

**IN THE SUPREME COURT  
OF THE TURKS AND CAICOS ISLANDS  
BEFORE SIR ROBIN AULD, ACTING CHIEF JUSTICE**

**Action No. CR-APM 28/05**

12 April 2006

**BETWEEN:**

**CARLOS MCDOWALL  
Appellant**

**and**

**THE CROWN  
Respondent**

Mr Guy Chapman for the Appellant  
Ms Yaa McCartney for the Respondent

**JUDGMENT**  
(revised 29 April 2006)

**Introduction**

1. This is an appeal by Carlos McDowall against conviction by the Chief Magistrate on 30<sup>th</sup> November 2005 in the Magistrate's Court at Providenciales of inflicting grievous bodily harm to Quinby Hall, contrary to Section 11 of the Offences Against the Person Ordinance, and of malicious damage to property of Mr Hall, contrary to section 32 of the Malicious Injury to Property Ordinance.
2. The two convictions arise out of the same incident alleged by the Crown, namely an attack by Mr McDowall on Mr Hall with a hammer in the early hours of the

morning, causing grievous bodily harm to his head and destruction of his mobile telephone by slamming it to the ground. Mr McDowall was at the time a serving police officer of some 18 years standing and a CID officer in the Turks and Caicos Police based in Providenciales. The only eyewitness of the attack was Mr Hall himself.

3. Mr McDowall's defence at trial was one of mis-identification and alibi. . As to alibi, he gave no notice of alibi before trial and no particulars of it before he went into the witness box.
4. The main issues raised by the appeal are as to the Chief Magistrate's application of the Turnbull guidance (*R v Turnbull* (1976) 63 Cr. App. 132) to the circumstances of Mr Hall's identification of Mr McDowall as his attacker — ground of appeal 2 — and as to the legal soundness of his rejection of the defence of alibi — grounds of appeal 1, 3 and 5..

### **Prosecution case and evidence**

5. The Prosecution case and evidence in a little more detail were as follows.
6. On 20<sup>th</sup> May 2005, at about 10 pm, Mr Hall visited Mr McDowall's wife, who was living apart from Mr McDowall and had become friendly with Mr Hall, at her home in Olympic Plaza [in Providenciales]. He stayed with her for several hours, leaving, on his initial account to the police and in evidence, at about 3 am and being attacked almost immediately thereafter. However, when reminded in cross-examination that, on his arrival at the Police Station at 5 a.m the same night to

report the attack, he had told Inspector Spring, the investigating officer, that it had happened just a few minutes earlier, he said that it had probably been about 4.45 a.m.

7. The reliability of Mr Hall's timing - as to which there was other indirect evidence - was important to the Chief Magistrate's consideration of Mr McDowall's alibi, which was that from about 8.20 p.m. until 5 a.m that night. he had been on patrol with a fellow officer, PC Forde, signing himself off duty at the Police Station at 5.06 a.m. He said that for part of that tour of duty, namely from about 1.45 am until 5 am, he and PC Forde were joined by another officer, PC Jervis.
8. Returning to Mr Hall's account of what happened when he left Mrs. McDowall's house, he found that his vehicle, which he had parked in the yard of her home, had two flat tyres. They had been slashed. As he was opening the trunk of the vehicle he heard someone coming up from behind him, and he then felt a severe blow to the back of the head, causing bleeding. He ran off, followed by his attacker. It seems to have been quite a long run, through the Kiskco area, and eventually into a parking lot where he fell face-down near a shed.
9. There, his attacker caught up with him and struck him on the shoulder. When he rolled over on to his back he looked up. With the benefit of reasonable lighting from an electric flood lamp on a tall pole nearby, he recognised his attacker as Mr McDowall and saw that he was wielding a hammer. It was then, according to Mr Hall, that Mr McDowall struck him with the hammer on the jaw, fracturing it and

causing him to loose a tooth, and also struck with it behind his right ear — the subject of the charge of inflicting grievous bodily harm.

