IN THE COURT OF APPEAL OF TURKS AND CAICOS ISLANDS

CRIMINAL APPEAL 21/2008

BETWEEN:

ANTHONY MCPHERSON **Appellant**

and

THE CROWN **Respondent**

Before: The Rt. Hon Mr. Justice Zacca - President
The Hon Mr. Justice Mottley - Justice of Appeal
The Hon Mr. Justice Ground - Justice of Appeal

Appearances:
Courtney Barnett for the Appellant
Leonard Franklin for the Respondent

Heard: 1 & 12 February , 2010 and 29 July 2010

MOTTLEY, J.A.

[1] The appellant Anthony McPherson was charged on an indictment containing two counts. In Count 1, it was alleged that on 11 September 2007 at Salt Mills Plaza, Grace Bay, Providenciales, the appellant attempted to murder Kenneth Carter. In Count 2 the appellant was charged with unlawfully and maliciously causing grievous bodily harm. On 26 November 2008 the appellant

was convicted of attempted murder and was sentenced to 13 years' imprisonment. He appealed against that conviction. On 12 February 2010, the appeal was allowed. His conviction was quashed, sentence set aside and a verdict of not guilty entered. At that time we promised to put into writing our reasons for allowing the appeal. We now hand down those reasons.

[2] On 10 September 2007, the appellant and some friends were outside the Bambooz, a club situated in the Salt Mills Plaza, Grace Bay, Providencials. He was inside the club dancing with a young lady after which he went outside the club. About 10 minutes later, the same young lady came outside the club and started to speak with him. He said a man who was standing outside started to "bad mouth" him. He told the person whom he did not consider to be a friend that you cannot get a woman by "bad mouthing" another man. He told the person that he sounded like a "big friggin sissy". On saying this, the man approached him in an aggressive manner as though he wanted to fight. After he and the person engaged in pushing each other, someone by the name of Ervin spoke to him. Carter walked away from the main door of Bambooz. After about five minutes, he heard a friend by the name of Ronald Malcolm shout to watch out he got a gun. Carter heard a voice behind him saying something. On turning he heard a gun shot which struck him on the left side of his neck. He fell to the ground. He heard a second shot but it did not hit

him. While turning he got a good look at the person who shot him. He also saw the gun which he described. Carter said that when Sergeant Irene Butterfield arrived he told her that he knew who shot him but he did not know his name however he knew him through his friend Kendre, who sold him a car. Carter did not identify the person who shot him until 21 January 2008 when the appellant was sitting in the dock on the Magistrate Court during the preliminary inquiry. In evidence in chief Carter told the Crown Counsel that he would recognize the person who shot him because he knew his face. Carter was then asked if he saw that person in Court. Following objection by Counsel for the appellant, the court reminded Carter that he had been asked by Crown Counsel if he saw the man who shot him in court. Carter was then informed by Crown Counsel that he should "point to the man who shot you in court". Carter replied "right there sitting in the back there by himself in that lil (sic) box".

[3] The prosecution also relied on the evidence of Trevor Saunders, a relative of the virtual complainant Carter, to establish the identity of the person who shot Carter. The evidence from Saunders was obtained by the question from Crown Counsel:

"Q. Now you know somebody name (sic) Tony?

A. Tony (witness nodding)

Q. Don't shake your head you have to speak so the jury can hear you?

A. Yes I know Tony.

Q. How you know him?

A. I don't know him I saw him before.

The Court: Sorry?

The Witness: I saw him before I don't really know him I just see his face before I know him around.

Later Crown Counsel asked Saunders whether he saw Tony in Court. He then purported to identify the appellant who was sitting in the dock as Tony. This was clearly another instance of dock identification. Saunders' evidence is to be contrasted with that of Carter who stated that he fell to the ground immediately after he was shot and that the person who shot him ran off straight away. Other witnesses made no mention of any person standing over Carter.

[4] The forensic analyst said that the swabs taken from the appellant all proved negative for the presence of lead and nitrate residues. However the gun shot residue kit taken from the hands of Dax Allen who was present at the scene of the shooting and who had been questioned by the police that night and released showed levels of antimony barium and lead present on the hand

the back and palm of the right hand and left palm that were above the threshold limit. The analyst stated that these swabs were way beyond the threshold levels and were considered positive for gun shot residue. However in respect of the appellant, the swabs taken from him were below the threshold level to indicate the presence of firearm discharge residue.

[5] The appellant gave evidence in which he stated that he was present at Salt Mill Plaza but denied shooting Carter.

