

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 89/2009

**BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)**

DAMION WALKER v R

Miss Tamiko Smith instructed by Frater Ennis and Gordon for the appellant

Adley Duncan for the Crown

ORAL JUDGMENT

9 October 2014

BROOKS JA

[1] On 27 October 2005, at about 10:00 pm, Mr Dean Reid, a vendor, was sitting at his stall at the corner of Hearne Avenue and Herrick Avenue in Duhaney Park in the parish of St Andrew when a motor cycle with two men aboard drove up. He saw the motor cycle stop nearby and noticed that the pillion rider was someone whom he knew before as Bruno. He called Bruno's name, but the response from Bruno was to shake his head, pull a firearm from between himself and the driver of the motor cycle and fire several shots at Mr Reid.

[2] One of those shots hit Mr Reid on the arm and caused a wound. He ran from his attacker and made good his escape. After hearing the bike move away, Mr Reid emerged from hiding and eventually made a report to the police. He was taken to the hospital where he was admitted and treated.

[3] The appellant, Mr Damion Walker, who accepted that he is known by the name Bruno, was arrested almost three years later, despite the fact that a warrant had been prepared for "Bruno's" arrest shortly after the shooting had occurred. He was tried in the High Court Division of the Gun Court and, on 10 July 2009, was convicted of the offences of illegal possession of firearm and wounding with intent. The trial was before Beckford J, sitting without a jury.

[4] The learned trial judge, on 17 July 2009, sentenced Mr Walker to eight years imprisonment in respect of the count of illegal possession of firearm and to 18 years imprisonment in respect of the count of wounding with intent.

[5] At his trial, Mr Walker accepted that he and Mr Reid knew each other and that they would talk together from time to time. He, however, denied that he was on a motorcycle in Duhaney Park on 27 October 2005 and denied being present when Mr Reid was shot. He testified that when that shooting took place, he was at Dam Head in the parish of Saint Catherine.

[6] The main issues raised at the trial were, therefore, identification by recognition and alibi.

[7] Mr Walker applied to this court for permission to appeal against his conviction and sentence. His application was first considered by a single judge of this court, who having reviewed the matter, was of the view that the learned trial judge's directions on the issue of alibi, should be considered by the full court. The single judge, therefore, granted permission to appeal against conviction and sentence.

[8] Before this court, Miss Smith, on behalf of Mr Walker, submitted that there was no basis to complain about the learned trial judge's direction to herself on the issue of identification by recognition. Learned counsel, therefore, focused on the issue of alibi as it had been identified by the single learned judge.

[9] Miss Smith submitted that the issue of alibi was one which required the learned trial judge to specifically remind herself that it was for the Crown to disprove the alibi of a person charged. This, Miss Smith submitted, the learned trial judge did not do, to the extent that this court could be satisfied that she had a proper appreciation for that principle. Learned counsel submitted that in those circumstances, the directions given by the learned judge to herself were, therefore, defective. Miss Smith cited a number of cases in respect of the issue of alibi and the directions to be given. These included **Mills, Mills, Mills and Mills v R** (1995) 46 WIR 240 and **R v Samuel Lindsay and Another** (1996) 33 JLR 492.

[10] Mr Duncan, for the Crown, in responding to those submissions, correctly pointed out that the cases cited by counsel for Mr Walker all dealt with jury trials. Mr Duncan

indicated that the authorities showed that where a judge is sitting without a jury there is a different standard to be used as opposed to when a judge is sitting with a jury.

[11] Learned counsel accepted that although a judge sitting alone is deemed to know the law, the judge is also required to demonstrate that she has applied the relevant law to the particular case. He submitted, however, that the transcript revealed that the learned judge did apply the relevant law to the facts.

[12] We have considered the submissions of both counsel and we agree with Mr Duncan. We have identified two places of the transcript in which the learned trial judge specifically addressed the issue of alibi. The first is at pages 99 -100 of the record and the second at page 106. There was also an important intervening portion, to which we shall make reference.

[13] At page 99 -100 the learned trial judge said:

“So, clearly his defence is one of alibi and I am aware that an alibi. [sic] False alibi, is sometimes generated for various reasons. Maybe it is to bolster a genuine defence, but this is what he says, the reason he gave. This is his reason.”

[14] Having set out what Mr Walker’s alibi was, the learned trial judge then reverted to the prosecution’s case. She said later, at pages 100-101:

“When I go back to the complainant’s evidence, he was cross-examined. He agreed that he and the accused never had any quarrel....”

She then assessed Mr Reid’s testimony and demeanour, including, at that time, a full **Turnbull (R v Turnbull (1976) 63 Cr App R 132; [1976] 3 All ER 549)** direction. The

learned judge then revealed her acceptance of the prosecution's case on the point of identification. She said at page 105:

"The question of identification is, to my mind, clear and resolved on the evidence of the complainant. He was not shaken on cross-examination. His evidence was clear and unequivocal. This is a man I am satisfied he is making no mistake."

[15] In reverting to and assessing the prosecution's case, the learned trial judge demonstrated that she recognized that it was for the prosecution to disprove the alibi of the accused person. The prosecution does so, of course, by convincing the tribunal of fact that the accused was where the prosecution says that he was. Having considered both cases, the learned trial judge at page 106, again addressed the issue of the alibi. She said as follows:

"I reject totally the evidence of the accused Damion Walker. I appreciate that his evidence, his defence is one of alibi but I do not accept it, I reject it. I find that he was discredited in relation to his alibi. It was not supported and I do not accept it.

I find that the prosecution, through the witnesses has satisfied me that there was a firearm, that the accused, Damion Walker, otherwise called 'Bruno' was in possession of that firearm, that he did discharge the firearm and cause a wound to the complainant, Dean Reid. I find him guilty as charged."

[16] Based on those directions and conclusion by the learned trial judge, we do not agree with Miss Smith that the directions, in the circumstances where the judge was sitting alone, were so inadequate that it resulted in a miscarriage of justice. We, therefore, find no reason to disturb the conviction and as a result the order should be

that the appeal is dismissed and the conviction and sentence affirmed. The sentence should be deemed to have commenced on 17 July 2009. And we so order.