IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS

Appeal No. CR-AP 1/21

from CR 26/20

BETWEEN:

JUMILLO ISMA

Appellant

-and-

REGINA

Respondent

Before:

The Hon. Mr. Justice C. Dennis Morrison P

The Hon. Mr. Justice Stanley John JA

The Hon. Mr. Justice Humphrey Stollmeyer JA

Appearances:

Ms. Lara Maroof for the Appellant

Ms. Angela Brooks and Ms. Kelly-Ann Francis for the Respondent

Date heard: **3rd February, 2022**

Date delivered: **1st March, 2022**

JUDGMENT

John, JA

1. On 20th April 2020, following a trial before Justice Shiraz Aziz and a jury, the appellant, Jumillo Isma, was found guilty of murder and sentenced to a term of life imprisonment with a minimum term of thirty (30) years.

2. On 3rd February 2022, after hearing submissions from counsel for the appellant and counsel for the respondent, we allowed the appeal, quashed the conviction and sentence, and directed that a verdict of acquittal be entered.

3. The case for the Crown depended upon CCTV footage retrieved from a camera on the security gate at the Beach Enclave Resort (hereinafter called the resort) on International Drive, Providenciales where the incident occurred.

The Factual Background

4. Midmorning on Wednesday, 11th March 2020, Godly Petiote "the deceased" was shot multiple times at the entrance to the resort. He received injuries to his head, chest, right and left forearm, and upper portions of his body. He succumbed to his injuries shortly after his arrival at the hospital.

5. On 19th March 2020, Dr. Michael Steckbauer performed postmortem on the deceased, and in his opinion, he died of multiple gunshot wounds. The postmortem was witnessed by D.C. Carl Wynter.

6. There were no eyewitnesses to the shooting. The only evidence connecting the appellant with the shooting was the CCTV footage retrieved by the police from the camera at the resort.

7. At about 10:26 a.m. on the day of the shooting, CCTV cameras captured a male walking towards the security gate of the resort. A white Honda Civic with dark tints drove up, and an unmasked male wearing a black hoodie exited the left passenger seat. He wore short jeans and was armed with a short handgun which he discharged multiple times.

8. Perez Alam downloaded the footage from the surveillance camera system onto a flash drive. Subsequently, the flash drive was handed over to D.C. Ashley Bennett. Later that day, Bennett downloaded the footage to the computer of D.C. Harvey.

9. The CCTV footage was viewed by two police officers namely Detective Police Constable Jamal Harvey, and Police Constable Calbert Baker at the C.I.D office. Each officer viewed

the CCTV footage at separate times from the other. Both officers testified that they recognised the male who discharged the firearm as the appellant, Isma.

10. At the close of the case for the Crown, counsel for the appellant made a submission of 'no case to answer'. The submission was based on the procedural unfairness concerning the identification of the appellant by D.C. Harvey and P.C. Baker. Counsel urged the court to exclude the identification and the recognition evidence of both officers. The judge, having reviewed the evidence, overruled the submission. He later gave a written ruling.

Grounds of Appeal

11. The Appellant appealed his conviction on the following grounds:

    (1) The Learned Judge erred in permitting the Crown to adduce the evidence of identification/recognition from officer Calbert Baker, and officer Jamel Harvey in circumstances where there had been a wholesale failure of the officers to comply with proper procedures and there were no objective means of testing the reliability of the identification.

    (2) The Learned Judge erred in refusing the submission of no case to answer at the end of the prosecution's case. The identification evidence was poor and unsupported.

    (3) The fairness of the appellant's trial was fundamentally undermined by the Learned Judge suggesting to the jury that they were to carry out their own identification between the images on the CCTV footage and the defendant in circumstances where:

        (i) neither party had invited the jury to carry out such process;

        (ii) the defence had not had the opportunity to address the issue as it had not been raised prior to the summing up; and

        (iii) such an identification was fraught with danger as the jury had had limited opportunity to view the appellant carefully or close up.

    (4) The Learned Judge erred in his directions to the jury as to how to assess the reliability of the identification evidence of the two police officers.

