

C.A. Grumation - Gun Court - Tras @ Illegal possession of firearm @ Shooting  
with intent - Verdict - evidence - Identification  
whether verdict unreasonable and cannot be supported having  
regard to the evidence - whether substantial description evidence to  
which judge did not address his mind - Appeal allowed, conviction  
quashed, sentence set aside Verdict JAMAICA of acquittal entered.  
Observation Per curiam on duty of trial judge to assist unrepresented accused No case referred  
IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 78/88

BEFORE: The Hon. Mr. Justice Rowe, P.  
The Hon. Miss Justice Morgan, J.A.  
The Hon. Mr. Justice Gordon, J.A. (Ag.)

R. v. NETLEY PERRIER

Delroy Chuck for Appellant

Carol Malcolm for Crown

June 5 & 20, 1989

GORDON, J.A. (AG.)

On 28th March, 1988 the appellant and George Cameron were convicted in the Gun Court for illegal possession of a firearm and shooting with intent by Panton J. Leave to appeal was granted by the Court and on 5th June, 1989 after hearing submissions on his behalf by Mr. Chuck we allowed the appeal, quashed the conviction, set aside the sentence and entered a verdict of acquittal and undertook to put our reasons in writing. This we now do.

Senior Superintendent of Police Isadore Hibbert, his wife Sybil and their two grandchildren returned to their home in the hills of St. Catherine about 1:05 a.m. on 12th April, 1987. Alerted by the growling of his dogs as he drove through the gate, Superintendent Hibbert left his car with gun in hand and followed by his wife proceeded to the front door of their house. He opened the door and he and his wife returned to the car for the children who were sleeping.

Mr. Hibbert opened the rear door of the car and bent to take out his grand-daughter when he heard a voice behind him say "Don't move." Instinctively he looked around and saw 2 men standing by the gate column 6 to 7 yards away each armed with what appeared to be a shot gun pointed at him. He heard two explosions, felt something brush his hair and he threw himself on the ground and took cover behind the car. He heard 2 more explosions and his wife's voice shouting murder! help! police!. The witness remained quiet where he was on the ground and he heard a voice enquire "wha we must do now?" Another voice replied "Shoot the woman and go tek the gun off the man." Mr. Hibbert said he saw a man by the gate pillar discharge two shots at his wife who was then by the front door; he heard footsteps coming towards him and he sprang up and fired one shot at the man he saw approaching him and one shot at the man who had fired at his wife. The two men turned and ran off and he realised that there were actually three men running off. He ran to the door and pulled his wife inside the house. He realised then that there were more than three men running away. He activated the alarm system he had at his home to alert his neighbours.

The driveway where this incident took place was lit by four 75 watt and one 100 watt bulbs. By this bright light Mr. Hibbert said he saw and identified the man who approached him and the one who shot at his wife. He said the man who came towards him he knew as George Anthony Campbell o/c Cameron and the other man he knew as Calvin Burnett. Cameron was about six feet from him on the driveway when he jumped up and fired at him. The man who fired at his wife was by the column at the gate some 17 - 18 yards from his wife who was by the front door. The incident, he said, lasted 50 to 60 seconds.

Mrs. Sybil Hibbert corroborated her husband up to the point when the men said "Don't move" then she said: "I froze. Then I turned and looked to my left and in one sweeping glance I saw these

seven men lined out against the wall by my premises." She heard three explosions saw her husband fall and she screamed and ran to the house. She stood by the front door of the house and saw the men jumping up and down the wall with guns. She recognized Calvin Burnett jumping on the wall with a red handkerchief tied about his face. This fell to his neck. She heard a voice say "whe de man deh?" Another said "go tek the gun off the man." All this time she said she was looking at the men moving up and down. She "saw Cameron jump on the wall next to Calvin Burnett," Cameron then jumped on an old car parked nearby. She said the appellant was one of the men. He had a gun which he carried with great difficulty. Someone said "kill the woman." The appellant then moved towards her from the column by the gate where he had been standing with his gun pointing towards her. She then heard two shots. She went on "Mr. Hibbert jump up from beside the car and he fired two quick shots one at Cameron and one at the man in the green shirt." The man wearing the green shirt at trial was the appellant. In answer to the question "Where was Cameron when your husband fired at him?," she replied "on the wall and on the car". When her husband fired at the men they ran into the bushes. According to Mrs. Hibbert the appellant, in his approach to her, got to about nine yards from her.

Mr. Chuck obtained leave to argue one ground of appeal:

"The verdict is unreasonable and cannot be supported having regard to the evidence and the acquittal of one of the accused."

He particularised:

"In support thereof, the evidence against the appellant and the third accused Herbert Grant was substantially the same. For the learned trial judge to acquit Grant and to convict the appellant is inconsistent and would amount to a grave miscarriage of justice."

In reviewing the evidence Mr. Chuck submitted that the evidence against Grant and Perrier was contained wholly in the testimony of Mrs. Hibbert. She said while her husband was on the ground Grant "was one of those she saw pointing his gun at the spot where my husband was lying when I heard those shots." She saw from his head down to his waist. She had him under observation about five minutes. Of the appellant, she said:

"I saw his face and parts of his body because he was partly hidden by the column at first, but when he moved from the column - he has a peculiar stance, and I noticed his arms, his cheekbones and his arms how he held that gun, I had noticed his arms, I can never forget them."

She said from the time she first saw him until he left the premises about 3½ to 4 minutes passed.

Mrs. Hibbert identified the appellant and Grant at two Identification Parades held at Spanish Town on 9th July, 1987. She denied in cross-examination that she had had a pre-view of them at the C.I.B. office in Spanish Town on the 2nd June, 1987.

