In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 37

PERRY KHUN SIMONS
Appellant

-v-

THE QUEEN
Respondent

EX TEMPORE J U D G M E N T
(In Court)

Date of hearing: February 1, 2013

Mr Kamal Worrell, Lions Chambers, for the Appellant
Ms Larissa R. Burgess, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. In this case the Appellant appeals against his conviction of two offences (robbery contrary to section 338 of the Criminal Code and possession of a bladed article contrary to section 315C of the Criminal Code) before the Worshipful Khamisi Tokunbo on April 27, 2012.

2. The history of the matter is helpfully set out in the Skeleton Argument which was produced by the Respondent. The Appellant appeared before the Magistrates' Court where he was charged with these offences on May 20, 2011 and remanded in custody. The offences occurred on March 17, 2011 at around 5.00pm. The Police attended

Maximart supermarket in Sandys Parish in response to a reported robbery. The Complainant gave a description to the Police and he later gave a witness statement

3. The Appellant was arrested on or about May 17, 2002, some two months later as a result of information received. On May 18, 2011 he was interviewed and denied any knowledge of the matter. Although told that he had a right to refuse to participate in an identification procedure, he agreed to under undergo a video identification procedure which procedure is governed by Code D of the Codes of Practice under the Police and Criminal Evidence Act 2006. The Appellant was identified by the Complainant through that procedure and on May 20, 2011 he was charged, elected summary trial and remanded in custody.

4. The trial commenced on or about September 15, 2011 with the Complainant giving evidence. At trial the only evidence relied upon by the Prosecution was identification evidence based on the Complainant's evidence. The trial, as already noted, concluded in April 2012 and so spanned a six-month period. On March 14, 2012 a no case submission was dismissed; the Defence opened their case on March 19, 2011 and the Appellant was found guilty on April 27, 2011. A social inquiry report was ordered and he was sentenced [on June 12, 2012] to four years imprisonment on count 1 and three years' imprisonment on count 2 [to run concurrently].

5. The significance of this matter to the Appellant is amplified by the fact that he was previously given a suspended sentence of two years' imprisonment in June 2010 and as a result of the present convictions (I was informed by Crown Counsel) that suspended sentence was activated and ordered to run consecutively to the sentences in this case. So his conviction in this case impacted not just in terms of the penalty received for these offences but also triggered the activation of a suspended sentence for, it has to be admitted, a similar type of offence involving the possession of a bladed article approximately one year prior to the commission of the present offences.

The grounds of appeal

6. The Notice of Appeal sets out various grounds of appeal which can be distilled down into a smaller number. But to do justice to them I should summarize what the various complaints are.

7. The first complaint is that the Complainant's evidence was insufficient to support a conviction and the second ground of appeal is that the Learned Magistrate erred in law in rejecting the submission of no case to answer. Those two grounds of appeal really run together.

8. The third ground of appeal was that the Learned Magistrate erred in law by admitting the evidence resulting from the "PROMAT" video identification parade. The fourth ground of appeal is that the Learned Magistrate wrongly exercised his discretion by refusing to admit a letter from the Assistant Commissioner stating the weight of the Appellant upon his admission on remand to the Westgate Correctional Facility. The fifth ground of appeal is that the Learned Magistrate wrongly exercised his discretion by refusing to admit an original entry from the Westgate records. That ground of appeal is very closely linked to Ground 4.

9. The sixth ground of appeal is the complaint that the Appellant was deprived of a fair trial. By way of an amended Notice of Appeal which was filed yesterday on January 31, 2011 [The Respondent was advised of this additional ground on January 30, 2013 in Chambers] it was further complained that the Learned Magistrate failed to comply with the obligations with respect to findings and reasons contained in section 21 of the Summary jurisdiction Act 1930.

10. Looking at the matter in its bare essentials, the grounds can be reduced to four:

    (1) the complaint that the no case submission was refused;

    (2) the complaint that the ID procedure evidence was wrongly admitted;

    (3) the complaint that the letter from the Commissioner was wrongly excluded; and

    (4) that there were insufficient findings/reasons for the decision in violation of section 21 of the Summary Jurisdiction Act.

11. In my judgment there are really three key issues. Firstly the question of whether the ID evidence was wrongly admitted. Secondly, whether the letter was wrongly excluded. And, thirdly, whether there were sufficient findings/reasons in relation to the key issues at trial.

