

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 129 OF 2005

**BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE GLORIA SMITH, J.A. (Ag.)**

**REGINA
v
DAVIAN WATSON**

Dr. Randolph Williams for the Appellant

Miss Joan Barnett, Crown Counsel for the Crown

November 15 & December 14, 2007

HARRISON, J.A:

At about 6:40 pm on June 8, 2004 Dwight Perkins was shot and seriously injured in the right leg whilst walking along Barnett Lane, Montego Bay in the parish of St. James. He was hospitalized in the Cornwall Regional Hospital for approximately two weeks and six days. After a trial in the Western Regional Gun Court before Williams, J. the appellant was convicted on August 17, 2005 on an indictment containing two counts. On Count 1 which charged him with illegal possession of firearm, he was sentenced to a term of seven years at hard labour. On Count 2 which charged him with shooting with intent, he was sentenced to nine years imprisonment at hard labour. Both sentences were ordered to run concurrently. He applied for leave to appeal the convictions and the single judge granted him leave on the

basis that there were arguable grounds of appeal in relation to the identification of the appellant.

The original grounds of appeal were abandoned and permission was sought to argue supplemental grounds of appeal which was granted. These grounds challenged the quality of the identification evidence, the dock identification at the trial and the failure of the police to hold an identification parade.

The evidence adduced on behalf of the prosecution

The complainant testified that at about 6:40 p.m. on June 8, 2004 he was on his way to his home when the appellant accosted him along Barnett Lane also known as Railway Lane in Montego Bay. He had known him by the names "Futton" and "Leego" for a period of seven months and had first met him whilst they shared a cell in the police lock-up. After he was discharged from custody, he said that he had seen the appellant "a couple of times" on Railway Lane and also at the market on Saturday mornings.

In continuing the narrative, Perkins said that the appellant walked up to him whilst they were on Railway Lane and said to him: "man, you just shoot after me man, what you shoot after me for, man?" He told him that he "must sick" in his head. As he walked off the appellant said: "Man give me a thing". Perkins turned to him and said, "Man, you see sey you big and strong, man go work". They were about four feet from the street light and the appellant came and stood about two feet in front of him. He looked at his face and further recognized him by the tattoos that he had on his neck that

marked "Juk" and "Jah Jah". There was also a burn which he had recognized on one of the appellant's hand.

Perkins spun around and the appellant said to him: "man yuh dis me". He stepped off and he heard an explosion like a gunshot. When he turned around he saw the appellant with a short, shine gun in his hand. No one else was standing at the spot where he saw him. Some people who were around began to run and the appellant fired another shot at him which caught him in the right leg. He fell to the ground; rolled over and said to the appellant: "man what mi do you? Yuh ah kill mi lef me three youth?" The appellant did not reply and he fired two more shots at him as he lie on the ground. The appellant then walked away with the gun in his hand. He tried to get up and was unable to do so because his right leg was badly injured and was bleeding profusely.

The police arrived on the scene and he made a report to an officer. He told the police where his assailant could be found. He said he was sent off in an ambulance to the Cornwall Regional Hospital. After he was discharged from hospital he went to Freeport Police Station in Montego Bay on several occasions in order to speak to Sergeant Paul Simms, but discovered that he was transferred to Westmoreland. He was quite disturbed because he did not know which officer was dealing with the case.

Sergeant Paul Simms who was stationed at Montego Bay CIB, Freeport, said he was on mobile patrol duty on June 8, 2004 when he received a radio transmission at about 8:15 p.m. This caused him to proceed to River Bay Road which intersects with Railway Lane. On arrival he saw

Perkins lying on the roadway and was suffering from what appeared to be gunshot wounds to the back of his right thigh. Perkins made a report to him and he sent him off to the Cornwall Regional Hospital in a police radio car. He conducted a search of the area and found two bullets on Railway Lane but no spent shells were found. Later that night he visited Perkins at the hospital where he further spoke to him. He made two other visits to the hospital but did not see Perkins. He subsequently learnt that he was discharged from hospital.

Sergeant Simms began investigating a case of wounding with intent. He went to Railway Lane in search of a man known as "Leego" but he was not found. He said he was transferred to Westmoreland so he was unable to complete the investigations. He had handed over the case file with an interim report but he was unable to say to whom it was given. He saw Perkins again when he attended court as a witness in the trial of the appellant.

Under cross-examination, Sergeant Simms said Perkins had given him a name when he had visited him at hospital on June 8. He was of the opinion that the witness was told who had shot him but there was certainly no basis for him to have arrived at this conclusion. He further testified under cross-examination that he was not given a description of the assailant and that he tried to make contact with Perkins on at least five occasions but was unsuccessful.