(5) The Learned Judge's summing up was fundamentally unbalanced against the appellant as he failed to remind the jury of any of the defence's cross-examination of one of the identifying witnesses, officer Calbert Baker.

The Submissions

12. Both counsel provided very detailed written submissions which were very helpful to the court. Counsel for the appellant, Ms. Maroof, began her submissions by reminding the court that the trial of the appellant was the first conducted under the ***Chief Justice's Practice Direction*** which permitted the jury to engage in the proceedings via video-link. Additionally, the jurors were placed in two separate rooms, seven (7) in one room and five (5) in another room. The appellant was being viewed on a video screen and he wore a mask.

Grounds 1, 2, and 4

13. These three grounds of appeal were considered together as they sought to challenge the refusal of the trial judge to uphold the no case submission. Moreover, they were directed to the issue of the identification of the appellant by the police officers.

14. Ms. Maroof's principal submission addressed the identification of the appellant by officers Harvey and Baker. Counsel submitted that both officers failed to follow the procedures with respect to identification via CCTV footage. She submitted, inter alia, that:

(1) there were no contemporaneous notes taken at the time of the viewing by either of the officers;
(2) there was no notation taken by Harvey of the time he viewed the footage;
(3) officer Harvey viewed the footage on 11th March 2020, and his first witness statement was not recorded until 29th April 2020, some six (6) weeks later; and
(4) officer Harvey was unable to provide specific dates on which he allegedly arrested or interacted with the appellant prior to 12th March 2020.

15. Turning to the evidence of P.C. Baker, Ms. Maroof submitted that in his testimony he said that he was able to recognise the appellant based on his facial feature namely: his nose and eyes, and his familiarity with him. Moreover, counsel submitted that officer Baker gave no evidence about his facial features that would have assisted him in making the recognition. Additionally, both officers admitted to appreciating the importance of making proper records but neither proffered any explanations for his failure so to do.

16. Counsel referred the court to the following cases ***Dean Smith and others v The Queen***[1] and ***Regina v Jake Seaton***[2].

17. In the former case, eleven (11) men attempted to enter a nightclub in Birmingham. Two were armed with loaded pistols. They did not attempt to enter via the main entrance but went down an alleyway off the main street and attempted to enter via a fire door. The doormen prevented them from doing so. One member of the group then fired a single shot, and the group went back onto the street. Shortly after, and no more than one and a half minutes later, thirteen (13) shots were fired killing one of the doormen and injuring three others. All the group then escaped in the four cars in which they arrived. Three of the cars were seen on the CCTV. The CCTV also showed some of the men pushing their way into the night club and were foiled by doormen who turned on the lights.

18. Ms. Maroof relied on paragraphs 67 and 68 of the judgment where the Court of Appeal considered the issue of recognition evidence from police officers watching CCTV footage, and the applicability of Code D of the Police and Criminal Evidence Act 1984 (PACE) in England.

> *"67. A police officer asked to view a CCTV is not in the same shoes as a witness asked to identify someone he has seen committing a crime. But, as the prosecution accepted, safeguards which the code is designed to put in place are equally important in cases where a police officer is asked to see whether he can recognise anyone in a CCTV recording. The mischief is that a police officer may merely assert that he recognised someone without any*

[1] [2008] EWCA Crim 1342
[2] [2016] EWCA Crim 393

objective means of testing the accuracy of such an assertion. Whether or not Code D applies, there must be in place some record which assists in gauging the reliability of the assertion. In cases such as these, there is no possibility of comparing the initial observation of a witness, as recorded in a contemporaneous note of description or absence of description, who purports to make a subsequent identification. The police officer can hardly be asked to record his collection of a description of a particular suspect before he has picked that suspect out from the CCTV recording.