Key evidence and governing legal principles

12. To understand the issues with greater clarity it is necessary to have regard to an overview of the evidence in this case and the legal principles applicable to cases based on identification evidence alone. The evidence was that the Complainant was parked in a van outside Maximart in Sandy's Parish at around 5pm on an afternoon in March, in the driver's seat, when a man came to the passenger window, engaged him in conversation and obtained a cigarette from him. Another man whom he was unable to identify came to the driver's window. He then felt a sharp object at his throat [held by

the man at the passenger window] and his chain was taken from around his neck by the other assailant whom he was unable to identify at the driver's window.

13. The Complainant described the incident as lasting no longer than around 30 to 40 seconds. He described the man with the knife as wearing a light-coloured shirt, about 30 years of age, light-skinned with a round face and of 'chubby' or 'husky' appearance weighing between roughly 220 and 240lbs. The incident it seems to me was on any view a case of what might be described as a fleeting glimpse in difficult circumstances in that the Complainant was being attacked by two people, one of whom he had some conversation with, as Ms Burgess pointed out. Nevertheless this was not an identification being made by a passive eyewitness who was simply observing a scene. The learned Magistrate clearly accepted that this was a case which required special caution.

14. Mr Worrell for the Appellant referred the Court to authorities which deal with the well-recognised principles about the need for care in cases which depend solely on identification evidence. Those cases included *Smith and Simons-v- R* [2000] Bda LR 7. In this case where the leading Judgment was delivered by Worrell JA the Court of Appeal for Bermuda dealt with identification involving the observation of someone climbing through a window by a police officer "*for a few seconds only*". At page 4 the following statement appears:

> "*In R v Turnbull, (1976) 63 Cr. App. R. 132 at page 138 Lord Widgery CJ, after enunciating the guidelines which judges should follow in directing juries on identifying evidence, then described the circumstances in which judges should withdraw a case from the jury and order an acquittal having regard to such evidence. This is what he said:*
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> > '*When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.'*[1]

15. It follows the authorities cited and principles which are well settled that in a case involving identification the trial judge or jury have to have careful regard to the fact that an honest witness may be mistaken and that the best way to eliminate the

[1] On the same page of Worrell JA's Judgment he cites with approval the observation by Steyn LJ in *R-v-Ivan Fergus* (1994) 98 Cr. App. R. at page 318 that "*Turnbull plainly contemplates that the position must be assessed not only at the end of the prosecution case but also at the close of the accused's case.*"

possibility of mistakes is to carefully scrutinize the circumstances and conditions which existed at the time of the relevant identification. And that principle has to be borne in mind when one comes to actually scrutinize how the trial judge dealt with the matter.

Findings: merits of appeal

16. Dealing with the broad submission that the case was insufficient to go to the jury, I see no practical need to deal with that complaint because this is a case of a trial before a judge alone and it really makes no difference if one simply looks at the position at the end of the case. I bear in mind that this was a case where the Appellant did not give evidence and so the Defence case did not assist the Prosecution and strengthen a case which might have been weaker at the end of the prosecution case.

17. As far as the issue of identification evidence is concerned, the complaint that is made is that the evidence of the identification procedure at the Police Station preceding charge should have been excluded because it was more prejudicial than probative. The Learned Magistrate took the view that the matters which were complained of were too technical to justify excluding the evidence altogether. In my view he was right to reach that conclusion. There was nothing made out by the Defence which justified excluding the evidence on the grounds of extreme prejudice. Rather the complaints that were made, in particular the complaint that the Appellant's clothing and appearance drew attention to him (having regard to the way the suspect had been described prior to the identification procedure) went to the weight of the identification evidence but not, in my judgment, to the admissibility of it. It would take a very serious breach of the Code to create such prejudice to justify excluding an identification on the grounds that it was carried out in a manner which was demonstrably prejudicial.

