In The Supreme Court of Bermuda

CRIMINAL JURISDICTION 2012 No. 20

THE QUEEN

Prosecution

and

AHIJAH DILL

Defendant

RULING

(In Court)

Date of Hearing: October 1st and 2nd, 2012
Date of Judgment: October 2nd, 2012

Ms. Takiyah Burgess, DPP for the Plaintiff and
Mr. Saul Dismont and Ms. Elizabeth Christopher, for the Defendant

INTRODUCTION

1. The defendant is charged on a two count Indictment for wounding with intent to do grievous bodily harm and possession of a bladed weapon in an increased penalty zone. The crowns case is essentially an identification case and rests upon the identification evidence of two witnesses; namely the complainant Mr. Swan and another, Mr. Johnson. The defence made a no case submission under limb two of Galbraith and submitted that the identification evidence is unreliable and that a jury properly directed cannot convict.

The Promat identification parade

2. Mr. Swan went to the Leopards Club in Hamilton City on the night of 21st January 2012. As he sat in his car in the car park he was approached by a persistent man who begged him for a cigarette. This encounter lasted for a few minutes before the man left. Some five or six minutes later the same man returned with a machete in hand and delivered some blows with it to the arm and back of Mr. Swan who received serious wounds and who ran away with the man chasing and yelling behind him.

Mr. Swan was taken to the hospital where he received surgery for the injuries. He gave the police a statement two days later at the hospital, in which he asserted that he knew the man, though not his name, as he had seen him on occasions before, and could identify him, if he should see him again.

3. On the 31st January 2012, Mr. Swan attended a Promat identification parade and there without any apparent difficulty or hesitation identified the defendant.

4. The defence unsuccessfully challenged that identification process in a voir dire and again during the trial on grounds that there were significant differences between the defendant and the other participants on the parade, that other officers had entered the identification room at some stages during the process when the defendant and witness were not there, that there were differences about the defendant not present about the others, including, a shadow behind the defendant, his position further back, his shoulders and chest appear greater, his head smaller. In addition that there was opportunity for the witness to have otherwise seen the defendant at the station.

5. All of these assertions were rejected after the voir dire on the grounds that there was insufficient evidence to support such allegations. Further, that the defects to the degree that they were, did not have such an adverse effect upon the fairness of the proceedings that the promat evidence should be excluded. I now reject them again for the same reasons.

6. Further, during the voir dire and again during the trial, the witness expanded upon his statement and testified that he had seen the defendant on several occasions before in the vicinity of Turning Point in the six months prior to the incident. Turning Point being a place the witness attended on a daily basis from Monday to Friday on a methadone programme for his recovering drug addiction. Sometimes he would have briefly spoken to the defendant there. Other times he had seen him about Hamilton.

7. I find that these latter assertions go to weight and do not affect my decision. I hold that in respect of the identification by the witness and the process, there is a case to answer.

The dock identification

8. The more difficult problem arises in respect of the evidence of Mr. Johnson. His evidence was that on the night of the incident he was speaking to a friend in the car park area of the Leopards Club. He saw when the complainant arrived in his car with others and remained in the car.

   Later he saw a man approach the complainant and spoke to him. He heard the complainant in argument with the man and as a result he approached the complainant whom he had known for a long time, placed his hand on his shoulder and inquired of him if he was alright. He said the man was still present but then left whilst keeping his eyes upon him all the time. He then returned to another area and resumed talking to another friend. Some minutes later he said he heard a noise and saw the same man with a raised machete rushing in his direction. This

scared him as he did not know the man's intention. He saw that man rush pass him towards the complainant who appeared to be about to get out of his car and he saw the man chopping the complainant with the machete. Eventually the complainant was able to escape with the man chasing behind him until they were out of sight. He said the complainant soon came back bleeding and was taken to the hospital. He pointed to the accused in the dock and said the defendant was the man.

9. This lead to an objection by the defence on the grounds that it was a dock identification. No voir dire was held or requested and no submissions were ordered in the absence of the jury. In my view had such been held, if the consequence was an upholding of the objection, it would have been too late to exclude the dock identification given the manner in which it occurred; furthermore a warning to the jury to ignore that evidence would at that time be of little value given the manner in which the identification occurred. Further in my view this was not a case meriting the declaration of a mistrial since dock identification evidence is not inadmissible perse.

