IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CRIMINAL APPEAL NO. 7 of 2009

BETWEEN:

ALLEN JAMES	**Appellant**
AND	
THE QUEEN	**Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr. Justice Barrow	**-**	**Justice of Appeal**

Mr. Hubert Elrington for the appellant.
Ms. Cheryl-Lynn Branker-Taitt, Director of Public Prosecutions (Ag.) for the Crown.

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14 and 30 October 2009.

BARROW JA:

[1] At the conclusion of the hearing this court dismissed this appeal against conviction for robbery for which the appellant was sentenced to 10 years imprisonment. These are the reasons for decision.

[2] The sole ground of appeal was that the evidence of identification of the appellant as one of the robbers was so tenuous that the judge erred in law when he failed to withdraw the case from the jury. Counsel submitted this was a case that fell squarely within the ambit of the words of Lord Widgery CJ in **R v Turnbull** [1977] QB 224 at 229:

> "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."

[3] The case for the prosecution rested entirely on the identification evidence of Clifford Guy. On 21st June 2007 at about 8:35 in the night Clifford Guy was a security guard employed at Sen Sen Game Room on Daly Street in Belize City when he was alerted to a robbery in progress next door, at Sen Sen Grocery Store, located about 10 to 15 feet away, at the corner of Daly and Craig Streets. He took up position outside the shop, in the 'middle' of the street, and looking through the shop's entrance he saw two men behind the counter of the shop along with a Chinese woman. One of the men was kneeling and had his head behind the counter. The other man was pointing a gun at the Chinese woman. The witness was then at a distance of about 25 to 30 feet from the persons at whom he was looking. He gestured to the Chinese woman, by placing his finger on his lips, for her to be quiet and also gestured for her to "draw back" but she did not do so while the gun was pointed at her. Clifford Guy remained in the street and said he prepared himself for the men to come out of the shop.

[4] When the men came out of the shop Guy drew his .38 firearm, pointed it at the two men, told them to "freeze" and put their hands where he could see

them. He was at this point 10 feet away from the two men. The men did not freeze. One of the men produced a black firearm and fired at Guy, who fired back two times at the man. This exchange happened while the men were in front of the shop's entrance and were facing Guy and he was facing them. Guy recognized one of the men, the one who shot at him, as his cousin, Allen James, the appellant. Guy saw that he had shot the other robber on the hand. After the shooter's gun misfired and Guy's own gun misfired the two men rode off on bicycles in different directions.

[5] Guy testified to the quality of the lighting in which he saw the appellant while the two men were inside the shop. He said it was very good. Nothing blocked or obstructed his view when he was looking at the men in the shop. He had them in view, inside the shop, for three to four minutes. When he saw the men standing in front of the entrance the lighting condition was very good. Light came from a lamp post and from a light above the shop at the entrance. The lamp post was located between the shop and the gaming room. Given the distance between the two establishments the lamp post would have been not more than 15 feet away. Nothing blocked or obstructed his view of the two men when they were standing near the entrance. He could see their entire bodies, from head to feet. At the point in time when the person fired at him, the shooter was in front of the entrance to the shop and nothing blocked or obstructed Guy's view of him. At that time Guy was able to observe the shooter's face and saw that it was his cousin. It was elicited in cross-examination that the only time Guy was able to observe the faces of the two men was "when they were coming out at the entrance". It was also elicited in cross examination that his cousin was dressed in shades (taken to mean sunglasses) and a white warm cap.

[6] Specific attention was also given to the length of time for which Guy was able to see the robbers. In examination in chief Guy stated that when he was watching the persons inside the shop he had them in view for 3 to 4 minutes. He also said from the moment he stood in the street and first saw the robbers until

after the shots were exchanged about 5 to 10 minutes passed. In cross examination he accepted he told the police in his statement given the day after the robbery that he observed the persons exiting the shop for a period of 3 to 4 seconds. In the court below prosecuting counsel observed to the judge that Guy did not contradict himself by saying 3 to 4 minutes in one instance and 3 to 4 seconds in another instance because he was speaking to different timelines for different transactions rather than to the different timelines for the same transaction.

[7] Guy testified initially that he had known his cousin, the appellant, for about ten years and had only seen him about three or four times. He did not remember when last he had seen the appellant. Counsel for the appellant submitted this meant the jury had no idea whether Guy had last seen the appellant 9 years ago or 8 years ago or whether it was at the very beginning of the 10 year period or at the end of it. Counsel submitted that evidence made the identification of the accused so poor that it ought to have been withdrawn from the jury.

[8] It is remarkable that counsel should have represented that portion of testimony as establishing the extent of Guy's acquaintance with the appellant because there was substantially more testimony from Guy on the matter. That portion of Guy's testimony was greatly strengthened by further testimony that counsel for the defence elicited in cross examination from Guy and was strengthened beyond challenge by testimony from the appellant himself. Counsel put it to Guy, who agreed, that Guy and the appellant had lived at the same residence on Gibnut Street for a while. Then the appellant testified that he and Guy had lived together in a two bedroom house, along with their grandmother, and the two had shared one bedroom for three to four months. Guy had testified that they lived together in 2002. The robbery was in 2007. It was open to the jury to understand Guy's evidence that he had only seen the appellant three or four times to relate to the period after they had ceased sharing premises. They could hardly have understood the evidence any other way.