68. Absent any such check as would be available had a witness described the commission of an offence and recollected his description of the offender, it is important that the police officer's initial reactions to the recording are set out and available for scrutiny. Thus, if the police officer fails to recognise anyone on first viewing but does so subsequently those circumstances should be noted. The words that officer uses by way of recognition may also be of importance. If an officer fails to pick anyone else out that also should be recorded, as should any words of doubt. Furthermore, it is necessary that if recognition takes place a record is made of what it is about the image that is said to have triggered the recognition." (My Emphasis)

19. In ***Regina v Seaton*** (supra), counsel submitted that the Court of Appeal identified a number of breaches of Code D by police officers providing recognition evidence. Counsel further submitted that those failings were on all fours with the failings by the police officers in the instant case. Counsel referred to two questions identified by the court which must be asked where breaches of the Code have occurred, as set out in paragraph 23 of ***Seaton***:

    (i) Did the breach occasion the mischief which the Code was designed to prevent? If so, the identification may be flawed.

    (ii) Was the breach carried by a flagrant disregard of the Code or was the breach capable of engineering considerable suspicion that the identification procedure was unfair?

20. Counsel concluded that the learned judge failed to apply the principles as set out in the cases above.

21. Ms. Angela Brooks, counsel for the respondent, submitted that:

    (1) both officers gave clear and cogent evidence of the identification of the appellant;
    (2) the appellant was well known to the police, both from their work as Police Officers when he was brought into the Police Station as well as having known him in the community; and
    (3) the trial judge did remind the jury of weaknesses in the evidence of identification.

22. Counsel pointed out that the procedural requirements set out in Code D of PACE did not apply to the Turks and Caicos Islands but agreed that the officers failed to make any contemporaneous notes of the viewing of the CCTV footage. Further, counsel accepted that it was important that police officers in trials make contemporaneous notes when viewing footage so that the court can test the reliability of the identification evidence.

23. In support of her submissions that the evidence of identification was good, counsel submitted that the officers interacted with the appellant on previous occasions. The court enquired of counsel whether it was incumbent upon the trial judge to give a specific direction with respect to the evidence given by the officers that they had executed search warrants at his home, and he had been brought in on a previous occasion as a suspect in a murder. In response, counsel said that the judge having given a good character direction, that direction overshadowed such evidence as may have been viewed as bad character.

Ground 3.

24. **The fairness of the appellant's trial was fundamentally undermined by the Learned Judge suggesting to the jury that they were to carry out their own identification between the images on the CCTV footage and the defendant in circumstances where:**

    i. neither party had invited the jury to carry out such process;
    ii. the defence had not had the opportunity to address the issue as it had not been raised prior to the summing up; and
    iii. such an identification was fraught with danger as the jury had limited opportunity to view the appellant carefully or close up.

25. Turning to ground 3, Ms. Maroof referred the court to that part of the judge's summation where he directed the jury that they should compare the image in the footage with the appellant, when he said:

> *"However, you do not have the CCTV footage and you've got paragraphs that have been made. You have – you are asked to compare the defendant against the person in the paragraph – I am sorry, in the footage."*

26. However, at the conclusion of the summation and after some discussion with both counsel in the absence of the jurors, the judge then recalled the jurors and sought to correct the earlier direction. This is what he said:

> "*I may have said to you that you are asked to compare the defendant against the person in the footage. Let me be clear, no one is asking you to do that. No one is asking you to look at the defendant and look at the footage and make a comparison to do so … You've had the opportunity of observing the defendant throughout the course of the trial, but there are pitfalls in trying to make any specific identification and comparison … So, please, again just to be clear, that you're not being asked by anyone to compare the defendant against the person in the footage. But again, you take into consideration everything else you've seen and heard in this courtroom. Also, you're going to get a copy of the information, which was what I referred to at the beginning of the summation …"*

27. Counsel submitted that such a direction must have led to a level of confusion in the minds of the jury. Additionally, she said it is customary in such cases for the trial judge to indicate to the jury that what he previously said was incorrect and he is withdrawing it, and then proceed to give the correct direction.

28. In her written submission, Ms. Brooks stated that the appellant's trial was not undermined by the judge's direction to the jury. She further submitted that the judge's approach mirrored the direction given in the case of ***R v Blenkinsop***[3]**.**

[3] 1 Cr App Rep 7

Ground 5.

29. **The learned judge's summing up was fundamentally unbalanced against the appellant as he failed to remind the jury of any of the defence's cross-examination of one of the identifying witnesses namely, officer Calbert Baker**.