10. In support of the dock identification, the evidence showed that the police had come to the scene that night and the witness had given a statement to the police, to an officer DeSilva, in which he had made several assertions tending to amount to some recognition evidence. The prosecution relies upon the Privy Council decision, *Mark France and Rupert Russell v The Queen. [2012]UKPC 28,* to support her argument that this was a recognition case and not a dock identification case. In particular that the evidence of Mr. Johnson was confirmatory, not a dock identification, as was distinguished by the board at paragraphs 33 to 38.

11. In the statement dated 22 January 2012, he said, "*I do not know this man but I have seen him before and I know his face. He is about 5'8" tall, slim but slightly muscular, short unkempt hair and slight patchy beard. He was unkempt. He was dark complexion and appeared to be in his early twenties. He looked to be between 165 lbs. and 175 lbs. He was wearing a grey hooded sweat top, black jeans and white sneakers. There was no writing on his top that I can remember".*

12. Later after further describing the attack he said, "*I had a clear look at this guy who attacked Miguel. He was close enough to touch him and nothing over his face. His hood came off during the attack. I have seen him before but I don't know his name".*

13. He gave that latter evidence after the objection consistent with his statement.

14. In addition he expanded upon that statement and gave testimony to which the defence objected on the grounds of non-disclosure. It was evidence about which the prosecution was never aware and about which they existed no previous statement.

15. He testified that he had seen the defendant that same night about twenty-five (25) minutes prior to the first conversation with the complainant and had a conversation with him for about three to four minutes close up at about three and a half to four feet, face to face. The defendant had approached him earlier that night begging him for cigarettes and money to buy drinks and he told him he had none

to give him. The defendant was persistent and argued, not taking no for an answer and eventually left. He later added, the defendant was around begging people for these things.

16. Furthermore he had met the defendant before and had seen him before in passing from time to time. He said he would see him by the Mini Mart in Happy Valley Road which is only a quarter mile from where he, the witness, lives in Parsons Road. These sightings were between the November previous to the incident and the incident itself about once or so per three weeks for a matter of seconds in passing, both in the day and night time but he did not know his name. The last sighting being in the night time two weeks before the incident.

17. When asked in cross examination why he had not told the police anything about this latter evidence when he gave them a statement on the 22nd January 2012 and again in August 2012 he said he wasn't asked. He said he gave the police what they asked. He didn't choose not to give them information.

18. In support of their no case submission, the defence relies upon Code D paragraph: 3.13(b) of the PACE Act 2006. That provision states: *Whenever there is a witness available, who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so and they have not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 3.6 to 3.11, an identification procedure shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence (for example, when it is not disputed that the suspect is already well known to the witness who claims to have seen him commit the crime).*

19. Despite the contents in the witnesses' statement dated 22nd January 2012, the chief investigating officer PC MC Cormack under cross examination said he had no basis for holding an identification parade to give this witness an opportunity to identify the culprit. That was because the witness never told him he had an earlier conversation on the night in question with the attacker, nor that he had seen or met him before.

20. Then under re-examination when asked if he had asked the witnesses these questions he gave the extraordinary answer that he did and that the witness responded he only saw him on the compound that night asking for money, that he never made mention that he had known Mr. Dill before.

21. Now I have earlier said that the statement of 21st January 2012 was recorded by another officer DeSilva and not by this officer and in it the witness clearly said he had seen the man before but didn't know his name. That witness inexplicably was never called by the prosecution despite some partial intervention by the bench.

22. One would expect, however, that the investigating officer who admitted he had overall responsibility for the case would or should have become aware of that statement and its contents.

23. On the other hand, in my opinion, it is evident, that when this officer recorded a recent additional statement from the witness on 22nd August 2012, nothing in the context of that statement suggests to me that any question of previous encounters between the witness and the assailant was asked or addressed at all. That latter statement, in my opinion, seems to be a clarification statement totally concerned with the material factors concerning the actual attack period.

