NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 206/2001

BEFORE: THE HON. MR. JUSTICE HARRISON, JA
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, JA (Ag.)

KERRICK THOMPSON v R

Leroy Equiano for the appellant
David Fraser, Deputy Director Public Prosecutions and
Tara Reid , Assistant Crown Counsel for the Crown

July 19, 20~~04~~ December 20, 2004

SMITH, J.A.:

Kerrick Thompson, the appellant, was convicted on the 30th August, 2001 of illegal possession of a firearm (Count 1) and shooting with intent (Count 2) by D. McIntosh J sitting in the High Court Division of the Gun Court in Kingston. He was sentenced to imprisonment for 10 and 15 years respectively.

On June 8, 2004 the appellant was granted leave to appeal by a single judge on the ground that the trial judge failed to demonstrate that he was mindful of the ***Turnbull*** warning.

On July 20, 2004 we dismissed the appeal and affirmed the convictions and sentences. We ordered that the sentences should

commence as of the 30th November, 2001. The following are our reasons for dismissing the appeal.

The Prosecution's case in outline

On the 12th May, 2000 about 4:00 p.m. Sgt. Carlos Bell and Constables Evon Blake and Errol Thompson were on mobile patrol in an unmarked service vehicle driven by Sgt. Bell. As they travelled slowly along Payne Avenue they saw two men standing in a track off the main road. The conduct of these men aroused the suspicion of the police officers. Sgt. Bell stopped the vehicle. Constables Blake and Thompson alighted therefrom. Constable Blake shouted "Police" as they approached the men. One of the men pulled a firearm from his waist and fired in the direction of the approaching officers. The police returned the fire and the men ran in opposite directions. A firearm fell from the hand of one of the men. This man who was dressed in blue and white shirt and a white pants ran into a lane. Constable Blake picked up the firearm. It was a .38 Taurus revolver. The officers eventually returned to the vehicle. There they saw the appellant who was dressed in blue and white shirt in the custody of Sgt. Bell. Constable Blake told Sgt. Bell in the presence and hearing of the appellant that the appellant had fired at him. The appellant did not respond to the accusation. Constable Blake observed that the appellant had an injury.

Sgt. Bell told the Court that after Constables Blake and Thompson alighted from the vehicle he drove to the entrance of a lane and parked the vehicle. As he came out of the vehicle he heard gunshot explosions. He then saw the appellant running along the lane coming towards him. The appellant was dressed in blue and white shirt and white pants. Sgt. Bell said that he stopped him and asked him what was the matter. The appellant replied: "The woman them tell me to run boss, is not my gun". "What gun? the Sergeant enquired. He got no answer. Shortly after he saw Constables Blake and Thompson coming from the same lane. They told him that the appellant had fired at them, they returned the fire and he dropped the gun and ran. A.38 Taurus revolver with five cartridges and one spent-shell was handed to Sgt. Bell as the gun which the appellant had.

Detective Corporal Latibeaudiere testified that on the 12th May, 2000 about 5:00 p.m. the appellant was taken to the police station and handed over to him. He also received a .38 Taurus revolver with four cartridges and one spent -shell.

At the end of his investigation he charged the appellant with illegal possession of firearm and shooting with intent. After he was cautioned the appellant said:

"Officer me never fire any shots".

Under cross-examination he said that the appellant's hands were swabbed after he had returned from the hospital. The swabbing was done by a Detective Sgt. Forbes who retired shortly after. There is nothing to indicate that the swabs were sent to the expert.

The Defence

The appellant gave evidence on oath and called two witnesses. The appellant testified that on May 12, 2000 at about 3:30 p.m. he was walking along a lane which leads off Payne Avenue. Many people, he said, including children, were on the lane at the time. He had his baby nephew Jordan Townsend in his arms. He described what happened then in this way:

> "I started to see gunshots start flying and bare people start to run and I start to run too and the baby drop out of my hand and buss his head."

After explaining how he came to take the baby in his arms he continued:

> "When I start to run I see something through mi leg and I start to run fast and hard and when I see a police at the top of the lane lean up right on his car and I run to the policeman and said 'Sir, them a shoot after people and shoot me on my foot, I don't know who fire the shot' and he tell me to lie down and gwaan easy".

He denied having a firearm in his possession. Annette Smith a hairdresser gave evidence on behalf of the appellant. She had known the appellant for over three (3) years. At the time of the incident she was in her hairdressing salon which is on Uganda Drive a lane off Payne Avenue.

She said that the lane was crowded with people at the time. She heard something and went to her gate. From there she saw a police jeep with four policemen therein. Two policemen jumped out of the jeep and rushed up to the two men who were standing in the lane. The policemen beat them and questioned them about a gun. A baby fell from the arms of one of the men. She heard an explosion and heard someone say "don't kill him".

Annette Cunningham, also a hairdresser was in the company of Annette Smith. She told the court that she heard gunshot and heard someone shout "Police! Police"!. She saw the appellant and three other men in the lane. The appellant had a baby in his arms. The three men ran off. A policeman accosted the appellant and questioned him about the men who had run off. Other policemen joined them. The policemen struck the appellant and the baby fell from his arms. She said the police shot the appellant in the face. They put the appellant and the baby in a police vehicle and drove off.

Grounds of Appeal

Mr. Equiano argued two grounds on behalf of the appellant -

(1) The learned judge failed to give the appropriate ***Turnbull*** warning.