30. This ground of appeal was essentially a complaint about the failure of the judge to adequately address the evidence of P.C. Baker on the issue of the recognition of the appellant. While we agreed that the judge did not adequately so do, notwithstanding that failure, we did not think his failure so to do rendered the summation fundamentally unbalanced against the accused.

31. In ***McGreevy v DPP*** [4]**,** Lord Morris of Borth-Y-Gest in giving the leading judgment had this to say at page 507 about the style of a summing-up:

> *"The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it."*

32. Later in the same judgment the learned Law Lord referred to the statement of *Lord Lowry* when giving the decision in the Court of Appeal where he said:

> "*… The ultimate aim of the trial judge must be to give directions that will assist and guide the jury based on the issues in the case. The Judge's approach is to ensure that the appellant gets a fair trial, inclusive of a balance of a fair summation. Whereas there is no obligation to rehearse all the evidence in a case, where the trial judge decides to recount the evidence, he should remind the jury of the evidence of the defense. The defense must be adequately put to the jury, including evidence relied on*

[4] [1973] 1 All E.R 503, at 507

to support it. The failure to refer to a piece of evidence, however, is not generally fatal as there is no obligation to rehash all of the evidence. In summing up of a case, a fair balance should be struck between the prosecution's case and the defendant's case by the trial judge." (Emphasis mine)

33. The trial judge's direction would have been sufficient had the safeguards been followed. The importance of a contemporaneous record of the viewing of the CCTV footage is necessary to enable the jury to make a meaningful assessment of its reliability.

34. Ms. Brooks submitted that the trial judge summed up adequately to the jury in keeping with the manner suggested in ***Labriba and others v R*** [5]. She referred to the passage where the trial judge said:

> *"Members of the jury, there are no specific rules in Turks and Caicos Islands as far as codes of practice for identification, but in the United Kingdom, and England in particular, there are Codes and there is a special law that deals with that. And those Codes are significant and they are a safeguard to good practice, and should generally be followed as close as possible. They are known as Codes of Practice and are designed to provide a safeguard of a suspect who a witness says he can identify. And it also assists with testing the ability and reliability of the witness and that applies to police officers when they identify a suspect.*
>
> *Now, there was no identification procedure carried out in this case. The witnesses, that's Baker's and Harvey's ability to identify a suspect was not tested in this sort of way, and the defendant has not had the advantage he might have had if a witness, including a police officer, had failed to pick him out, or had picked out another person. In this case, it may be that an identification parade may not have been appropriate, as the police may have picked out the defendant as they believe, from seeing the CCTV footage that it was the defendant on the footage. There is no other supporting evidence for the identification, Mr. Foreman and members of the jury. There is no forensic evidence. There is no expert evidence in this case. So you*

[5] [2015] EWCA Crim 478.

should take all of this into account when you decide whether or not you can be sure that PC Baker's and Detective Police Constable Harvey's identification of Mr. Isma was reliable, and you should ask yourselves whether the fact there was no formal identification procedure that puts this identification in doubt."

Analysis

35. As indicated earlier in the judgment, the case for the Crown rested primarily on the integrity of the CCTV footage. The respondent contended that the evidence of both officers Harvey and Baker was clear and cogent and that they described the circumstances under which they identified the appellant.

36. As submitted by counsel for the appellant, the defence was denied the opportunity to test the reliability of the evidence of the viewing by the officers in the absence of contemporaneous notes taken. The officers admitted under cross-examination that there was a need for such contemporaneous notes and neither proffered any explanation for their failure so to do.

37. Paragraphs 67 and 68 of ***Regina v Smith & others*** (supra), clearly support Ms. Maroof's submission though Code D of PACE does not apply to Turks and Caicos. The case of ***Regina v Seaton*** (supra) is also supportive of counsel's submissions.

38. The latter case turned almost entirely upon evidence of identification by claimed recognition of the appellant from photographic evidence. The facts were as follows:

    (1) In the early hours of 12th May 2014, a quantity of diesel was stolen from a Hospice. In the CCTV footage at least one of the individuals involved in the theft was provided to the Police. A still image of the individual was circulated around the police station in the district in the possibility that one of the officers might recognise the individual. The case depended upon the identification by Police Officer Bowering, who said in evidence that he had had previous dealings with the appellant. The defence case was quite simply that the identification and purported recognition was incorrect.

