[2013] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 39/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

SHELDON WHYTE v R

Delano Harrison QC for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Yanique Gardener for the Crown

17, 20 December 2012 and 18 January 2013

DUKHARAN JA

[1] The applicant was convicted on an indictment in the High Court Division of the Gun Court on 19 February 2010 of the offences of illegal possession of firearm and robbery with aggravation. The first count charged that he (the applicant) on 7 August 2009 in the parish of St Catherine unlawfully had in his possession a firearm not under and in accordance with the terms and conditions of a Firearm User's Licence. Count two charged him on the same day with robbing Patrick Thomas of a laptop computer valued at $60,000.00 He was sentenced to five years imprisonment on each count with the sentences to run concurrently.

[2] An application for leave to appeal against conviction and sentence was considered by a single judge of this court who refused leave. This is a renewal of that application.

[3] We heard arguments on 17 December 2012 and reserved our decision to 20 December 2012, when we gave the order outlined in paragraph [21] herein. We promised to give written reasons. These are our reasons.

Prosecution's Case

[4] The relevant facts are that on 7 August 2009 at about 11:30 pm the complainant, Mr Patrick Thomas, was walking along a road in Palmetto West, Passagefort, St Catherine. Whilst walking, he saw the applicant whom he did not know before, coming towards him from a side road. The complainant said that the applicant was wearing a camouflage peak cap and dark jeans. The cap was positioned at his hairline or on his forehead. He said he was able to see him as two streetlights were brightly lit on either side of the road.

[5] The complainant said that the applicant came to within touching distance, pointed a gun resembling a 9mm in his face and said "Gimmie this bag on yuh shoulder." Having relieved him of his bag containing his laptop computer, the applicant walked backwards about 34 feet and left the area.

[6] The complainant described what he said was a 9mm as he was trained to use those guns, and he would see policemen with similar guns. Mr Thomas said that the incident lasted about 20 to 25 seconds and he was able to observe the

applicant's face for about 15 seconds. He subsequently made a report at the Waterford Police Station.

[7] On 4 September 2009, at about 8:30 pm the complainant said he was driving through Passagefort with a friend when he saw the applicant wearing the same cap he was wearing at the time of the incident on 7 August 2009. He was in the company of three others. He stopped his vehicle and observed the applicant. He called the police who came about 15 minutes later and apprehended the applicant. In the presence of the applicant, the complainant identified him as the person who had robbed him of his laptop computer on 7 August 2009. The applicant did not respond. He was subsequently arrested and charged for the offences. On caution he said, "Officer from me born me never rob a man yet."

[8] The applicant in an unsworn statement said that he was 18 years old and innocent of all charges.

Grounds of Appeal

[9] Mr Delano Harrison QC, for the applicant, abandoned the original grounds, sought, and was granted leave to argue supplemental grounds which are as follows:

> "1. In light of the fact that identification was the live issue in the case, the Learned Trial Judge erred in that he plainly treated the complainant's evidence that, on 4 September 2009, he saw the applicant, at the time wearing a camouflage hat/cap, as buttressing

his identification of the applicant as his assailant who, he testified, was wearing a camouflage hat/cap at the material time, on 7 August 2009, one month previously (pages 9; 25; cf. pages 44; 49).

2 As respects the live issue of identification in the case, the Learned Trial Judge erred in his failure to actually determine, as a finding of fact, which of the complainant's two inconsistent accounts he accepted - in relation to the precise position of the hat/cap on the assailant's head at the material time: The material headgear had **a peak** which was then (i) **at** the assailant's forehead (page 9), the hairline of the forehead being indicated (pages 40;41); (ii) **pulled down over** [assailant's] forehead (page 20; cf, pages 40-41; 43; 50, emphasis supplied).