10. According to Mr Hall, he managed to wrestle the hammer from Mr McDowall, and he threw it behind a nearby shed. He said that, as they continued to struggle, Mr McDowall asked him what he had been doing at his wife's house and said that he was an officer and would shoot and kill him if he did not leave her alone — evidence that the defence put in issue as part of their case of alibi. As Mr. Chapman conceded, if true, that evidence had an important input to the Turnbull exercise and posed a problem for the defence on the issue of identification.
11. In the course of this part of the attack on Mr Hall, his assailant picked up Mr Hall's mobile telephone, which had fallen out of his pocket, and slammed it to the ground, smashing it — the subject of the malicious damage charge.
12. Mr Hall, on his account, then ran off straight to the Police Station to report the attack — about a quarter of an hour's run. As I have indicated, he arrived at the Police Station at or just after 5 a.m. The police recorded his report in the incident book at 5.10 a.m. Sergeant Sutton, who spoke of seeing Mr Hall at the Station at about 5.06 am on his return from patrol, saw the entry shortly afterwards, but could not say who had made it.
13. As a result of what Mr Hall told Sergeant Sutton, police officers went to the scene of the second part of the attack and found there a shiny steel hammer with a black handle and the smashed mobile phone. They photographed both in situ and then took them to the Police Station. They were later produced as exhibits in the trial.

14. Mr McDowall arrived at the Police Station at about the same time or a little after Mr Hall. When Inspector Spring sought to interview him under caution about Mr Hall's allegations, Mr McDowall declined to answer any of his questions. Nor, as I have indicated, did he give any indication then or before trial that his defence would be one of alibi, not that he had any obligation to do so when facing summary proceedings in the Turks and Caicos Islands.

#### Defence case and evidence

15. Turning now to Mr McDowall's defence as he developed it at trial. It was, as I have said, one of alibi coupled with an assertion of mistaken identity. He gave evidence — very detailed evidence - in accordance with the summary that I have given of having been on duty from about 8 p.m. until 5 a.m. on the night in question in the company of PC Forde and from about 1.45 until 5 a.m. also of PC Jervis. He called three witnesses in support of his alibi, but notably not PC Forde.

16. The first was PC Jervis, who supported Mr McDowall's account of having been in his company and that of PC Forde until about 5 a.m. on the morning of the attack until shortly before Mr McDowall and PC Forde went off duty. However, he maintained that, although in their company that morning, he was not on duty at that time.

17. The second alibi witness was Wendy Delancey, PC Jervis's girlfriend. She gave evidence of having seen Mr McDowall and PC Forde together that night and of having been in their company until about 4.30 a.m., and also of having been with PC Jervis for part of that time — certainly up to around 5 a.m.

18. The third alibi witness was PC Windsor. He gave evidence of having been on duty at the Police Station from about 3.10 a.m. — 4.00a.m., when, at about 3.50 am, a person with the sort of injuries suffered by Mr. Hall came into the Police Station to report them. According PC Windsor, he gave the name of his attacker, but did not respond to a request to describe him. PC Windsor also gave evidence of having gone early that morning with another officer Corporal Brown, to Mrs McDowall's address where he found Mr Hall's vehicle, and also to the scene of the second part of the attack where he looked at the lighting. He described the lighting, in particular by the shed area, which, he said, was not as good as that suggested by Mr Hall in evidence and not as good as the lighting at the time of an inspection made during the trial.
  
19. On the application of the Crown, the Chief Magistrate permitted it to call PC Forde to give evidence in rebuttal of Mr McDowall's evidence that they were together at the material time. DC Forde's evidence was that Mr McDowall, PC Jervis, Miss Delaney and he were together only until 3.10 a.m., when they left, he thought, to go back to the Police Station. If they had done that, he said it would have taken them about 20 minutes to reach the downtown area where the Police Station and the scene of the second attack are located.