[9] In light of this evidence the judge was right to treat this as a case of recognition. The jury would have inferred that Guy immediately told the police, who came to the scene of the robbery shortly after it occurred, the identity of the robber – that Guy told the police one of the robbers was his cousin, the appellant -- because, as the appellant testified, the police came for him at his home on Gibnut Street the very night of the robbery.

[10] Counsel for the appellant argued it was a serious flaw in the proceedings that Guy was permitted to identify the person in the dock as the robber, when no identification parade had been conducted and counsel used as the starting point of his argument that a dock identification should not have been permitted the weakness of the eyewitness' recognition of the appellant in the course of the robbery. As shown by the review of the evidence above, counsel was only able to characterize the evidence of recognition as weak by ignoring the evidence that the eyewitness and the appellant had been sharers of a single bedroom for a number of months. The strength of the eyewitness' recognition of the appellant is further brought home by contrasting the difference in the quality of the identification of the appellant in this case and the identification of the appellants in two other recognition cases to which counsel referred.

[11] In **Pop (Aurelio) v R** (2003) 62 WIR 18 a murder occurred in July 1995 but the eyewitness did not identify the perpetrator to the police, and then only by a nickname, until December 1995. No identification parade was held and the eyewitness made a dock identification at the trial, in March 2000. The dock identification was made the more unsatisfactory because crown counsel asked a leading question of the eyewitness that assumed that the person known by the nickname the eyewitness gave to the police and the person in the dock were one and the same. In those circumstances the failure of the trial judge to give a full direction to the jury covering all the aspects mentioned in Turnbull made the conviction unsafe and it was quashed. In **Pipersburgh and Robateau v R** Privy Council Appeal No 96 of 2006 dock identifications were made by persons who

had known the appellants at their work place but had not known the appellants by way of knowing their names. The failure of the judge to give the proper directions about dock identifications led to the quashing of the convictions. It was decided in both cases that dock identifications are not inadmissible but that proper directions needed to be given to the jury both as to the failure to hold an identification parade and as to the danger of a dock identification.

[12] In the present case the earlier knowledge by the eyewitness of the appellant was knowledge of a far greater degree than in those cases; the eyewitness and the appellant had lived together. The eyewitness' identification to the police of the accused, by name, was virtually immediate. Counsel's submission that the eyewitness had not been sufficiently familiar with the appellant before the robbery to have been able reliably to recognize him runs counter to the facts. It was because of this degree of familiarity that this court asked counsel in the course of argument what purpose would have been served in the circumstances of this case by placing Allen James in a line up for the eyewitness, Guy, to pick him out as Allen James, the person whom Guy had recognized to such a degree of certainty as to have given James' name and address to the police. Counsel had no ready response to that inquiry.

[13] The remaining aspect of counsel's argument that it was unsafe to have allowed Guy to identify the appellant without holding an identification parade was that it was a fleeting glance identification that Guy had made. Relying on the statement of Lord Widgery CJ in **Turnbull** (above), counsel urged that this identification was so poor that the judge should have withdrawn the case from the jury. Counsel buttressed this argument by reference to the evidence that the robber was wearing a warm cap and shades. It is notorious, counsel submitted, that persons wear shades to conceal their identity so the robber's attire in this case resulted in the concealment of his identity and made it unsafe to rely on Guy's identification of the robber as the appellant. Counsel also relied on the lighting conditions, the frightening circumstances in which the witness was seeing

the robbers and the likely state of mind of the witness to argue it was impossible for Guy to have identified the robber.

[14] The objective conditions in which the identification was made were not of such a nature as to render any identification done in these conditions poor and make a conviction founded on that identification unsafe. It was open to the jury to find there was adequate lighting in the form of the light above the entrance to the shop where the robbers came face to face with the eyewitness and a lamp post light not more than 15 feet away. The evidence was not that the robbers suddenly burst into view of the eyewitness but rather had been in his view inside the shop for 4 to 5 minutes during which time the eyewitness mentally prepared himself for when they would face him coming out the shop. When the robbers were exiting the shop they came face to face with the eyewitness and he had an unobstructed view of the appellant's face. It was possible, in these circumstances, for a proper identification to be made. The factors on which counsel relied to argue against the quality of the identification, including the 3 to 4 seconds duration of the eyewitness' view of the face of the robber, were essentially matters for the jury to consider in deciding whether to believe the eyewitness that he recognized the appellant. The trial judge amply directed the jury on how to approach the identification evidence, including the factors on which counsel relied and the appellant had no complaint about the judge's directions.

[15] It was for these reasons we concluded the appeal could not succeed and dismissed this appeal.

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MOTTLEY P

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MORRISON JA

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BARROW JA