    (2) The evidence given by PC Bowering was that on 6th June 2014, he saw an image that had been circulated at the police station and on 9th June 2014,

he made a statement claiming to identify the man shown in the still image as being the appellant. He stated that he had dealt with him on a number of occasions as a Police Officer in the area, having arrested him in 2013 and having stopped him a few times since then. His most recent dealings, he said had been on 9th June 2013, just short of a year previously.

(3) PC Bowering made a further statement on 26th February 2015. In that statement he said he had stopped the appellant on "countless occasions" and provided a more detailed description. He described him as a white male in his mid-20's with a slim build approximately 6 feet tall, with short scruffy brown hair and mostly clean shaven. He said, "**his most distinguishing feature is his pointy nose, and I would recognise Jake all the time."**

(4) At the outset of the trial, counsel for the appellant, applied to the judge to exclude the evidence of identification in exercise of the powers under *section 78* of the *Police and Criminal Evidence Act 1984*. He submitted that the evidence had come into existence in breach of Code D, which had been enacted largely to deal with concerns raised by the court in the case of ***R v Smith and Others*** (supra). The learned judge quoted from paragraph 69 where Moses LJ said:

> "Absent any such record, that is to say a record made contemporaneously, of the police officer's initial reactions to the recording, it will not be possible to assess the reliability of the recognition. We were told that a protocol is being prepared for such cases with the increasing use of CCTV recognition."

(5) Although expert evidence on facial mapping was called on both sides. Notwithstanding that, the court held that the flawed evidence of Constable Bowering was undermined by the evidence of the experts and accordingly, the appeal was allowed.

39. Counsel for the respondent referred to the case of ***Dodson & Williams***[6]. That case is distinguishable from the instant case. In the case of ***Dodson & Williams***, the accused sat in the dock well. The jury was directed to make a comparison between the accused in the dock, and the photographs which the crown relied upon to prove the case. The accused gave evidence denying their involvement. The trial judge rejected a submission of no case to answer. The accused were convicted. On appeal it was submitted on their behalf that the photographs should not have been admitted into evidence. In dismissing the appeal, of relevance to the instant matter, the court at pages 978-979 said:

> *(1)* "*We entertain no doubt that photographs taken by the process installed and operated in the branch office of the building society are admissible in evidence. They are relevant to the issues as to (a) whether an offence was committed and (b) who committed it. What is relevant is, subject to any rule of exclusion, we know of none which is applicable to this situation, prima facie admissible. As for the exercise of any discretion which a judge may have to exclude such evidence in the form of photographs, we have no hesitation in stating that we cannot see any reason why he should do so.*
>
> *(2) Moreover, we reject the attempt here made to persuade this court to prevent a jury from looking at photographs taken by means of this technique, looking at a defendant in the dock and then to conclude if it be safe to do so that the man in the dock is the man shown in the photographs. Photographs of the same man taken at other times we regard as permissible aids in this process, bearing in mind that some offenders after the commission of crime by one device or another change their appearances.*
>
> (3) *It is, however, imperative that a jury is warned by a judge in summing up of the perils of deciding whether by this means alone or with some form of supporting evidence a defendant has committed the crime alleged. According to the quality of photographs, change of appearance in a defendant and other considerations which may arise in trial, the jury's task may be rendered*

[6] [1984] 1 WLR 971, at page 979

difficult or simple in bringing about a decision either on favor of or against a defendant. So long as the jury having been brought face to face with these perils are firmly directed that to convict, they must be sure that the man in the dock is the man in the photograph, we envisage no injustice arising from this manner of evaluating evidence with the aid of what the jurors' eyes tell them is a fact which they are sure exists."

40. Accordingly, we hold, as appears to have been conceded by the respondent, that there were serious procedural breaches in the identification process that went to the root of the identification and resulted in the accused having an unfair trial. We strongly recommend that the Turks and Caicos Islands develops protocols along the lines of Code D.