### **The Chief Magistrates's findings and conclusion**

20. On that evidence, the Chief Magistrate correctly resorting to and identifying the Turnbull Guidelines, concluded that he could rely on Mr Hall's identification of Mr McDowall so as to leave him sure that he was his attacker. An essential

contributor to that conclusion was his acceptance of the credibility and reliability of Mr Hall's evidence when put against his unfavourable view of that of Mr McDowall, PC Jervis and Miss Delancey.

21. The Chief Magistrate also found against Mr McDowall on the overlapping issue of his alibi defence, properly applying the test that it was for the Crown to disprove it, i.e. to negative any reasonable doubt as to the correctness of Mr Hall's identification and the other evidence on which the prosecution relied. In doing so, he accepted

- i) Mr Hall's evidence in cross-examination that the attack had occurred at about 4.45 a.m., not 3.00 a.m. as he had originally testified; and
- ii) DC Forde's evidence that he had left Mr McDowall at about 3.00 am, thus rejecting Mr McDowall's testimony that DC Forde had remained with him until his return to the Police Station at about 5.00 a.m, and the evidence of PC Jervis and Miss Delancey that they were with him until about 5 a.m. and 4.30 a.m. respectively.

22. Mr. Chapman's challenge to the overlapping findings of the Chief Magistrate on identification and alibi is not as to his interpretation of the law governing those issues, but as to his application of it to all the evidence before him in reaching his findings.

## **The jurisdiction of this Court on appeal from the Chief Magistrate**

23. Before examining that challenge I should state my understanding of my jurisdiction in considering the appeal, which to be found in principally in section 161(2) and 171 of Part XIV of the Magistrate's Court Ordinance. Section 161(2) provides that such an appeal may be on matters of fact as well as law. Section 171 gives the Court power to confirm, reverse or modify the Chief Magistrate's decision or to make such order in the matter as the Court thinks just, as the Chief Magistrate might have done.
24. Neither Counsel was able to refer me to any reported authority in this jurisdiction or any other where the same or similar provision is found, as to the extent of the scrutiny to be exercised by this Court in considering challenges to finding of fact by Magistrates in the essence of these summary jurisdictions. However, both counsel appeared to agree that it was open to the Court to consider "the reasonableness" of any such findings in issue and to uphold or quash a conviction accordingly.
25. But what is the test of reasonableness for the Court in this context? Again both counsel seemed to be **in** agreement, namely that it is not open to the Court to consider what it would have decided on the evidence before it, but whether the Chief Magistrate, properly directing himself on the law, as he did, could reasonably have reached the decision he did — a form of *Wednesbury* reasonableness./



26. In my view, counsel have correctly identified the task of the Court, when the challenge by way of appeal invites value judgments as to the soundness or reasonableness of a Magistrate's findings of fact on conflicting evidence before him. Sections 161(2) and 171 do not empower the Court to rehear the case, save and to the extent that it may, if it thinks fit, hear further evidence tendered by the parties under section 169 and 170 of the Ordinance — not applicable on this appeal.

27. Nor do sections 161(2) and 171 empower the Court, by reviewing the evidence and arguments presented to the Magistrate simply to substitute its own view as to credibility and reliability of the evidence in issue so as and treat the appeal in that way as a rehearing. As I see it, the Court's task is by analysis of the issues and evidence provided to the Magistrate to consider whether, properly applying the law any competent and reasonable Magistrate could reasonably have concluded as he did. In doing so, the Court should keep in mind the common-sense and practical approach of any reasonable tribunal of looking at the case of each party in the round as well as on each individual issue. The Court should also keep in mind that the overall consideration for it is whether the convictions are safe.

**The two main issues in the appeal of identification and alibi**

28. Although, as I have said, the two issues of identification and alibi overlap in this case — as they frequently do when identification is in issue - it is logical to consider them first separately and then together in their relationship one with the other.

### *Identification*

29. It is also logical to start with identification - ground 2 of the appeal, which complains of the Chief Magistrate's misapplication of the Turnbull Guidelines to the evidence before him. As I have indicated, Mr Guy Chapman, accepted in argument that the Chief Magistrate properly and adequately identified the material Turnbull guidelines. His complaint is that he did not apply them, in particular the relevance of the length of time Mr Hall had to see and identify his attacker and the adequacy of the light at the scene in respect of which Mr Hall and PC Windsor gave differing accounts.
  