[6] At the trial the issue was the identification of the person who did the shooting. This required the judge to give a direction in accordance with the Turnbull guidelines and on the effect of dock identification in the absence of an identification parade by the police. The issue in the appeal was whether the judge having allowed dock identification of the appellant in the absence of an identification parade by the police gave the proper direction to the jury. In his summation the Chief Justice pointed out that before the shooting Carter knew the appellant by sight only. He reminded the jury that Carter said that he told Sergeant Butterfield at the scene of the shooting while he was on the ground waiting for the ambulance that he did not know his assailant's name but he was the man who had purchased a car from his friend, Kendre.

[7] The Chief Justice told the jury that the police ought to have tested Carter's identification by holding an identification parade to check the accuracy of his identification. He reminded the jury that no reason was given by the police for the failure of the police to hold an identification parade. He told the jury:

> ".....the police should test his identification by some form of identification parade or other confrontation to check the accuracy of his identification. We don't know why but that was not done in this case and the result was that the first time that the victim Kenneth Carter was again asked to identify the person he said he saw shot him at that time was in the Magistrate's Court when he was asked if he saw the man in court and identified the defendant – he did again in this court. Now such, we call dock identifications must be considered with great care members of the jury. You only have to think about it anyone in any court room when asked if he could identify the person knows perfectly well who is being charged and that person is Mr. McPherson who has to sit in a separate dock and that is the person who is identified and so look at that with care."

[8] In **Goldson and Devon McGlashan v The Queen [2000] UKPC9,** Lord Hoffman observed at para 13 and 14:

> "13. There is no dispute that if an identifying witness has not made a previous identification of the accused, a dock identification is unsatisfactory and ought not to be allowed. Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade.....
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> 14. The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence...."

[9] Carter did not know the name of the person who shot him. This is made clear in his evidence in chief when he said that he told Sergeant Irene Butterfield that he knew who shot him but he did not know his name. He went on to say that he knew him through his friend Kendre as the person who bought his car. Not having given the police the name of the person who shot him nor any adequate or proper description, it was, in our view, necessary for the police to have held an identification parade to test the accuracy of Carter's recollection of the person who he said had shot him. In our view there ought

to have been an identification parade as it would have served a useful purpose. See Hobhouse LJ in **Reg v Popat [1998] 2 Cr. App. R. 208, 215.**

[10] In **R v Forbes [2001] 1 AC 473** at para. 27 Lord Bingham of Cornhill pointed out:

> "27. .....the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye-witness's reliability to the test, that the suspect has lost the benefit of that safe-guard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair."

[11] In **Garnett Edwards v The Queen, Privy Council Appeal [2006] UK PC 23**, Lord Carswell giving the judgment of the Judicial Committee of the Privy Council said at para. 22:

> "22.....it is well established that this would be a serious irregularity if it were the first identification. See e.g. **The State v Constance, Wilson & Lee (1999, unreported)**, where Sir Patrick Russell, giving the judgment of the Board, stated that it is only in the most exceptional circumstances that any form of dock identification is permissible: cf the discussion in the Scottish devolution appeal

Holland v H M Advocate [2005] UKPC DI. It may be borne in mind that this was far from being a first identification and it can fairly be said that the dock identification may have had little impact on the minds of the jury. It is, however, an undesirable practice in general and other means should be adopted of establishing that the defendant in the dock is the man who was arrested for the offences charged. On both these matters, when the evidence had been admitted, it was incumbent upon the judge to direct the jury to give it little or no weight."

[12] Carter first identified the appellant at the Magistrate Court when he was giving evidence at the Preliminary Inquiry and the appellant was sitting in the dock. He subsequently identified him at trial again while the appellant was sitting in the dock. In the circumstances, the Chief Justice was required to give the jury a careful direction as to how they should proceed in the view of the fact that the prosecution was relying on the dock identification of the appellant to prove that he was the person who shot Carter.

[13] In our view the judge ought to warn the jury of the special dangers of identification without a parade. In **Pipersburgh & Robateau v The Queen [2008] UKPC 11** Lord Roger of Earlsferry said at para 16:

"In the hearing before the Board the Advocate-depute, Mr. Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the office when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check of the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate-depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticized in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification."