41. Notwithstanding the submissions of Ms. Brooks, we were satisfied that the breaches in this case created a great level of unfairness to the appellant and occasioned the mischief which Code D was designed to prevent.

42. The case of ***R v Deakin*** [7] is equally instructive. The essential issue on appeal in that case was whether a police officer should have been permitted to give evidence purporting to recognize the appellant by virtue of his studying certain CCTV footage. In ***Deakin*** an incident involving violence occurred at a club sometime in May 2011. CCTV footage recorded the incident lasted about 15 minutes. The appellant was one of the persons seen participating in the incident. He was a young white man wearing a green T-shirt with an Adidas logo on it. All the defendants were arrested on the scene after the Police viewed the CCTV footage, with the exception of the appellant.

43. On 2nd September 2011, the appellant attended the police station voluntarily. He had no solicitor present. During an interview he declined to answer any questions save to confirm that the club was run by his aunt, and he did not go there very often. When he was shown the CCTV footage and asked if he recognized himself, he declined to comment.

44. The Prosecution's case against the appellant depended entirely upon the identification of him from the CCTV footage, evidence being given by Detective Constable Churton, who viewed

[7] [2012] EWCA Crim 2637

that footage on 29th September 2011. This officer's evidence was to the effect that he was able to recognise the appellant on the CCTV because he had visited him at his home address between 2002 and 2006. It may be added that in 2002 the appellant would have been very young- and had also interviewed him on two separate occasions at a police station in 2010, the interviews each lasing a number of minutes. Thereafter, as he said, he had also seen the appellant's mugshot photograph which the local police force had because they had an interest in the appellant. He stated further that so far as the CCTV footage itself was concerned, that he looked at it three times. He made no notes at the time. He said in his evidence that he was "100%" sure of his recognition of the appellant and indeed recognised him on his first viewing as the man in the green T-shirt with the Adidas logo on it.

45. The defence was concerned about how the evidence of recognition had materialized. As a consequence, further statements had been put in by D.C. Churton and P.C. Gorringe who was the officer in the case, as to the circumstances in which D.C. Churton had been asked to view the footage. In her statement, P.C. Gorringe said she was on duty on Tuesday 27 September 2011, at Barnsley Police Station. She said that at around midday she spoke to Detective Constable Churton and asked him if he remembered dealing with a man called Jamie Lee Deakin. The statement went on in these words "He confirmed to me that he did, and I therefore asked him to view a CCTV disk for me for an incident I was dealing with where I believed that Deakin was involved in a Public Order offence." She then went on to say that she did not watch the footage with Detective Constable Churton. She then states that Detective Constable Churton told her he had viewed it, had recognised the appellant Deakin immediately and had no doubt about it.

46. In his own statement, which was dated 27 March 2012, D.C. Churton said:

> *"On Tuesday 27 September 2011 I was on duty in plain clothes when PC Gorringe asked me if I remembered dealing with a male called Jamie Lee Deakin. I confirmed that I did. PC Gorringe asked me if I would view some CCTV footage that she believed had Deakin in it."*

47. In holding the conviction unsafe and directing an acquittal, the court said:

"*It is clear in the present case that what happened here was contrary to the Code. There was no reason, moreover, for Police Constable Gorringe, having named the appellant to Detective Constable Churton as she did, than to say to him that she believed the appellant was on the CCTV. What she could and should have simply asked him to do was to view the CCTV to see if he recognised anyone on it… the recognition evidence of Detective Constable Churton was in effect the only evidence available against the appellant and should not have been allowed to proceed. This evidence was tainted and should have been excluded. There was very real prejudice to the appellant which outweighed such probative value as the recognition evidence might have had: to admit that evidence could potentially cause very significant unfairness ...*"

48. In light of the foregoing and having regard to the submissions by counsel for the appellant, we were satisfied that the appellant did not get the benefit of a fair trial. Accordingly, we allowed the appeal, set aside the conviction, and directed that an order of acquittal be entered.

Dated 1st March, 2022

/s/Stanley John, JA

I agree.

/s/C. Dennis Morrison, P

I also agree.

/s/Humphrey Stollmeyer, JA