[2014] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 91/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

KEVIN WILLIAMS v R

Everton Bird for the applicant

Miss Claudette Thompson for the Crown

24, 25, 26 February and 2 May 2014

BROOKS JA

[1] The applicant in this matter, Mr Kevin Williams, was convicted before Sykes J on 10 October 2011 in the High Court Division of the Gun Court, for the offences of illegal possession of firearm and shooting with intent. On 30 November 2011, he was sentenced in respect of these convictions to 10 and 12 years imprisonment, respectively. The sentences were ordered to be served concurrently.

[2] The convictions arise from evidence that was led before the learned trial judge that Mr Williams and two other men were standing together inside premises at Jones Avenue, Spanish Town, in the parish of Saint Catherine, when two police officers,

Constables Moore and Sweeney, approached them. It is said that two (Mr Williams being one of them) of the three men, produced guns and opened fire at the officers. Although the police officers returned fire at the men, all three ran and made good their escape. This event is said to have occurred on 11 July 2009 at about 6:15 am. Mr Williams turned himself in to the police station later that morning, he having heard that morning, he said, that they wanted to speak with him.

[3] The main issues that were joined before the learned trial judge were those of identification and credibility. Although Constable Sweeney claimed to have known Mr Williams before the morning in question, that prior knowledge, as well as his opportunity to observe his assailants, was severely questioned at the trial. Constable Sweeney was the only witness for the prosecution.

[4] Mr Williams' defence to the prosecution's case was one of alibi. He said, in an unsworn statement, that he was at his home at the time of the incident. He called no witnesses to support his alibi.

[5] He has applied for permission to appeal against these convictions. Mr Bird, on his behalf, highlighted the claim of prior knowledge and sought to show that the previous sightings could not have supported that claim. He argued, with characteristic fervour and thoroughness, that this was not a case of recognition and that the learned trial judge erred when he assessed it to be such. The issue of identification dominated in this application, as it did at the trial.

The grounds of appeal

[6] Mr Bird argued the application in the context of four supplemental grounds of appeal that he had filed in substitution of the grounds originally filed by Mr Williams. The supplemental grounds are:

> "GROUND 1
> The Learned Trial Judge failed to adequately identify and examine the several issues related to visual identification having regard to the guidelines in **R v TURNBULL** [[1976] 3 WLR 445 and [1976] 3 All ER 549] in that:-
>
> (A) he failed to identify the specific areas of weakness in the evidence of identification and furthermore he failed to assess the effects of those weakness, and,
>
> (B) having erroneously concluded that the evidence of prior sightings [sic]
>
> was evidence of prior knowledge and having further concluded as he was entitled to do that such evidence was not strong but not sufficiently weak for him to say that the absence of an identification parade in the identification of the Defendant was incurably bad: he failed to demonstrate in his summation how he had resolved these shortcomings in the evidence of identification in arriving at his determination of guilt, and that such matters as were referred to by the Learned Trial Judge were incapable of resolving these shortcomings.
>
> This failure by the Learned Trial Judge amounts to a misdirection in law thereby rendering the guilty verdict unsafe.
>
> GROUND 2
> The verdict handed down by the Learned Trial Judge was against the weight of the evidence adduced by the prosecution's sole witness.

GROUND 3
The Learned Trial Judge was wrong on the facts and erred in law in arriving at the conclusion that the sole witness for the prosecution was truthful, accurate and reliable and that the credibility of the evidence of identification adduced by the said witness was not a central, germane or decisive issue for his determination in arriving at a verdict.

GROUND 4
By reason of the failure of the Learned Trial Judge to address in his summation, aspects of the evidence adduced by the sole witness for the prosecution which militated in favour of the Appellant, in the final analysis, it cannot be said that the Appellant had had a fair trial.

Consequently there may very well have been a miscarriage of justice and his conviction should be quashed."

The grounds will be dealt with in turn.

Ground one: The learned trial judge's treatment of the identification evidence

[7] In respect of this ground, Mr Bird concentrated on the issues of the failure to hold an identification parade and, what learned counsel described as, the weaknesses in Constable Sweeney's evidence. Both issues are linked, as it is most likely that it was Constable Sweeney's claim of previous knowledge of Mr Williams that resulted in the failure to hold an identification parade.

[8] In respect of the former, Mr Bird submitted that Mr Williams having surrendered to the police, the prosecution should have provided an explanation for his presence in custody. It should also have detailed how he was processed while in custody. Constable Sweeney's evidence was that he had not seen Mr Williams between the time of the incident and his appearance in court. No explanation was given for the failure to

hold an identification parade. Mr Bird argued that the learned trial judge, although recognising that an identification parade should have been held, excused that lapse by relying on Constable Sweeney's evidence of prior knowledge. Learned counsel argued that that reliance was unsafe, as Constable Sweeney's "prior knowledge" had not been established. That argument provided the transition to the second element of Mr Bird's complaint in this ground.