[14] The Chief Justice did not explain to the jury the potential advantage to the appellant of an inconclusive parade. In **Pop v R [2003] UKPC 40** Lord Rodger of Earlsferry observed at para 9:

> "……..The fact that no identification parade had been held and that Adolphus identified the appellant when he was in the dock, did not make his evidence on the point inadmissible. It did mean, however, that in his direction to the jury the judge should have made it plain that normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care. **R v Graham [1994] Crim LR 212** and **Williams (Noel) v The Queen [1971] 1 WLR 548.**"

[15] In **Pipersburgh's** case, Lord Rodger again observed on the failure to hold an identification parade at para 17:

> "But, despite what the Board had said in Pop, he did not point out that Mr. Robateau had thereby lost the potential advantage of an inconclusive parade...."

The Chief Justice did not explain to the jury that in considering the dock identification, they ought to have regard to the failure of the prosecution to hold an identification parade which would have offered the appellant the opportunity that he may not have been identified by Carter as the person who shot him."

[16] The judge did warn the jury that they had to look at the evidence with care. However, in our view, this direction fell short of what was required. The judge ought to have gone further and made it clear to the jury that they had to approach the evidence with **great care**. Lord Rodger in **Pipersburgh's** case observed that:

> "17. .....perhaps most importantly, even if the judge's directions would have ensured that the jury appreciated that this type of identification evidence was undesirable in principle, he did not explain that they would require to approach that evidence with **great care**."

[17] The sole issue in this case was the identity of the person who did the shooting. The judge directed the jury in accordance with the guidelines of **R v Turnbull**. However, it should be pointed out that even though the warnings may have been given in keeping with the Turbull guidelines, this does not satisfy the requirement in respect of the warnings where there has been no identification parade. In **Pipersburgh's** case Lord Rodgers had occasion to refer to his earlier judgment in **Holland v H M Advocate [2005] UKPC D1 at para. 58** where he observed:

> "It is necessary, however to distinguish between directions which a judge gives on the approach to be adopted in relation to eye-witness identification evidence in general and directions on the dangers of dock identification, in particular."

Lord Rodgers went on to point out in **Pipersburgh's** case that:

> "…..a judge does not discharge his duty, to give proper directions on the special dangers of a dock identification without a prior identification at an identification parade, by giving appropriate directions on the approach to be adopted to eye witness identification evidence in general. Though related, the issues are different and, where they both arise, the judge must address both of them."

[18] Even though the judge may have given the appropriate **Turnbull** directions on the issue of identification, the warning in relation to the failure to hold an identification parade and the resultant dock identification were in the opinion of the court unsatisfactory.

[19] Even though the judge did not adequately direct the jury on the issue of the failure to hold an identification parade and the dock identification this court in disposing of the appeal must nevertheless have regard to the strength of the prosecution's case. Regard must be had to the admonition of Lord Carswell in **Nyron Smith v The Queen [2008] UKPC 34**:

> "If a parade is not held, the court may have to consider the effect of its absence on the fairness of the trial and the safety of the conviction. In doing so it will have regard to the strength of the prosecution case on the evidence adduced, including the quality of the identification of the suspect by the witness. Their Lordships have given consideration to this issue and have reached the conclusion on the facts of the present case that the absence of a parade was not sufficient to render the trial unfair or the conviction unsafe."

[20] Carter insisted that, while he lay on the ground after being shot awaiting the arrival of the ambulance, he told Sergeant Butterfield he did not know the name of the person who shot him. He told her that his assailant was the man who bought his friend Kendre's car. Sergeant Butterfield however denied that she had any conversation with Carter at the scene of the shooting. In fact, her evidence was that Carter was not at the scene when she arrived. Kanel Rodney gave evidence that he twice asked Carter what had happened and at that time Carter told him he did not know. Pooran Ramchrarn known as "Mongot" said that he asked Carter who shot him and Carter replied and said that he did not know. The purported identification by Saunders at best was also dock identification and the judge ought to have given the warning in respect of his evidence. In addition the forensic evidence showed that there was no gun shot residue on the hands of the appellant but there was on the hand of Dax Allen who had been questioned by the police on the night of the shooting and released.

[21] Identification was the main issue at the trial. Based on the evidence of Carter as to the identity of his assailant it was in our opinion necessary for the police to have held an identification parade to afford Carter an opportunity of identifying the person who shot him. The parade was also necessary as it would have afforded the appellant the advantage that Carter may not have

picked him out in the parade. Having not done so, it was imperative that the judge warn the jury of the dangers of convicting without a parade and the need to approach such evidence with great care.

[22] This failure in our view made the trial unfair. It was for these reasons that we allowed the appeal, quashed the conviction and set aside the sentence and returned a verdict of not guilty.

Dated this 29th July , 2010.

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Edward Zacca – President

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Elliott Mottley J.A.

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Richard Ground J.A.