18. As far as the letter from the Commissioner is concerned, the significance of it arose in this manner. The Complainant, as I have alluded to already, estimated that the weight of his assailant was over 200lbs and possibly as high as 240lbs. The Appellant wished to adduce evidence that his actual weight at the time was likely to be what it was two months later when he was remanded in custody; namely, just over 180lbs. The application to rely upon the letter, which was clearly prepared in contemplation of the criminal proceedings, namely the trial, was made on the basis of sections 76 and 77 of the Police and Criminal Evidence 2006. In my view the Learned Magistrate rightly excluded the relevant letter on that ground because those sections only permit the inclusion of what are often referred to as business records; documents which are prepared in the ordinary course of business, not documents which are prepared in response to a request from Defence counsel.

19. On the other hand, the Learned Magistrate's attention was not drawn to the provisions of section 78 of the Police and Criminal Evidence Act which gave him the discretion to include the document in circumstances where the Prosecution might not have been able to justify its exclusion. In my judgment, although it is entirely understandable, the Learned Magistrate did err in failing to consider admitting the letter under the discretionary umbrella of section 78[2]. The issue of the disparity in weight was not perhaps a pivotal matter but was a matter which might have undermined the accuracy of the identification to a material extent.

20. The most significant issue which was raised, ironically by way of amendment to the Notice of Appeal, was the adequacy of the reasons and findings recorded by the Learned Magistrate. In this regard, the starting point is to look at section 21 of the Summary Jurisdiction Act 1930 which reads as follows:

> "***Record of judgment***
> *21 When the case on both sides is closed the magistrate composing the court shall record his judgment in writing; and every such judgment shall contain the point or points for determination, the decision therein and the reasons for the decision, and shall be dated and signed by the magistrate at the time of pronouncing it.*"

21. The crucial issues which the Learned Magistrate had to consider in a case of this nature appear to me to be as follows. The most important matter was the circumstances and conditions in which the identification at the time of the offence

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[2] Section 78 provides:

"Where a statement which is admissible in criminal proceedings by virtue of section 75 or 76 appears to the court to have been prepared, otherwise than in accordance with section 5 of the Criminal Justice (International Cooperation) (Bermuda) Act 1994 or under section 81 or 82, for the purposes—

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard—

(i) to the contents of the statement;

(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(iii) to any other circumstances that appear to the court to be relevant."

took place. This was a matter which would have laid the foundation for the Court's ability to eliminate any risk of the Complainant being mistaken. It is true, as Ms Burgess pointed out, that in his 'Ruling on No Case' the Learned Magistrate says this:

> "*I have reminded myself of the special need for caution when a case depends substantially or wholly on identification evidence and that an honest witness can be a mistaken witness.*"

22. In his 'Verdict', the Learned Magistrate goes on to say this:

> "*This case was one which was wholly dependent upon identification evidence-that is the evidence of the Complainant. I made certain observations which the Court undertook when considering the no case submission at the close of the prosecution case about such cases. I repeat and remind myself of those observations and warnings and the need for caution when deciding a case wholly dependent on eyewitness identification.*"

23. He then goes on to say in a passage of which Mr Worrell complains: "*I found the Complainant to otherwise be a credible witness.*" Nowhere in the Verdict or in the No Case Ruling does the Learned Magistrate record his findings of the conditions under which the identification took place[3]. The sort of findings which in my judgment would have been appropriate would have addressed the following issues. Firstly the length of time of the observation that the Complainant had of his assailant. The second matter would have been the conditions of the observation. This would have required the Court to apply its mind to how long the Complainant was able to look at the assailant while the cigarette was being supplied as opposed to how long the actual attack lasted[4]. Another factor which appears to call for specific mention is the extent which the involvement of another person in the attack on the other side of the car, physically closer to the Complainant, might not, perhaps, have resulted in the Complainant blending in his memory the recollection of the man on the other side of the car with his recollection of the man on the passenger side of the car who was the man he says was the Defendant.

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[3] Ms Burgess, who did not appear below and took over carriage of the appeal shortly before the hearing was diligent enough to find (at page 147) rough notes apparently written by the Learned Magistrate at page 147 of the Record. They appear between the last page of notes of the final hearing of the trial proper and the beginning of the Verdict. When approving the Record the Learned Magistrate did not invite this Court to supplement his formal signed judgments by reference to these notes which include the following statements relevant to the quality of the identification: "*very good look at person on passenger side…5pm good visibility no obstruction…whole incident lasted 30-40 seconds*". I indicated by way of response that these notes could not properly be taken into account as forming part of formal findings and/or reasons for the impugned decision. These notes did not address to any material extent the most serious concerns surrounding the safeness of the convictions in any event.

