunt instrument and that he sustained a fracture to the

posterior aspect of his left 10th rib. Detective Sergeant Collins confirmed that the complainant reported the matter.

The defence

[6] The appellant, however, was adamant that he was nowhere near the complainant on the morning of 31 January 2010, nor was he in his company. He insisted that, at the material time, he was in the parish of Manchester. His grandfather had died and he was there with family members.

[7] He was supported by his uncle, Mr Garfield Bowes. It was Mr Bowes' evidence that his father had died in January 2010. The funeral, he said, was on either 30 or 31 January 2010. He testified that the appellant had taken leave and transported the family around before the funeral. He said he saw the appellant at the funeral. According to him, the appellant remained in his company.

[8] Assistant Commissioner of Police Leon Rose told the court below that the allegation was inconsistent with the person whom he had known personally since 2011. It was also his evidence that the appellant's record was exemplary and he had received commendation for efficient service.

[9] It was common ground that the appellant and the complainant had lived in close proximity to each other for more than 10 years before the complainant removed from the community. The appellant said it was 10 years whereas the complainant said it was over 12. The determining issue is therefore one of recognition. Scrutiny of the evidence in that regard is crucial.

[10] In respect of this issue, the learned Resident Magistrate (at page 35 of the record of proceedings) correctly said:

> "...Mr. Prince raised an alibi defence.
>
> Once such a defence is presented, the issue that comes to the fore is that of identification. Nevertheless, in this case, both the [appellant] and the complainant stated that each was known to each other for more than a decade. According to the complainant Frazer, at the time of the incident, he had known the [appellant] for over twelve (12) years. Mr. Prince indicated that he had known Mr. Frazer since the year 2000. This bit of fact is not in contention and in view of the [appellant's] alibi, what would emerge then is the question of recognition. As such, I warn myself that although recognition may be more reliable that [sic] identification, even when a witness claims to recognize an individual whom he knows, mistakes in recognition even of close relatives and friends are sometimes made. Neither has it escaped my attention that this [appellant], Mr. Conroy Prince, is not duty-bound to prove his alibi and I am also mindful of the fact that the burden of proof still resides with the Crown."

[11] Thereafter the learned magistrate analysed the evidence in respect of the appellant's credibility regarding his whereabouts at the material time. No further reference or analysis of the complainant's evidence regarding his ability to recognise the appellant was made.

The appeal

[12] Being aggrieved at the learned Resident Magistrate's treatment of the matter, the following ground of appeal was consequently filed on his behalf:

> "The verdict was unreasonable having regards [sic] to the evidence adduced."

[13] At the hearing of the appeal, the original ground was abandoned. Permission was sought and obtained for the appellant to argue the following supplemental grounds of appeal, filed on 24 July 2015. Ground 2 was however abandoned:

> "1. That the Learned Resident Magistrate arrived at her verdict relying on erroneous interpretations of the evidence and consequently erred in her findings of fact, namely, that the Appellant did not challenge aspects of the Prosecution's case.
>
> 2. That the learned Resident Magistrate failed to reconcile the differences between the medical evidence relating to the Complainant's injuries.
>
> 3. That the Learned Resident Magistrate erred in relying on the inadequate identification evidence led by the Prosecution."

Submissions

The court finds it convenient to firstly examine ground 3.

> **Supplemental ground 3 -** the learned magistrate erred in relying on the inadequate identification evidence led by the prosecution

[14] In respect of supplemental ground 3, it was Mr Reece's submission that although evidence was led as to the parties previous knowledge of each other, no other evidence was adduced in respect of the primary identification in support of the purported recognition. That is, no evidence was led in respect of:

> (a) the length of time of the attack;

(b) whether he saw the face of his assailant;

(b) the length of time the assailant's face was seen; and

(c) whether his view could have been impeded.

[15] Mr Reece submitted that the attack was sudden and unexpected. He pointed out that the complainant's evidence was that he first noticed the piece of wood when his assailant held it up to hit him. He argued that for a part of the time the complainant was being beaten, he would have lain on the ground terrified. Furthermore, he said, there was no evidence, as to whether the attacker was behind the complainant or whether he was able to see his assailant.

[16] He contended that the learned Resident Magistrate erred in failing to properly analyse the complainant's evidence relating to identification and that she failed to assess the inherent weaknesses in the prosecution's case. He complained that she relied solely on the complainant's prior knowledge of the appellant. He posited that, even in cases of recognition, the nature and quality of the identification evidence ought to be assessed and the learned magistrate failed to do so.