3. The verdict is unreasonable having regard to the evidence."

Grounds 1 and 2

[10] Mr Harrison submitted that the learned trial judge identified the plain inconsistency in the complainant's evidence respecting precisely where on the assailant's head the camouflage hat or cap was as an area of weakness in the evidence of identification. However, the learned judge continued his summation by saying "[The complainant] said that when he saw the [applicant] again almost a month later the [applicant] was wearing the same cap." He further submitted that identification by way of hat or cap was fraught with danger as there was no evidence of any mark or other features of identity peculiar to the hat or cap of 7 August 2009 save for its military-style coloration. He further submitted that the learned trial judge fell into error by his plain reliance on the evidence of the hat or

cap the applicant was seen wearing on 4 September 2009, as constituting material fit for the purpose of determining the correctness of the identification evidence.

[11] Mr Harrison submitted that the test of the quality of visual identification evidence is not whether the evidence is very credible and cogent as the learned trial judge found but whether it was correct. He further submitted that the issue of the precise position of the peak of the cap on the assailant's head at the material time was crucial for purposes of the identification of particularly a stranger. If the peak of the cap was pulled over the forehead, it would more than likely cover the face.

Ground 3

[12] Mr Harrison submitted that although the road on which the complainant was robbed was brightly lit, the unexpected attack frightened him. He saw the assailant's face for about 15 seconds. This was someone he had never seen before and was approaching him sideways. He further submitted that on the basis of the submissions on all three grounds taken cumulatively, the conviction of the applicant ought to be quashed.

[13] It was submitted by Miss Gardener for the Crown that the learned trial judge was merely recounting the evidence presented by the Crown as to the inconsistency of the position of the cap on the applicant's head. It was further submitted that the actual consideration of the identification evidence relied on by the learned trial judge occurred at page 50 in his summation, when no mention is

made of the cap of the applicant being the same cap of 4 September as assisting, whether explicitly or implicitly, in buttressing the identification of the applicant.

[14] Miss Gardener submitted that should this court find merit in the submission of the applicant that the learned trial judge placed reliance on the identification evidence, there was ample and substantial evidence in other aspects of the identification circumstances to support the learned trial judge's conclusion. Counsel further submitted that this would be an appropriate case for the application of the proviso, as there has been no miscarriage of justice.

Analysis

[15] The main issues for determination by the learned trial judge were credibility and the correctness of the identification of the applicant. Where identification is a live issue, a trial judge ought to be guided by the **Turnbull** guidelines. In ***R v Turnbull*** [1976] 3 WLR 445 it has been held that the judge should deal adequately with the strengths and weaknesses of the identification evidence. The essential requirement is that the weaknesses should be critically analysed where this is appropriate.

[16] The learned trial judge identified the issues and gave himself the necessary warnings under the **Turnbull** guidelines. The question is, did he relate the facts of this case to those guidelines?

[17] In his summation the learned trial judge identified an area of weakness in the evidence of identification (page 49). However, in assessing the quality of the complainant's evidence he said:

> "Now, what view do I take of the witness Patrick Thomas. I find that Mr. Thomas gave very credible and cogent testimony, that he was not phase [sic] on cross-examination because when he answered counsel that the cap was pulled down, he said that the cap was pulled down over the forehead. What he had said in Examination-in-Chief that the peak [sic] pointed on the forehead."

[18] The precise position of the peak of the cap on the assailant's head at the material time was crucial for the purposes of the identification. The complainant was seeing his assailant for the first time on that night, albeit under streetlights. The learned trial judge preferred the complainant's evidence in chief that the peak of the cap was merely "at the front - at the forehead". However, in cross-examination the complainant had said that the peak of the cap was pulled down over the forehead. This was a material inconsistency and no reason was given by the learned trial judge in resolving this inconsistency.

[19] The focus of identification was this camouflaged cap worn by the applicant. There were no other distinguishing features in identifying the assailant.

[20] The Crown has asked this court to apply the proviso, as in all the circumstances there has been no miscarriage of justice. However, in our view, the identification of the applicant cannot be said to be satisfactory. There is no other evidence linking the applicant to the offences charged. In our view, it would be unsafe to uphold the convictions.

[21] Accordingly, the application for leave to appeal was granted. The hearing

of the application was treated as the hearing of the appeal. The appeal was allowed, the convictions were quashed and the sentences were set aside. A judgment and verdict of acquittal was entered.