24. Despite the assertions of PC Mc Cormack, which I find difficult to accept, I having a tendency to believe the witness when he said he was not asked, I hold the view that just as the officer found there was sufficient information in the statement of the complainant to merit the holding of an identification parade, so was there sufficient information provided by the witness Mr. Johnson, to the police, in his statement dated 21st January 2012, whether the investigating officer was aware of it or not, that an identification parade ought to have been held to give the witness opportunity to identify the assailant and the defendant opportunity to avail himself of any benefit if that parade had been a failure.

25. To support their no case submission, the defence further relies upon Privy Council decision *in Maxo Tido v The Queen [2011]UKPC16.* That is, that the pointing out of the defendant in the dock by the witness for the first time amounted to a dock identification and that the evidence ought to have been excluded. That it now having been admitted, the prejudice is so substantial to the defendant that, it denies him a fair trial and thus the submission of no case to answer should be upheld.

26. *In Maxo Tido,* one of the principal witnesses gave the police a description of a man whom she had seen in her club on occasions, whom she had seen make a telephone call from her facilities on the material night, identified himself to someone by a nickname, told the person he was coming to pick them up, and he saw him drive off in a chevy. The judge permitted her to make a dock identification but then failed to give the jury a proper warning about the danger of such evidence.

27. Lord Kerr delivering the judgment cited several authorities which acknowledge the undesirability of dock identifications but which hold that when they do occur the judge should go on to give the jury appropriate warning.

> At page 21 he said, *"The board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence perse and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused. Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he was deprived of the opportunity. In such circumstances the judge should draw directly to the attention of the jury that*

the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well intentioned eye witness to be the person who had committed the crime with which he or she is charged''.

Applying the proviso, the Board concluded that the evidence included in that case did not necessarily lead to an unfair trial and concluded that the discretion to exclude will be influenced by the particular circumstances of each case. Lord Kerr said; r*elevant circumstances will always include consideration of why an identification parade was not held. If there is no good reason not to hold the parade this will militate against the admission of the evidence.*

28. The evidence which the judge would have had to consider in the *Maxo Tido* case as referred to at paragraphs 6-8 and 23 was similar to that in this case.

29. In this case I obviously considered that the evidence was admissible. That is why I overruled the objection. On reflection, I think the appropriate time and manner to have properly considered the issue in this case should have been after a voir dire at the point of objection or by legal submissions in the absence of the jury. Neither occurred.

30. Though I find, given the evidence available to the police at the time, and after hearing the testimony of DC Mc Cormack, there was no good reason given in evidence why the parade should not have been held, I am unable to see how I would not have admitted the evidence of the witness. I think the evidence, as it unfolded, would have and does raise a question of weight for the jury.

So in short I find there was a breach of Code D paragraph 3.13 caused by the failure to hold a parade with the witness Mr. Johnson. I also find, pursuant to section 98 of the PACE Act, that given all the circumstances, the breach does not have such an adverse effect on the fairness of the proceedings that the evidence should be excluded. *R v Granwell 90 Cr. App. R 149, R v Hickin [1996] Crim. L.R.584, R v Malashev [1997] Crim.L.R.587, R v Quinn [1995]1 cr, App. R. 480.*

31. I think the crucial error in the Maxo Tido case was not just the judge's failure to consider the issue at all, but the compounding of it by the failure to give a proper warning to the jury.

32. In the circumstances I am not able to agree with the prosecution that this was a recognition case attracting the dicta in in the *France* and *Vessel* case. I think it is a dock identification case attracting the dicta in the *Maxo Tido* case.

In any event, I think in the instant case, it was proper to admit the evidence and I think it is proper that the jury should consider the evidence together with a proper warning in the terms set out in *Maxo Tido*, illustrated with the relevant evidence, and a pointing out the strength and weaknesses of that

evidence and the relevant inferences to be drawn. Such should not lead to any unfairness or injustice to the defendant.

CONCLUSION

In the circumstances I find that there is sufficient evidence in this case that a jury properly directed can convict. Consequently I dismiss the defence application and hold that the defendant has a case to answer.

Dated this 2nd day of October 2012 _____
Carlisle Greaves, PJ