[17] Miss Sasha-Marie Smith, on behalf of the Crown, conceded that the learned Resident Magistrate's dealing with the issue of identification was deficient.

Analysis

[18] It is trite that the legal burden of proving the appellant's guilt rested completely with the Crown. Each element of the offences against him was to be proven beyond a reasonable doubt. Careful examination of the evidence by the learned Resident

Magistrate was therefore crucial, more so because the complainant was the sole witness as to identification and the danger in convicting on such evidence.

[19] The Privy Council and this court have repeatedly emphasised the need for judges dealing with matters of such nature to give comprehensible warning as to the danger of a mistaken identification. In the absence of a clear warning, a conviction which was obtained on uncorroborated identification evidence will not be sustained unless the circumstances were especially exceptional (see Lord Griffiths' statement in **Richard Scott and Another v The Queen** [1989] AC 1242, 1261).

[20] Lord Widgery CJ's statements, in the English Court of Appeal case, **Regina v Turnbull and Another** [1977] QB 224, which have been embraced by the Privy Council and this court (see **Junior Reid v The Queen** [1990] 1 AC 363), provide important instructions for judges dealing with controversial identification. The learned Chief Justice stated, at pages 228-229, as follows:

> "...First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have

> the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger..."

[21] The learned Resident Magistrate correctly recognised that although a person is well known to a witness, that witness might nevertheless be mistaken in his recognition. She, however, ignored the need to assess the weaknesses in the complainant's evidence in order to determine his ability to properly discern his assailant's face and hence the correctness of his identification.

[22] There was no evidence from the complainant whether he saw the face of his assailant and if he did, for how long he was able to view his face at any point in time. It was the complainant's evidence that he saw the appellant playing on the ball field with friends. There was however no evidence as to how long he viewed the appellant whilst he was playing, the distance he was from him, or how many persons were playing?

[23] The complainant's evidence was that the appellant came towards him, held up his hand and began hitting him. How far away was the appellant when he noticed him coming towards him? Was he able to see the person's face? He said he first noticed the piece of wood when his attacker held it up. Was he looking at his assailant's face at the same time or was he focusing on the piece of wood?

[24] His entire body, he said, became numb after the first blow which was to his head. Having been hit in the head, he held up his left hand. Was he cowering from further blows or was he looking at his attacker's face? Those questions remained unanswered.

[25] The complainant's evidence thereafter was that the appellant rained several blows to his left side. He said he was terrified, in pain as he lay on the ground in excruciating pain. He was also unable to tell the number of blows because of the pain he experienced.

[26] Dr Brown's evidence supported the complainant that he received blows to the left side of his forehead. He found a number of injuries to various parts of the left side.

His posterior (back) rib was also fractured. Apart from an injury to his anterior abdominal wall, the injuries were to his left side and back.

[27] Having received the first blow to the left side of his head, he took evasive action. Certainly his preoccupation during the attack was to recoil from the blows. It was his evidence that he was rescued from his attacker but was unable to say what became of him (his assailant) after he was rescued. This is understandable, given the terror and the pain he said he was experiencing. Any recognition of his assailant would therefore have been made under difficult circumstances.

[28] Did the prosecution, in the circumstances, discharge their burden of proving that it was the appellant who inflicted the complainant's injuries? That burden could only be discharged by the prosecution proving, beyond a reasonable doubt, that the complainant was in fact able to properly discern his assailant's face or to otherwise reliably recognise him.

[29] In light of the inherent weaknesses in the prosecution's case, the learned Resident Magistrate ought to have demonstrated that she gave herself a full **Turnbull** warning. Instead she failed to demonstrate that she had addressed her mind to the aforesaid weaknesses in the complainant's evidence of his purported recognition of the appellant.

[30] Significantly, the learned Resident Magistrate also ignored the fact that the complainant's evidence on that critical issue, of recognition, was not only tenuous, but uncorroborated. No attempt was made by her to indicate the exceptional circumstance

which permitted her to rely on the complainant's uncorroborated evidence of recognition in light of the clear danger which existed.

[31] The court was therefore in agreement with both Mr Reece's and Miss Smith's submissions that, in the circumstances, the prosecution had not discharged its burden of proving to the required standard that it were the appellant who inflicted the complainant's injuries. That burden could only have been discharged by the prosecution proving beyond a reasonable doubt that the complainant was in fact able to properly discern his assailant's face. Ground 3 therefore succeeded.

> **Ground 1 -** the learned magistrate arrived at her verdict relying on erroneous interpretations of the evidence and consequently erred in her findings of fact, namely, that the appellant did not challenge aspects of the prosecution's case.