(2) The sentence of the Court was manifestly excessive.

Identification – The Turnbull warning

It is now trite law that whenever the case against an accused depends wholly or substantially on the correctness of the identification 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. He should also instruct them as to the reason for the need for such a warning and as to the possibility that a mistaken witness can be a convincing one. This is known as the **Turnbull** warning. In a case such as the instant one where the judge sits without a jury in the Gun Court, the judge is required to warn himself expressly: see ***R v Gerald Cross*** [1999] 31 JLR 228; ***R v Locksley Carroll*** SCCA No. 39/89 delivered 25th June, 1990 and ***R v Kirk Manning*** SCCA 43/99 delivered 20th March 2000. In ***Cross*** the Court held that the failure of a trial judge to demonstrate in the summation that the need for caution is appreciated when visual identification is relied upon will result in the conviction being quashed.

Mr. Equiano submitted that the case against the appellant was based on the correctness of the visual identification of the appellant by Constable Blake and as such a ***Turnbull*** warning was necessary. The issue, he said, was whether Constable Blake was correct or mistaken in his identification. Mr. Fraser, the Deputy Director of Public Prosecutions, contended that the learned trial judge adequately directed himself. He

submitted that while it is acknowledged that as a general rule a ***Turnbull*** warning should be given, in some cases where the main issue is credibility, there was no need for a judge to expressly warn himself of the special need for caution. He submitted that ***Beckford and Others v R*** [1993] 97 Cr. App R. 409 should be read in the light of ***Shand v R*** [1996] 2 Cr. App. R204. He also relied on ***Wayne Watt v R*** [1993] 42 W.I.R 273, ***R v Oakwell*** [1978] 1 WLR 32 and ***R v Farquharson*** [1993] 43 W.I.R 305.

In the ***Beckford*** case the Privy Council stated that even if the sole or main issue is the credibility of the identifying witness that is whether his evidence is true or false as distinct from accurate or mistaken, a general warning is nonetheless required in identification cases. However, the Board did recognize that there may be rare cases involving recognition where the ***Turnbull*** caution may not be required.

In ***R v Oakwell*** (supra) one of the complaints was that the ***Turnbull*** guidelines were not applied to the identification problem. About the complaint Lord Widgery CJ said (p.36):

> "To start with it was something of a surprise to the court to realize that any identification problem arose in this case at all. But further investigation shows that it amounts to this. There was a period when P.C Tapson was on the ground when he had not got the defendant in his sight, and the suggestion is that there may have been confusion in P.C. Tapson's mind between the man who knocked him down and the defendant who was standing up beside him when he got up again. This is not the sort of identity problem which ***Reg v Turnbull*** is really intended to cope

> with. ***Turnbull*** is intended primarily to deal with the ghastly risk run in cases of fleeting encounters. This certainly was not that kind of case."

In the instant case the learned trial judge was clearly of the view that no identification problem arose and that there was no need for a ***Turnbull*** warning. After rejecting the evidence of the appellant and his witnesses he said:

> "On the other hand this Court finds the prosecution witnesses to be witnesses of truth. And this court finds beyond all reasonable doubt that on the 12th day of May 2000 in the Payne Avenue area of Olympic Gardens while on patrol the police party saw a group of men and went towards these men. That the accused man had a firearm. That firearm is the firearm now in evidence in this court. That the accused man fired at the police officers who returned the fire. And the accused was in turn hit by the return fire of the police as he attempted to run. He dropped his weapon which was recovered by the poice. He subsequently ran straight into the waiting arms of Detective Sergeant Bell, who held him until the other police arrived. There is no doubt about the identification of the accused, because he was dressed in the same manner as the person who fell (sic) and probably described and recognized by the persons whom he had shot at..."

According to Mr. Equiano the identification problem arose because the Constables lost sight of the men, they did not know the men before and they saw the men for only a short time. Further he said the Constable's identification of the appellant seemed to have been based on the blue and white shirt he was wearing. The evidence of Constable

Blake is that the appellant ran into the lane and he lost sight of him. The Constable said he picked up the gun which fell from the hand of the appellant and with Constable Thompson he returned to the police vehicle. His evidence is that it was about two minutes after he lost sight of him that he again saw him – this time in the custody of Detective Sgt. Bell. We agree with Mr. Fraser that given the short time between the shooting incident and when the appellant was seen in the custody of Sgt. Bell, the evidence as to his clothing is a significant feature of the recognition of the appellant.

The presence of the appellant was not disputed. The issue therefore, is whether he was involved in the shooting. In this regard the unsolicited words attributed to the appellant by Sgt. Bell, whose evidence the judge accepted, are important as they tend to support the policeman's evidence that the appellant was the one who fired at him and dropped the gun.

In our view the quality of the evidence was such as to eliminate the danger of mistaken identification. As was said in the ***Oakwell*** case this is not the sort of identity problem which ***R v Turnbull*** is really intended to cope with. We think that the learned trial judge having found that the witnesses for the prosecution were truthful the only conclusion he could reach was that the appellant was guilty.

Counsel complained that the sentences were manifestly excessive. We do not share that view. Both offences are punishable with imprisonment for life. The learned judge took into consideration the fact that the appellant had no previous convictions. We can find no reason to interfere. Indeed, after the sentences were passed defence counsel expressed his approval.

Accordingly, we dismissed the appeal and made the order referred to at the outset.