On January 5, 2005 Constable Troy Powell was at Freeport Police Station, when Perkins came there and had enquired for Detective Sergeant Simms. He took over the investigations; collected a statement from Perkins

and prepared a warrant for the arrest of Davian Watson o/c "Futton". He made several visits to Railway Lane but was unable to locate the appellant.

On April 4, 2005 Constable Powell went to the lock-ups in Montego Bay where he saw and spoke to the appellant. He executed the warrant on him and when he was cautioned he said nothing.

Constable Powell said he had applied for the holding of an identification parade but for reasons unknown to him this did not materialize. He said he saw the need for an identification parade because he wished to satisfy himself that the appellant was the correct person who had shot Perkins. He had also informed Perkins of his intention to hold an identification parade. Perkins had called him several times about the parade but he was unable to inform him when it would be held.

The no case submission

A no case submission was made at the close of the Crown's case.

Counsel submitted inter alia, that:

- "(i) the circumstances relating to the identification of the appellant by Perkins on the night of the shooting were unsatisfactory;
- (ii) no description was given to the police of his assailant;
- (iii) no identification parade was held; and
- (iv) the complainant had identified the accused for the first time in court."

The learned judge ruled however, that there was a case to answer.

The defence

In his defence, the appellant made a brief un-sworn statement from the dock. He said he was living at 8A Barnett Lane, that he did not know the

complainant, he did not have a gun and he knew nothing about the shooting. He also said they had never met and that they had never exchanged any words.

Analysis of the submissions

The cross-examination of Perkins had elicited his denial of suggestions that he did not know who had shot and injured him. It reads at page 25 of the transcript:

"Q That you gave no information to the police as to who shoot you.

A. Repeat that again.

Q. You gave no information, no name, to any officer because you did not know who shot you.

A. Sey mi did not know who shoot mi?

Q. Yes, you never say nuh Futton shoot you.

A. Mr. Lawyer, that's why the officer try to draw card pon mi but him never know sey mi out a hospital before that.

HER LADYSHIP: You hear the suggestion the lawyer put to you? You need to answer. What you have said, he said you never told the police officer who shot you because you never know who shoot you.

WITNESS: Yes, Your Honour, I told the police who shoot mi.

HER LADYSHIP: When you told the police officer who shot you?

WITNESS: I told the police the same night, the 8th of June sey is Futton shoot me."

and at pages 26 – 27, it was further suggested:

"Q. In fact, I'm going to suggest to you that this man, him don't know you, him don't know you, you and him never talk any time for him to know you or for you to know him.

- A. Mr. Lawyer, I know this man for at least seven months."

Identification was therefore the live issue in the trial and it required careful consideration of the evidence by the learned trial judge. At pages 80 – 81 of the transcript she directed herself as follows:

"... this is the trial where the case against the defendant depends to a large extent on the correctness of the identification of him which the defence alleges to be mistaken.

I must, therefore, warn myself of the special need for caution before I can convict the defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification, and indeed there have been wrongful convictions in the past as a result of such mistakes. An apparent convincing witness can be mistaken and indeed witnesses will lie.

I remind myself to consider carefully the circumstances in which the identification was made. How long did the complainant say he had the defendant under his observation, at what distance? In what light? Did anything interfere with the observation and had he ever seen the person he observed before? If so, how often, and how long was it between this original observation and subsequent identification to the police? These are factors that I need to bear in mind.

I must remind myself of any specific weakness which appears in the identification evidence, and indeed what is stated by the witness, the fact that the complainant said he gave the name of his attacker to Officer Paul, as he calls him, who turns out to be Detective Sergeant Simms, the said night at Railway Lane ..."

The learned judge had also carefully warned herself about the absence of an identification parade. She said at page 84:

"... Constable Powell indicated that it was only an alias that he was given but he was able to connect

the alias with a name, based on information given to him by the complainant. **The accused was not placed on an identification parade. It would certainly would have been the best and surest way of confirming that 'Futton' was the same person of whom the complainant speaks, and is the same person who Constable Powell arrested and brought before the Court. ..."**

(emphasis supplied)

She continued:

"... The Court is aware that while the identification parade may have been the best way in connecting the accused to the alias, I have before me a complainant who comes to this court and positively identified this accused as the said man. He identified him he says, not only from his face, but from his neck and hands. He says there was streetlight in the immediate vicinity of the incident. He said that this person was no stranger but someone he recognized, and I remind myself in cases of recognition, the warning is even so necessary as persons will make mistake in recognizing even close relatives. The complainant said it was over a distance of two feet for a period of two minutes as they stood face to face in conversation. He was able to observe his assailant. Mr. Perkins was a convincing witness but they too can be mistaken.