30. Miss ..... McCartney, for the Crown submitted that the Court should not disturb the Chief Magistrate's finding on that evidence and also the evidence from PS Sutton of his visit to the scene at or about dawn on the morning in question and of a view by the Chief Magistrate during the trial. albeit long after the event when the location had changed.
  
31. The Chief Magistrate, in accepting Mr Hall's identification of Mr McDowall as his attacker, expressly put aside any reliance on what he himself observed on his view of the site. He said that he preferred the evidence of the Crown witnesses, in particular, Mr Hall about the lighting at the scene of the attack. As to PC Windsor's contrary evidence, he clearly and expressly, rejected it as unreliable for a number of reasons going to his role as a witness in the matter, reasons that he catalogued compellingly on pages 17 and 18 of his Reasons and which I need not rehearse.

32. Whilst Mr Chapman takes issue with the detail in various respects of the Chief Magistrate's general conclusion that PC Windsor was an unreliable witness, I cannot say that his acceptance of the evidence of Mr Hall and his rejection of that of PC Windsor in this and other respects was unreasonable in the same that I have identified as contemplated by Section 161(2) and 171 of the Ordinance. Having alerted himself to the relevance of the length of time Mr Hall claimed to have seen Mr McDowall during the course of the assault, he was clearly satisfied that it was sufficient for reliable identification. He was also clearly satisfied — and reasonably in the sense that I have indicated — of the adequacy of the lighting at the scene of the second attack for such identification. And, as he noted, this was a case of recognition, Mr Hall having seen Mr McDowall before and having known of his relationship with Mrs McDowall.
33. Importantly, the Chief Magistrate included in the matters on which he accepted Mr Hall's identification of Mr McDowall, Mr Hall's evidence of what Mr McDowall said to him at the time of the second attack - evidence, which as Mr Chapman conceded, if true, was relevant and probative on the issue of identification, namely evidence of his attacker upbraiding him for being with his estranged wife. In my view, the Chief Magistrate also rightly took into account the assault on Mr Hall and the slashing of his tyres outside Mrs McDowall's home, and the pursuit from there to the parking lot where his assailant renewed the attack and where, on Hall's evidence, he first had an opportunity to see that it was Mr McDowall.

34. In my view, all those aspects of the evidence going to identification were relevant, probative and, if accepted by the Chief Magistrate as they were, compelling — certainly sufficient to prevent this Court from concluding that his acceptance of Mr Hall's identification of Mr McDowall was unreasonable in the *Wednesbury* sense or even in the *non-Wednesbury* sense.

35. I, therefore, reject ground of appeal 2 going to the issue of identification.

*Alibi*

36. I turn now to the second and overlapping main issue raised by grounds of appeal 1, 3 and 5, namely whether the Crown have disproved the defence of alibi — whether notwithstanding the Chief Magistrate's favourable view of the Crown's case, the alibi evidence should have given him pause enough — doubt enough — so as not to convict.

37. As should be apparent from my summary of the evidence and the Chief Magistrate's conclusions on it, he was alive to the point that if the attack had occurred at about 3 a.m. as initially stated in evidence by Mr Hall, there were available in support of his alibi the evidence of PC Jervis and his girl friend. He would also have had the support up to that time of the evidence of PC Forde who was called by the prosecution to give evidence in rebuttal and whom the Chief Magistrate found to be a "convincing witness". The Chief Magistrate was equally alive to the point that if the attack took place at about 4.45 a.m. as Mr Hall accepted in cross-examination then Mr McDowall was left only with the support

of PC Jervis and Wendy Delancey, who along with Mr McDowall, the Chief Magistrate found to be unreliable witnesses.