The learned trial judge dealt with the evidence against Perrier and Grant in this manner:

"So far as the accused Perrier is concerned I am satisfied that he was present at the scene and did participate as testified to by Mrs. Hibbert. I accept her evidence that he was about nine yards from her, that he moved towards her, that he had a gun that apparently gave him great difficulty to handle, that his arms and cheek bones and the manner in which he held the gun left a lasting impression on her mind. I note that at the identification parade he was identified although his hair had been covered at his request. I reject the suggestion that there was an improper identification in that on the 2nd of June, he had been brought face to face with Mrs Hibbert. So as far as the accused Grant is concerned I have noted that Mrs. Hibbert was quite positive in her identification of him. However as far as I can recall the evidence as to her means

"of identification of him, bearing in mind the apparently subsidiary role that he played, the evidence on that point to my mind was skimpy and looking at the picture painted in relation to him I cannot say, although the witness was positive, I cannot say that I am satisfied beyond reasonable doubt that there has been no mistake so far as the accused Grant is concerned and that being so he gets the benefit of the doubts that are in my mind."

At the invitation of the Court Mr. Chuck compared the evidence of Mr. Hibbert with that of Mrs. Hibbert as it related to the persons at whom Mr. Hibbert fired shots. Mr. Hibbert said when he jumped up from where he crouched beside the car he discharged two shots from his gun one at Cameron the other at the man who had shot at his wife. This man he said was Calvin Burnett. Mrs. Hibbert said when her husband "jumped up from beside the car he fired two quick shots, one at Cameron and one at the man in the green shirt." Perrier at the trial was wearing a green shirt.

This is a grave discrepancy. On the evidence there is no doubt that both witnesses knew George Cameron and Calvin Burnett. Mrs. Hibbert said she saw Cameron jump on the wall next to Calvin Burnett. Mrs. Hibbert said her husband fired at Cameron who was on the wall, and on the car, as also the man whom she identified as the appellant, who was approaching her on the driveway. Mr. Hibbert said he fired at Cameron who was in the driveway and Burnett who was by the gate.

We now look at the summing up to see how the learned trial judge dealt with this evidence:

"Yes, the essential issue for determination in this matter is the identification of the accused. The question posed, that has to be posed is, has each been accurately, properly and without assistance from the police or anyone else been identified as being among the persons who shot at Hibbert on the night in question. I take into consideration demeanour of the witnesses as they gave their evidence. Foremost in my mind also is the evidence

"as to lighting and the distance of each accused from both witnesses during the incident. I take into consideration the evidence relating to the behaviour of the men during the incident and the evidence as to the conduct of the identification parade. I find that Mrs. Hibbert witnessed the entire incident whereas her husband saw only a part. Specifically so because for some moments Mr. Hibbert was on the ground having as he said taken cover after the shooting had begun. There is no doubt in my mind on the evidence that I have heard that both witnesses Mr. and Mrs. Hibbert knew the accused Cameron before the incident and that they are speaking the truth and are not mistaken when they say they saw him with a firearm participating in the shooting that night, no doubt whatsoever in my mind on that."

Mr. Hibbert with 32 years of service in the Jamaica Constabulary Force had risen to the rank of Senior Superintendent. He was undoubtedly an experienced officer. At the time he was defending his family and himself by shooting at the assailants. He was not taking cover at the time he made his observation, but had risen to face them and he identified the persons at whom he fired. Nowhere in his summation did the trial judge address his mind to this glaring discrepancy between the testimony of the two witnesses and while it is open to the judge to decide on the credibility of witnesses and in so doing he may split the credibility of a witness it must be apparent on the record that his mind was adverted to all the circumstances which enabled this kind of assessment.

Mr. Chuck submitted that although Mrs. Hibbert was positive in her identification of the accused Grant, in so much so, that she said in cross-examination (which was conducted by Grant in person) that:

"A: Yes, I saw you.

Q: You see me, me?

A: Yes.

"Q: In what position you see me?

A: I saw you along the wall with the other men and you had a gun.

Q: Me have a gun?

A: Yes.

Q: You didn't see me, you know, Miss Hibbert?

A: I saw you.

Q: You didn't saw me.

His Lordship: Yes, any other questions?

The learned trial judge nevertheless rejected that testimony as being insufficient to prove positively the case against Grant. In those circumstances, said he, the unsupported identification evidence of Mrs. Hibbert against the appellant ought also to have been rejected. In any event in the light of the unexplained discrepancy between Mr. Hibbert and Mrs. Hibbert, there was no credible evidence to warrant a conviction of the appellant.

Miss Malcolm conceded that the discrepancy between Mr. Hibbert and Mrs. Hibbert was material to which the trial judge should have adverted his mind.

We welcomed the succinct response of Miss Malcolm and her refreshing candour. We find that there was indeed a substantial discrepancy in the evidence and the trial judge did not address his mind to it. We accept the submissions of Mr. Chuck as well founded and have arrived at the conclusion that the verdict of the learned trial judge adverse to the appellant cannot be allowed to stand.

Mr. Chuck observed that the trial judge could have been more helpful to the appellant in the presentation of his defence as he was, without personal fault, unable to obtain legal representation.

A trial judge is required to assist an unrepresented prisoner in the presentation of his defence. In our view merely to invite him to ask questions of a prosecution witness is not enough. The

8.

assistance extends to ascertaining what the prisoner seeks to establish and to assist him in formulating and asking relevant questions based on what the defendant discloses that he wishes to have probed.