[4] The Complainant testified that this conversation did not last long enough to enable him to recall anything about his assailant's voice.

24. All of those matters go to recording the Court's assessment of how good or tenuous the quality of the identification evidence was. The absence of such findings is in my view a serious defect in a context such as the present.

25. When dealing with the quality of the identification (procedure) evidence which was admitted, it is also concerning that the Learned Magistrate does not appear to have appreciated one of the main complaints that the Appellant was making, albeit bundled up with other complaints which were less meritorious or less arguable. This was a compliant that the clothing that the Appellant was wearing at the time of the video procedure drew attention to him; and also that the appearance of the other people in the video parade was not sufficiently similar to him.

26. It is impossible for this Court to say, looking at still pictures, whether the argument about the composition of the panel has merit or not. This was certainly a matter which potentially was one of substance. The 'T' shirt point is easier to identify as a complaint which cannot be dismissed out of hand. The Complainant's evidence was that his assailant, whom he identified to be the Appellant, was wearing at the time of the offence "*a light coloured 'T' shirt*". It is obvious from the pictures that the selected panel included no one other than the Appellant who was wearing a light coloured 'T' shirt. This was a point which arguably went to the validity of the identification procedure and this was a point that the Learned Magistrate did not explicitly make a finding on. What he did say was this in the course of his Ruling on No Case:

> "*I find that there were some breaches of Code 'D' in the conduct of the PromatParade but find that such breaches were of a technical nature* [and] *had no effectual bearing on the ID and that they in no way rendered any prejudice to the Defendant such that the probative value of the ID evidence was prejudicially outweighed.*"

27. The failure to explicitly consider and reject the complaints that the composition of the panel was unfair and that the attire that the Defendant wore drew attention to him undermines the safeness of the finding that the identification evidence was in fact evidence that could be given clear weight. In fact no specific finding appears to have been made about the weight the Learned Magistrate attached to the video evidence as opposed to the general evidence of the Complainant based on what he recalled at the scene.

28. The other issue which in my judgment the Learned Magistrate failed to adequately deal with is the question of the tattoos. There was in the course of this hearing some lack of clarity as to precisely what the Crown did or did not concede about the tattoos which the Appellant complained the Complainant ought to have seen. On balance it seems to me from the Verdict that the Learned Magistrate accepted that the Appellant

at the time of the offences had tattoos [on both arms] and that the Complainant simply did not notice them. What he said about it was this:

> "*In cross examination the Complainant said he did not notice any Tattoos on man's arm and that he would have told the police if he did.*"[5]
>
> *He did however say he had a very good look at the robber at his passenger window and that he could not say that he had never seen the Defendant before.*"

29. The issue of the tattoos was in my judgment an important issue which required the Learned Magistrate to record his findings on. It might have been possible for the Learned Magistrate to have concluded that in fact it was not possible for the complainant to have seen the tattoos if they were there; but that conclusion was not really open on the evidence because the evidence did not directly address the issue of whether the assailant was wearing long or short sleeves. However, I bear in mind that (a) the term which the Complainant himself used was 'T' shirt and the word 'T' shirt in my view in ordinary usage suggests a short-sleeved round-necked shirt, and (b) that the Complainant himself had an opportunity to say that he would not have had an opportunity to see any tattoos on the assailant's arms because he was completely covered. This did require some positive finding by the Magistrate as to why he was able to find that the identification evidence was of a sufficient quality to satisfy himself of the Appellant's guilt despite the fact that the tattoo issue was unresolved.

30. On the face of it must be said, looking at the matter in hindsight and based on the documentary record, it is difficult to see why the tattoo issue alone would not have been sufficient to raise a reasonable doubt about the identification case. Because of the way the incident was described, if the assailant was wearing short sleeves-and it was really for the Prosecution to prove that he was not- it is difficult to see how the Complainant would not have noticed such distinguishing marks. It is true that the Learned Magistrate said:

> "*On this point I only observe that there was no evidence before the court that the alleged robber's arms were uncovered when they reached into the Complainant's vehicle, such that any tattoos would have been clearly visible. This was not put to the Complainant.*"

31. This in my judgment seems to be reversing the onus of proof. Because all a defendant has to do is to raise a reasonable doubt about an issue and it is for the

[5] The Defendant adduced photographic evidence showing two long tattoos on the leading edge of each arm. The right arm from the bicep to just above the wrist was inscribed in large script with the words: "*Against all odds*". The left arm from elbow level to just above the wrist was inscribed with: "*Still rise*". Under cross-examination, the Complainant testified: "*No I did not notice any TATTOOS on man's arm*".