After careful consideration taking into account the circumstances, the discrepancies and the flaws in the Crown's case, I am left in a position, where I find that, Mr. Perkins is not lying, and he is not mistaken when he says that this is the man who accused him of shooting at him, asked him for money and then shot him. Accordingly, I find Mr. Watson, guilty on this indictment for which he has been charged"

(emphasis supplied)

Dr. Williams, who appeared for the appellant submitted that the live issue in the trial was whether the appellant was the person who had shot and wounded Perkins on June 8, 2004. He submitted that:

- (a) there was no evidence from the complainant as to how long the appellant and himself had been together in custody;
- (b) there was no evidence as to the "character of passing" whilst they were in the lock-ups or when he had seen the appellant in the market;
- (c) the complainant had only told the police that it was "Futton" who had shot him but he had given no description of his assailant to the police;
- (d) in cross-examination it was put to the complainant that he did not know the appellant, they had never spoken and that he had not seen the appellant on the night of the incident;
- (e) in his statement from the dock the appellant had denied knowing or ever meeting or talking to the complainant; and
- (f) no identification parade was held.

Dr. Williams submitted that in the circumstances, an identification parade ought to have been held since this would have tested whether the complainant really knew the appellant. He argued that the failure to hold the parade had denied the appellant the facility to demonstrate that he was known by Perkins. He referred us to ***Goldson (Irvion) and McGlashan (Devon) v R*** Privy Council Appeal No. 64 of 1994 delivered March 23, 2000 and now reported at (2000) 56 WIR 444. That case held:

- (a) That in cases of disputed identification an identification parade ought to be held where it would serve a useful purpose.

- (b) That no useful purpose would be served if it is accepted, or is incapable of serious dispute, that the accused is known to the identification witness.
- (c) Where the issue of identification turns on the credibility of the identification witness, the failure to hold such parade does not necessarily result in a serious miscarriage of justice, provided that the trial judge adequately directs the jury.

Dr. Williams finally submitted that the circumstances surrounding the identification of the appellant were such that the correctness of the identification was not supportable.

In her reply to Dr. Williams' submissions, Miss Barnett submitted that the failure of the police to hold an identification parade would not have been fatal in this case. The evidence she said, showed clearly that the appellant was known to the complainant. Furthermore, the tattoos and burn marks were "special marks" which had aided him in recognizing the appellant. She submitted that these marks were unique to the appellant and when all of the circumstances are considered, this would have rendered an identification parade unnecessary.

Miss Barnett referred us to page 5 of *Goldson's* case in support of her submissions. Lord Hoffmann said inter alia:

"... On the other hand, Mr. Thornton accepts that if the accused is well known to the witness, an identification parade is unnecessary and could, for the reasons already given, be positively misleading ..."

and at page 9 the Law Lord said:

"Mr. Thornton submitted that the judge should have given the jury a specific direction about the absence of

an identification parade and the dangers of a dock identification. But their Lordships consider that in the present case such directions were unnecessary. The judge told the jury that they should first consider whether Claudette Bernard was a credible witness. If they thought she was lying, the accused had to be acquitted. This appears to their Lordships to be sufficient, because if she was not lying, it would follow that there had been no need for an identification parade and the dock identification would have been purely formal confirmation that the men she knew were the men in the dock ..."

There is, we think, much force in the submissions made on behalf of the Crown. We agree with Miss Barnett on her assessment of the evidence which clearly established in our view that the recognition of the appellant was:

- (i) By sight in addition to the tattoos on his neck and the burn on his hand;
- (ii) By prior knowledge of the appellant. The complainant had known him for a period of seven months before the incident;
- (iii) By close contact. They had shared a cell whilst they were both in custody;
- (iv) By encounter. He had seen him on other occasions after his discharge from custody;
- (v) By the lighting conditions which were good; and
- (vi) By the relatively short distance between them when he was shot.

It is further our view, that as between the complainant and the appellant the learned judge had properly considered the credibility issue. She said she had taken into account the discrepancies and "flaws" in the Crown's case and found at the end of the day that Perkins was a truthful witness. On

a whole we find that the directions that were given by the learned judge cannot be faulted.

Conclusion

For the reasons we have endeavoured to set out, we are of the view that the identification evidence of the complainant was exceptionally good. The dock identification and the absence of an identification parade did not result in a miscarriage of justice. It is our view, that the appellant was properly tried and convicted and we can find no reason to interfere with the verdicts in this case.

The appeal is therefore dismissed and sentence is to commence as of November 17, 2005.