In The Supreme Court of Bermuda

Appellate Jurisdiction
2007 No. 37

BETWEEN:

NEVILLE WOODS

Appellant

-and-

LYNDON RAYNOR

Respondent

Date of Hearing: Monday December 3, 2007

Appellant in person;
Mr R. Welling of the DPP's Department for the Respondent.

JUDGMENT
(Extempore)

1. This appellant appeals against his conviction and sentence for entering as a trespasser with intent to steal before the learned magistrate, Wor. Khamisi Tokunbo, on the 15th March 2007.

2. The facts of the case, very briefly, were this. On 1st January 2007 a lady called Mrs Haak went out to the park with her children and she returned home at about 10:00 a.m. On arriving back at her premises she noticed a widow that had previously been closed was open, and the screen had been caved in, and there was an item of what appeared to be clothing outside the door. When she went to the door she saw a person inside of her house - she saw him first through the sliding glass door. She described him, saying that he was wearing army type pants with a belt, a white T-shirt, a gold chain, boots and white gloves with a blue slash on. She did not recognise him; she did not know him before that day. She then went to unlock the door, the man must have been on the other side because she describes him as playing with the lock on the inside, and she then opened the door and says that this man stepped towards her and out to the right hand side. They then had an altercation, and she says this person told her that she should not have left her window open. They were about three feet apart, and she said that this was 10:00 a.m. in the morning, so it was plainly daylight. She says that this person told her to "back off," which she did and he left the premises and took off down the road.

3. At that point she called the police, and she also alerted her upstairs neighbors who included her brother-in-law, Mr. Carl Haak. She plainly gave him a description. Indeed, he says she gave him a description and that he went out looking around the

neighborhood. He then saw a man by some condos nearby, coming towards him from the pump house. He accosted him, saying to him "what are you doing coming out of the bushes." The man he was accosting said words to the effect that "I didn't break into your house, I didn't do this." At this point the police arrived on the scene, Mr. Haak shouted to them, and the person to whom he was talking started running. There was then a chase and he was apprehended.

4. Both the lady, Mrs. Haak, and the brother-in-law, Carl Haak, subsequently and separately identified the appellant at an identification parade. It is significant that when he was arrested the appellant was wearing clothes that matched the description given by Mrs Haak and in particular he had some gloves. She had described the gloves as being white gloves with a blue slash on them. The gloves recovered from the appellant are an off-white or grey with a light blue back on them. Similar gloves were observed by Mr Haak.

5. It is important that Mrs Haak says, and it is not contested, that she did not see the appellant before the identification parade. She did not see him between the time the man fled her premises and picking him out at an identification parade.

6. On those facts it is plain that an incident happened. The learned magistrate would have had no reason whatsoever for disbelieving the lady about what had occurred - not least because she called the police immediately, she alerted her neighbors, she did not know the appellant before, and she had no reason to lie on him. Nothing was in fact taken, though she says her bag had been disturbed, so that even the most far-fetched reason for lying, such as an insurance claim or something like that, did not arise here. The learned magistrate, therefore, very rightly accepted her evidence.

7. The question, however, was whether the appellant was in fact the man that she saw in her house. And that is not just a question of credibility, it is also a question of accuracy. She might be a witness of great credibility, believable and intending to tell the truth, but she can still make mistakes. Because of this the law, since the well known case of *R v Turnbull*[1977] Q.B. 224, 63 Cr. App. R. 132, CA[1], has developed guidance to judges and other finders of fact about how to approach identification issues like this. They are required to put their minds to the question of whether the witness might have been mistaken or not, and in order to address that question they are obliged to consider various common-sense factors such as: how long did the witness have the person concerned under observation, in what light, was there anything obstructing them, did the witness know the person concerned before (and was it therefore a recognition case or not), and so on. They are also required to look for something that might corroborate, or perhaps it is better to say 'support,' the identification.

[1] For the application of these principles to decisions of the Magistrates' Court, see Harvey v R (1993 Criminal Appeal No. 24) [1994] Bda LR 4.

8. The learned magistrate in this case appears to have been unaware of the requirements of the law in this respect. He does not so much as mention the case of *Turnbull.* He does not analyse the evidence in the way that I have just indicated, and appears to have treated this simply as a matter of credibility.

9. How should I approach that? Had he put his mind to all those factors I think it is apparent that he would have been driven to the conclusion that she was correct in her identification, because one can go through all the criteria and tick them off: it was good light, it was in the morning, she had him under observation for a while through the sliding glass doors, and then during an altercation immediately afterwards when she spoke to him, and so on. She does say that she did not know him before that day, and that is a factor. But it is one factor to put in the balance. She obviously gave a description immediately afterwards to the brother-in-law upstairs, and using that description he was able to home in on the appellant and that description in fact fitted him, save for two possible discrepancies as to the colour of the jacket and as to whether the gloves are better described as white or as grey. Those are, frankly, minor matters: the gloves are off-white.

10. Was there anything else to corroborate the identification? Well, the appellant was found in the neighborhood. He gives an explanation for this about being on his way to work. He was cross-examined on that, and the cross-examiner appears to have been aware that the time, at around 10:00 a.m., was nowhere near the time this man would normally make work. He was making work at 7:30 and his explanation for being in the neighborhood long after when he should have been making work is somewhat convoluted. He says that he had been going to get a ride from a neighbor, but the neighbor had left early. He could not give his name, but he was a Jamaican he said. When he realised that his ride had gone he said that he started to panic, and he almost went on his unlicenced bike, but then he went back in his house and he ended up doing household chores, and it was then only later, some two hours later, that he left home and went to his boss's house to find out where the guys were working. Frankly, that is an implausible explanation which, if the learned magistrate had put his mind to it, would have quite forcefully corroborated the identification - the fact that he was in this neighborhood at that time of day without a real explanation wearing similar clothes and otherwise fitting the description given.

11. So, although the magistrate was technically in error, because he did not go through the motions, if I can put it that way, the evidence was nevertheless very strong. There were no fingerprints found, but the evidence was that the intruder into the house was wearing gloves, so there would not have been any fingerprints to be found. The appellant complains that his boots, which were heavy construction boots with a heavy tread, did not leave any footprints, but we have no evidence as to why they would have left footprints.

There is nothing in the evidence to suggest that there was soil or something similar in which the intruder would have had to have trod to have entered the window. So that does not advance it at all. In the end it was a very clear case.

12. It was also said that the magistrate had prior knowledge of the appellant's convictions and that that may have biased him. There are two things to say on that: first there is nothing to show that he did have prior knowledge, because he was not the trial magistrate for any of the appellant's other convictions. Second, even if he had, one has to recognize, in a jurisdiction this size, that magistrates will repeatedly come across certain persons again and again. There really is no way around it: we do not have enough magistrates to provide a totally innocent and unknowing trial court on every occasion. We have professional magistrates who know their duty and should, and I am sure are, able to approach that sort of difficulty in a professional manner and put it out of their minds when considering the evidence. As it is, the evidence in this case was very clear and the magistrate frankly had very little choice but to come to the conclusion that he did and convict.

13. I therefore dismiss the appeal against conviction. [After hearing further argument] I quash the sentence and substitute a sentence of 18 months' imprisonment. That is to run from the time of arrest.

Dated this 3rd day December 2007

Richard Ground.
Chief Justice