Prosecution to rebut any such issues and satisfy the court beyond all reasonable doubt[6].

32. Finally mention must be made of the fact that the Prosecution case was further undermined in a general way by the fact that the Appellant cooperated with the identification procedure. The position is that if the Appellant had refused to participate in any identification procedure at all, the fact that he refused could be put into evidence[7]. But it is difficult to see how a defendant who had some experience of the courts would not have realised that his position would have been far better with no identification procedure than taking the risk of the Complainant pointing him out. If he had in fact come to court and the only evidence was the Complainant's general description of the assailant at the time of the offence together with the fact that the Defendant had refused to participate in the parade, it is difficult to see how there would have been a case to go to 'the jury'.

33. This point may not have been a point which was formally advanced by the Defendant's counsel at trial but this was yet another factor, which was not averted to by the Learned Magistrate, which goes to undermine the confidence this Court is able to have that the convictions which were entered against the Defendant in respect of these charges are safe.

34. For the reasons I am bound to find that the convictions should be quashed and the sentences set aside.

Conclusion: should there be a retrial?

35. It then remains to decide the question of whether the matter should be remitted for retrial. Ms Burgess rightly points out that these are serious offences and that there is a public interest in not allowing a person charged with such serious offences to escape effectively due to errors of law in the trial process which the Prosecution cannot be blamed for. Mr Worrell for the Appellant points out the fact that the Appellant has in fact been in custody since he first appeared in Court on May 20, 2011. And so he has, in circumstances where he has been wrongly convicted (as I have now found) been incarcerated for some 20 months now.

36. In the course of the hearing I averted to the fact that it appeared to me that the Appellant would have to serve the activated two year suspended sentence in any event. That view must be wrong because I failed to take into account the fact that the

[6] The Prosecution seemingly did not seek to clarify this issue in re-examination of the Complainant.

[7] Paragraph 3.18 of Code D provides that "*before a video identification, an identification parade or group identification is arranged, the following shall be explained to the suspect:…(e) that if he does not consent to or co-operate…his refusal may be given in evidence in any subsequent trial; and the police may proceed without his consent to make other arrangements to test whether a witness can identify him*…" Paragraph 3.24 provides that a confrontation does not require the suspect's consent; but such a procedure is clearly less probative that the consensual identification regimes.

activation of that suspended sentence was based on the fact of this conviction. So the result of quashing this conviction would be that the Appellant would not have to serve that extra time unless in fact at a subsequent trial he was again to be convicted.

37. The pivotal concern that I have about a retrial in the unique circumstances of the present case is the risk that the Appellant may be irreparably prejudiced by the ability of the Prosecution to strengthen their case in a way which would be unfair. For example, once the Complainant learns of the grounds upon which the present conviction has been quashed, there is a real risk that if he is called upon to apply his mind again to matters such as whether long sleeves were being worn, he might be encouraged (by his own conviction and desire to vindicate his original evidence) to give inaccurate evidence.

38. Ms Burgess astutely points out that Mr Worrell can draw any inconsistencies to the attention of the Court. But in my view there is something distinctive about a case which rests wholly on identification evidence. This is one area of the law where it is possible for a completely innocent person, particularly a person with a history of previous similar convictions, to be falsely convicted. Because what happens in situations such as this is that the Police look for the 'usual suspects' and someone, perhaps based on past history alone, is put into the frame in circumstances where the only evidence against them is the evidence of a visual identification in difficult circumstances.

39. If this case was one where there was other supporting evidence or the quality of the identification evidence was so strong that the concerns that I have alluded to did not arise, I would err in favour of remitting this matter on retrial. But on balance I consider that the interests of fairness for the Appellant, taking into account the passage of time since the offences occurred and the possible time before any retrial would take place, all mitigate in favour of my quashing the convictions and making no other order.

Dated this 1st day of February 2013, _____

IAN RC KAWALEY CJ