[9] Although Constable Sweeney said that he had seen Mr Williams on "numerous" occasions before the morning of the shooting, he could only particularise four such occasions. Those four sightings, Mr Bird contends, were insufficient to support the learned trial judge's acceptance that this was a case of recognition. Learned counsel argued that there is a difference between prior sightings and prior knowledge. He submitted that prior sightings did not satisfy the test for recognition as outlined by Lord Widgery CJ in **R v Turnbull**. Mr Bird argued that what Constable Sweeney had described were, in fact, prior sightings and that the absence of interaction between Constable Sweeney and Mr Williams, the brevity of the previous sightings and the lack of specificity as to their time and circumstances, did not satisfy the cognitive elements that recognition requires.

[10] The third element of Mr Bird's complaint in this ground is that the learned trial judge failed to address these weaknesses in the identification evidence. Mr Bird submitted that the learned trial judge took refuge instead in his acceptance of Constable Sweeney's evidence on the basis that the officer was "not seeking to mislead

anyone" and was "trying to give the account as honestly as he can recall". That, Mr Bird submitted, is precisely the mischief against which Lord Widgery CJ had warned in **Turnbull**.

[11] Mr Bird relied on a number of other cases as support for his submissions. These included **Mills and Others v R** (1995) 46 WIR 240, **R v Oliver Whylie** (1977) 15 JLR 163, (1977) 25 WIR 430, **R v Desmond Bailey** (1974) 12 JLR 1462, **R v Clifford Donaldson and Others** (1988) 25 JLR 274 and **R v Fergus** [1992] CLR 363.

[12] Miss Thompson, for the Crown, disagreed with Mr Bird's stance in respect of the learned trial judge's handling of the identification evidence. She contended that, although there was an absence of the usual details concerning the previous sightings, such as the length of time for each observation and the distance from which each observation was made, the learned trial judge dealt with all the issues of identification with the greatest care.

[13] Learned counsel argued that Constable Sweeney's evidence of prior knowledge eliminated the need for an identification parade to have been held for Mr Williams. She stressed the fact that, although Constable Sweeney had only detailed four sightings, he did in fact say that he had seen Mr Williams on more occasions than the ones that he had particularised. She argued that this was a genuine case of recognition. For that reason, she submitted, the identification of Mr Williams while he was in the prisoner's dock was not, strictly speaking, a case of "dock identification".

[14] Miss Thompson submitted that the learned trial judge had not only assessed Constable Sweeney to be an honest witness but had also assessed the evidence of the officer's observation of his assailants. She said that the learned trial judge had looked specifically at the time for viewing, the lighting and Constable Sweeney's view of the assailants, prior to the outbreak of gunfire. In that context, she argued, the learned trial judge was entitled to find, as he did, that Mr Williams was one of those assailants.

[15] In assessing these submissions, it must be noted that Mr Bird's submission, that mere sightings on previous occasions cannot be equated with previous knowledge, is supported by the decision in **R v Fergus**. In that case, the court held that prior sightings may not be sufficient to convert a case from simple identification to one of recognition. The headnote states, in part, as follows:

> "...The case where the complainant had seen the assailant only once or on a few occasions before might well be treated as that of identification rather than recognition."

In those circumstances, the court held, it would have been preferable to have held an identification parade.

[16] In addition to the evidence already noted above, it must be noted that Constable Sweeney testified that not only had he known Mr Williams for two years before the incident, but also that he knew Mr Williams by the name "Face Dog". The previous occasions of sighting that he could particularise of having seen Mr Williams, according Constable Sweeny, were as follows:

(a) At the "Spanish Town cell", while Constable Sweeny was posted to the Saint Catherine North Police Division.

(b) At 91 Street, John's Road.

(c) At Dela [sic] Vega City.

(d) At Saint Jago Plaza along Burke Road.

All these places, Constable Sweeney said, are in the Spanish Town area. The sighting at the "Spanish Town cell", he said, was the first time that he had seen Mr Williams. The constable did not assign a chronological order to the last three sightings, but he did say that it was six months before the incident on 11 July 2009, that he had last seen Mr Williams.

[17] Constable Sweeney testified that he spoke to Mr Williams on one occasion only, and, on that occasion, Mr Williams had answered him. They did not speak for long. The discussion took place while Mr Sweeney was on patrol at Saint John's Road. During that interaction, he also searched Mr Williams' person.

[18] No complaint was made at the trial, about any prejudice being occasioned by the reference to the search or to the "Spanish Town cell". Mr Bird did refer to "the loose use" of the term "Spanish Town cell" and queried whether it was "a deliberate attempt to malign" Mr Williams' character. The point was not developed, however, and will not be further considered in this judgment, except to say that any such attempt to prejudice fair adjudication of a case should be condemned.