[32] Mr Reece directed the court's attention to pages 11-12 and 20-22 of the record of proceedings which he submitted were in direct contradiction to the learned Resident Magistrate's assertions that the appellant did not challenge aspects of the prosecution's case. Cross examination of the complainant, he submitted, clearly demonstrated that the appellant had challenged the complainant's evidence. The heavy reliance which the learned Resident Magistrate placed on the lack of challenge, he said, resulted in her falling into error by arriving at findings of fact that the appellant had "labelled the Complainant as the person responsible for breaking into his home".

[33] He submitted that the appellant steadfastly maintained that he had heard of the break in and a name was called. His evidence however clearly indicated that he formed

no view which led him to label the complainant as being responsible. Again Miss Smith conceded. She agreed that the learned Resident Magistrate arrived at conclusions that were unsupported by the facts.

Analysis

[34] The learned Resident Magistrate correctly commented (at page 35 of the record of the proceedings) that:

> "Mr. Conroy Prince, [sic] is not 'duty-bound to prove his alibi and I am also mindful of the fact that the burden of proof still resides with the Crown.'"

She however contradicted that statement with the following statement (at pages 35-36 of the record) that:

> "At this juncture, I will assess the evidence in total [sic] commencing with the case put forward by the Crown. In his evidence, the complainant, having established that he was on a ball field in Sandy Bay, Clarendon, went on to say, 'I was walking - with the coal bags and I saw Mr. Prince running towards me.' As he continued his testimony, he asserted that after the beating had ceased, he (complainant) crawled onto [sic] the premises of a shopkeeper called Skinny Guy and; 'At the time I was on their [sic] premises, Mr. Prince was with his friends because he left me there.' Mr. Frazer further stated that while the beating was in progress, 'somebody came there and take [sic] him (Prince) off me. They were Mr. Dwight and Mr. Tuddy.' He added, 'After they pulled Mr. Prince off me, I don't know what happened to him.'
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> **The aforementioned aspects of Mr. Frazer's evidence I deem to be as damning as they were robust**. **but what I find more startling is that they were neither directly nor specifically challenged by the [appellant]. He basically left them undisturbed.** It did not miss me, that the [appellant] did put to the

> complainant that on the fateful day he [the appellant] was nowhere on the ball field in Sandy Bay, **but I still do not regard that as having directly countered the complainant's very pointed bits of testimony referred to earlier.**
>
> I note that [the appellant] did directly challenge the complainant's evidence that he had uttered the words, 'pussy yuh leave Sandy Bay, yuh come back and break mi house, ah dead yuh fi dead.' This specific contradiction was made notwithstanding [sic] that the [appellant] had also put to the complainant, 'at no time at all did Mr. Prince say anything to you that day.' **This bit of evidence which gave rise to two challenges,- one direct and the other general,-I deem to be just as strong as those which I discussed earlier which were left untouched. Hence the mind is left to ponder why those pieces of testimony were left intact, and I say this having regard to the issue of recognition.**" [Emphasis mine]

[35] The learned Resident Magistrate's statement, with due respect, is perplexing. The appellant's evidence was that he was nowhere near the complainant at the material time. The fact that he failed to specifically counter each of the complainant's assertions cannot be regarded as "damning". His alibi, if true, made it pellucid that he would not have spoken to the complainant that day. Further, we cannot fathom the learned Resident Magistrate's finding of contradiction in the fact that the appellant denied uttering the statements which were attributed to him by the complainant and his statement that he did not speak to the complainant that day. Her comment that those pieces of evidence were left intact is baffling.

[36] At the trial, it had been suggested to the complainant by counsel Mr Reece that it was "Sheldon, Fred and Pan Head" who had inflicted the blows to his body whilst he

(complainant) was in the vicinity of the football field. It was also suggested to him that the appellant was "nowhere near the football [sic] field in Sandy Bay". Both the appellant and his uncle, Mr Bowes testified that the appellant was at the material time in Manchester. They provided details of his movements and his whereabouts at the material time. Having testified that he was "nowhere near the foot ball [sic] field in Sandy Bay", what more was required in light of his alibi?

[37] It is trite law that there was no burden on the appellant to establish his defence of alibi. The burden remained with the Crown to negative the alibi. Evidently the forbidden was done. The immutable burden was shifted from the prosecution to the appellant.

[38] For the foregoing reasons, the appeal was allowed and the consequential orders (at paragraph [1] above) made. In light of the poor quality of the complainant's uncorroborated evidence as to identification, the court declined to order a retrial.