IN THE COURT OF APPEAL OF BELIZE AD 2015

CRIMINAL APPEAL NO 20 OF 2013

DIONDRAY McKOY Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

B S Sampson SC for the appellant.
C Vidal SC, Director of Public Prosecutions and S Smith for the respondent.

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14 October 2015.

AWICH JA

[1] The appellant, Diondray McKoy, was convicted of the offence of attempted murder of Everald Gray, under s. 18 read with s. 117 of the Criminal Code, Cap. 101 of Laws of Belize. On 15 November, 2013 he was sentenced to 12 (twelve) years imprisonment. The trial was at the Supreme Court by a judge and a jury. Mr. McKoy appealed against the conviction and sentence on several grounds. At the hearing on 16

June, 2015 we allowed the appeal and quashed the conviction and sentence. This is our full judgement.

[2] When the appeal was called up on 16 June, 2015 for hearing we had much concern about the state of the evidence regarding the identification of the accused (now the appellant) as the gunman who on 23 June, 2009 at Queen Charlotte Street, Belize City, shot Everald Gray, the complainant, the first prosecution witness. Mr. Gray was one of only two witnesses for the prosecution who saw the incident or part of it. The appellant must be taken to have disputed the evidence of identification of him at the scene. He testified that, he was elsewhere at his mother's home at the time. The mother testified and supported the alibi.

[3] We decided to put our concern to the learned DPP, Mrs. C. Vidal SC for the Crown, the respondent, and ask her to first address us on it. Poor evidence of identification was indeed one of the main grounds of appeal.

[4] Although in some of her written submissions Mrs. Vidal disagreed with some of the written submissions for the appellant, she promptly and properly conceded that, given the state of the evidence of identification, the respondent would not support the conviction of the appellant for attempted murder returned by the jury and entered by the trial judge. She stated that, "the identification evidence was non-existent." We did not trouble learned counsel Mr. Sampson SC, for the appellant, to address the Court. His written submission had made the point sufficiently. We concluded that there was a miscarriage of justice. We allowed the appeal, quashed the conviction and sentence, entered a verdict of not guilty and discharged the appellant.

[5] Our view was that, the case against the appellant depended wholly or substantially on the correctness of the evidence of visual identification of him at the scene, No. 20 Queen Charlotte Street, Belize City. The appellant denied the correctness of the identification. Our concern was not absence of, or insufficiency of directions given to the jury regarding, "*the special need for caution before convicting the appellant in reliance on the correctness of the identification,"* which is the first general rule in ***Turnbull v R [1977] QB 224***. The concern was, subject to the submission that

we requested from Mrs. Vidal on the point, that the evidence about identification of the shooter was uncertain and could be taken as no evidence at all. So, given the absence of evidence (or the uncertain item of evidence) of visual identification, and the absence of other implicating evidence, we were concerned that the learned trial judge did not consider stopping the case at the close of the prosecution case, or even later before the verdict stage. The record of the proceedings did not show that the judge ever considered this point.

[6] What was relied on by the prosecution as evidence of identification of the shooter was given only in the testimony of Mr. Gray himself. On pages 17, 18 and 21 of the record of proceedings he stated this:

> "On 23/6/09 around 8:30, I can't recall it vividly. I was inside my room watching TV in my house. I heard a voice calling me 2 times. I went to the screen open…there I saw a male person in black T-shirt, blue was the pants. Looking at the person, I saw his left hand go to pants waist and then I saw a black object come out of the waist. The object looked like a firearm. I then turned to run and then I felt a burning sensation to my left upper shoulder and side. It was close to my heart. Before I turn to run I heard bang like gunshots. I then run into my room. My girlfriend Sharlene and son were in the room… The distance between me and the person at the screen door was about 5 feet to 10 feet. There was a lamp post light in front of the house about 8 feet to 10 feet from the screen door. It had on a light but it blink on and off. In front of the door was dark. I saw from his waist up and he had a black fitted cap. I saw his hand and the weapon. I did not see that person's face. I remember giving a statement to Roberto Novelo on the 24/6/09. The signature is not my signature. I gave this statement to the police. I gave this information a day after this incident and the information the day after."

[7] On page 21, this is recorded:

"Q: Having refreshed your memory, do you now recall whether you saw the face of the person who was standing infront of that screen door?

A: Yes, ma'am.

Q: You now recall?

A: Yes, ma'am.

Q: What do you recall?

A: I recall a young man in blue and black, Your Honor with a black…

Q: Alright, just listen to me carefully…

A: Ma'am I still don't recall if I saw his face.

Q: You still cannot recall if you saw his face?

A: Yes, ma'am."

[8] On pages 42 to 43 the appellant asked Mr. Gray in cross-examination. It is recorded as follows:

"Q: Mr. Everald Gray, from the 23rd of June, 2009 you referred to me that you saw me Diondray McKoy shoot you?

…

A: To be honest I nuh sure.

COURT: What is that?

A; I'm not sure to be honest."