[19] The question to be answered in this analysis is whether the evidence of the prior sightings was sufficiently strong for him to find that "the absence of an Identification Parade in the identification of [Mr Williams] [was not] incurably bad" (page 55). The law in respect of the circumstances in which an identification parade should be held, has been often repeated. The principle is that, unless there are exceptional circumstances and unless the suspect is well known to the witness, an identification parade should be held for that suspect. Recently, McIntosh JA, in **Tesha Miller v R** [2013] JMCA Crim 34, carefully analysed the point and the relevant authorities. She concluded that analysis with the following:

> "In sum, while condemning identification by confrontation of the suspect by the identifying witness or witnesses the authorities indicate that it may be permissible if the suspect is **well known** to the witness but it nevertheless should be a last resort (see **Brown, Brown and Matthews v Regina**) and where the suspect is unknown to the identifying witness should be confined to rare and exceptional circumstances as in **Trevor Dennis**. Further, where the suspect is known to the witness before and no identification parade was held, if there has been confrontation the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by the witness." (Emphasis as in original)

[20] In the instant case, the learned trial judge found that Constable Sweeney's evidence was not "the strongest evidence of prior knowledge" (page 46 of the transcript). When examined carefully, that was an understatement. Constable Sweeney's evidence did not meet the requirement of the suspect being well known to

the witness, in order to obviate the need for an identification parade. An analysis of those previous sightings will explain that opinion.

[21] The first sighting at "Spanish Town cell" was not particularised. Constable Sweeney, in cross-examination, said that he did not speak to Mr Williams at the cell. He did not say how long he saw Mr Williams for, or how he came to see him. The second and third sightings are equally unimpressive in this regard. Constable Sweeney did not speak to Mr Williams at St Jago Plaza, nor did he speak to him at De La Vega City. No details of those sightings are given. His single conversation with Mr Williams was on the last of the four occasions. It was over six months before the day of the shooting incident. Constable Sweeney said that this last sighting, "wasn't for long, we were on patrol" (page 28 of the transcript). He did, however, search Mr Williams and the area where he was standing.

[22] When examined carefully, these sightings cannot be classified as amounting to Mr Williams being well known to Constable Sweeney. It is true that Constable Sweeney did say that he had seen Mr Williams on other occasions, but the absence of particulars makes that evidence inadequate for the standard that the prosecution must satisfy in criminal trials. If it cannot be said that Mr Williams was well known to Constable Sweeney, then, following the reasoning set out in **Tesha Miller**, and given the circumstances of this case, it means that an identification parade should have been held.

[23] Against that background, it is necessary to examine the evidence of the observation at the scene at Jones Avenue that early morning. Constable Sweeney testified that he saw the men for 15 seconds, and from a distance of 15 feet, before they started firing. He testified that the sun was coming up and that during those 15 seconds he could see the faces of the men clearly. At one point, he described the lighting as "sunny" (page 28 of the transcript). He said that he recognised two of the men, Mr Williams and another man known as Marlon McCreary. He noticed Mr Williams' mode of dress and his hair style.

[24] Although this opportunity may not properly be classified as a fleeting glance, it was not a long observation when there were three men who were "avoiding eye contact" (page 6 of the transcript). There were no exceptional circumstances in this case, which obviated the need to hold an identification parade. This was not a case where, for instance, the suspect was taken, within minutes of the commission of the crime, to be shown to the victim, as occurred in **R v Trevor Dennis** (1970) 12 JLR 249. Indeed, Constable Sweeney stated that he did not see Mr Williams after the shooting incident until he saw him in court. An identification parade could, and should have been held in those circumstances.

[25] No explanation was forthcoming from the prosecution for the failure to hold an identification parade. Constable Sweeney, having only heard that Mr Williams had turned himself in to the police, could not have proffered an explanation for that omission, and there was no effort to produce any statement from the investigating

officer, which addressed that issue. It would be speculation only to say that it was Constable Sweeney's claimed prior knowledge of Mr Williams that led to a decision not to hold an identification parade.

[26] The failure of the prosecution to hold an identification parade or to provide an acceptable explanation for that failure is fatal to this conviction.

[27] Based on these findings it is unnecessary to address the other grounds of appeal.

The failure to produce forensic evidence

[28] Before parting with this application, it must be noted that Mr Williams said that he presented himself to the police station at 10:00 o'clock on the same morning of the incident. There is no evidence as to whether his hands were swabbed for testing for the presence of gunshot residue (GSR), and if not, the reason for that omission. In contrast to that situation, it must be noted that Constable Sweeney testified that, although he had reported that he had fired his weapon during the incident, his hands were swabbed for GSR over four hours after the shooting had taken place. There was, apparently, a forensic report in respect of that swabbing, but none in respect of Mr Williams' hands. The failure to have such a testing done, in the face of Mr Williams having turned himself into the police is most unsatisfactory.

Summary

[29] The prosecution failed in its duty to prove a case against Mr Williams to the requisite standard. Constable Sweeney's evidence of his previous sightings of Mr Williams was so vague that Mr Williams could not be said to be "well known" to Constable Sweeney. Nor were the circumstances of the incident or the observation at the time of the incident such that they could be described as "exceptional" and therefore obviating the need to hold an identification parade. The failure of the police to hold an identification parade and to explain their failure so to do is fatal to the conviction in this case.

[30] In those circumstances it would be improper to order a new trial.

[31] On these bases, we make the following orders:

a. The application for leave to appeal is granted.

b. The hearing of the application is treated as the hearing of the appeal, which is allowed.

c. The convictions are quashed and the sentences are set aside. Judgment and verdict of acquittal entered.