[9] The second prosecution witness, Sharlene Neal, was present when the shots were fired. She did not see much though. The relevant part of her testimony was recorded on page 53 as follows:

> "THE COURT: Cooking what?
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> THE WITNESS: Chicken with rice. That's about it. And I hear somebody hollered. Everald mi deh eena the chair di sit down and I hear somebody hollered Gray. I heard somebody hollered Gray so I neva did look fu see. I see he get up and he went to the door.
>
> Q. He went to the door which door was that?
>
> A. The front door.
>
> Q. Yes.
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> A. And then as he get up went to the door I hear like four gunshots.
>
> Q. Yes.
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> A. Then when I look up I see he stagger towards the big door because da mi the screen door he mi deh and he hold fu he chest. And with that when he hold fu he chest because I hear the shots then gone off. He tell me run so I run eena the room where the neighbour she mi done deh underneath my bed already and my son mi done deh eena mi room. Then he run behind me and close the door. He tell me fuh call 911."

[10] From his testimony, Mr. Gray was not sure about having seen the face of the person who shot him. When the appellant asked Mr. Gray a direct question, his answer dashed any hopes of connecting the appellant with the shooting. Mr. Gray answered: "To be honest I nuh sure." So, the evidence about the identity of the shooter was so uncertain that we concluded, it was simply non-existent. That led us to the law applicable.

[11] One of the rules in ***Turnbull*** is that, "*when in the judgement of the trial judge the evidence is poor, as for example when it depends solely on a fleeting glance or on a long observation made in difficult conditions, the judge should withdraw the case from the jury and direct an acquittal, unless there is some other evidence which supports the correctness of the identification"*. In this appeal, the uncertain or no evidence at all of identification of the appellant may be equated to poor evidence. A trial judge should always, when the evidence of identification is uncertain or non-existent, and there is not some other evidence that implicates the accused, withdraw the case from the jury.

[12] In ***Wade, Mendez and Baptist v The Queen***, ***Consolidated Appeals Nos. 28, 29 and 30 of 2001***, one of the grounds of the appeal to this Court was that, the trial judge erred in rejecting the submission by counsel for the appellants, of no case to answer in the circumstances of the evidence. In particular, counsel contended that, the evidence of identification of the appellants as the three men who shot and killed one Osrin White was poor. On this ground of poor evidence of identification this Court (Rowe, Mottley and Carey) allowed the appeal of Mendez, but dismissed the appeals of the other two appellants.

[13] The submission for the appellant Mendez was that, the learned judge should have accepted the submission of no case to answer, based on the poor evidence of identification, and dismissed the case at that stage. Counsel argued that, the evidence was, "tenous, weak and inconsistent;" and the observation of the appellants by the witness who identified Mendez took place in difficult conditions; the men wore dark clothes and peak caps, the witness observed the appellants from behind a zinc fence ten yards away through holes in the fence, and it was night time.

[14] Counsel for Mendez then supported her contention by reading a question and answer passage during the examination of the witness as follows:

> "…Q. I will just put one final suggestion to you that based on the condition of that night, the physical condition as well as your own concern that night, you could not positively tell this Court who any of the persons you saw on those three bikes were?

THE COURT: You understood the question?

WITNESS: Yes.

THE COURT: What is your response?

WITNESS: Yu have wahn point there…"

[15] The Court accepted the submission by counsel for appellant Mendez about the poor evidence of identification of him and what the consequence should have been. It held, following ***Turnbull,*** that the evidence was non-existent, and that where identification evidence was crucial, and its quality was poor, the trial judge had "a positive duty" to withdraw the case from the jury. At paragraph 15 Carey JA who wrote the judgement of the Court stated this:

> ***"15. It is manifest to us that the very witness on whom the Crown was relying to link this appellant with the crime charged, was not claiming to be sure of his own identification. In those circumstances, it was a profound understatement to say that the evidence was weak; in reality, it was non-existent. We would hope that after more than two decades, since R. V Turnbull [1977] Q.B. 224 and myriad cases from the Privy Counsel, it is not in dispute that there is a positive duty on trial judges in cases where identification evidence is crucial, and its quality is poor to withdraw the case from the jury. This case is, in our opinion, graphic proof of what is likely to occur when this duty is not discharged."***

[16] In this appeal our decision is the same. The evidence of identification of the appellant McKoy by Mr. Gray was so uncertain as to be non-existent. The learned trial judge had a duty at the close of the prosecution case or later before the verdict, to withdraw the case from the jury. He did not. The result was that, there was a miscarriage of justice. The appeal is allowed, the conviction and sentence are quashed, and a verdict of not guilty is entered. The appellant was discharged on 16 June, 2015.

[17] We would like to bring to the attention of the trial judge an embarrassing matter which could have been argued in the appeal, had we not decided to deal with the ground of poor evidence of identification first. The record of proceedings has many gaps caused by abrupt ending of the audio recording. There have been no notes by the judge from which to obtain the omissions in the record.

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AWICH JA

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BLACKMAN JA

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DUCILLE JA