38. Mr. Chapman's main submission was that the Chief Magistrate wrongly accepted Mr Hall's evidence in cross-examination of 4.45 a.m. as the approximate time of the attack, thus depriving him of the value of PC Forde's account of his movements until just after 3 a.m. However, he maintained, as an alternative, that even if the attack had been at about 4.45 a.m., the timings were just too tight for Mr Hall to have reached the Police Station at just after 5 a.m. as recorded in the station incident book, and also for all the processing, and medical checks said by the Crown to have occurred in the time alleged. In short, Mr Chapman argued that, even if the attack occurred at about 4.45 am, regardless of the unavailability of PC Forde's support to cover that time, there were other strong pointers in the evidence against the attacker having been Mr McDowall.

39. The main thrust of Mr Chapman's attack on the Chief Magistrate's rejection of Mr McDowall's alibi defence was as to the latter's heavy reliance on his assessment of the reliability of each of those and other witnesses by reference to their demeanour and manner in the witness box. As my summary of the evidence and the Chief Magistrate's response to it have indicated, he accepted as truthful and reliable the evidence of Mr Hall and PC Forde and, to the extent that it bears on the issue of timing as well as other matters, that of Sergeant Sutton.

40. By contrast, the Chief Magistrate rejected as untruthful the evidence of Mr McDowall, PC Jervis and his girl friend, Wendy Delancey and also, to the extent

that it may bear on timing as well as other matters, that of PC Windsor. In each case, the Chief Magistrate commented with some care on aspects of the witness's manner and treatment of questions in the witness box, leading him to form a view about each one of them, one way or another. Mr Chapman acknowledged the advantage given to a tribunal deciding at first instance issues of fact over that of an appellate court is that a first instance tribunal sees and hears the witnesses and is able to form a view as to their truthfulness or other reliability in part from their demeanour in the witness box.

41. However, Mr Chapman suggested that the Court should be sceptical about the Chief Magistrate's reliance on such a feature in this case, which he described as "extreme" and "too much of a good thing". In making that suggestion he pointed to the Chief Magistrate's uniform acceptance of the evidence of the prosecution witness, in particular Mr Hall and PC Forde, in large part by reference to their demeanour in the witness box, and to his uniform rejection of the evidence of the defence witnesses, Mr McDowall, PC Jervis, Miss Delancey and PC Windsor, again in large part by reference to their demeanour.

42. I did not take Mr Chapman's criticism of the Chief magistrate in this respect to be a suggestion of bad faith on his part in resorting to demeanour where he should not have done or done to the extent that he did. However, it is right to consider whether, in his over-all approach to the relative credibility and other reliability of witnesses in this way, there is something there that should cause the Court to doubt the reasonableness of his assessment of each or any of the witnesses or, at its broadest, to cause the Court concern as to the safety of the convictions.

43. It is plain from my reading of the Chief Magistrate's careful analysis of the evidence of each individual witness and of the effect of the evidence over-all that he had proper regard to the importance in this case of determining who was telling the truth and whose evidence was otherwise reliable on the critical issues of identification and the defence of alibi. There is no reason to believe that he did not undertake that task in good faith and in an objective way. Nor is there any basis upon which I can look behind his assessment of each of the important witnesses, both as to the content of their testimony and as to the way in which he or she gave it. Certainly, there is nothing in the evidence looked at as a whole or in individual pieces of objective or undisputed evidence on which I could question the soundness of his assessment of the credibility and reliability of those witnesses, still less any approach suggesting *Wednesbury* unreasonableness in those respects. The fact that at the end of his analysis, he preferred the account of the prosecution witnesses rather than that of the defence witnesses is often a feature of successful prosecutions where the indictment is a true bill and the defence a dishonest attempt to defeat it. In short, the important issues in the case turned on the credibility and reliability of the material witnesses, matters essentially for the Chief Magistrate, not for this Court in the absence of some significant pointer or pointers to misjudgements by him in that respect. I, therefore, also reject grounds 1, 3 and 5.

44. The remaining grounds of appeal, as Mr Guy Chapman properly conceded, were of little or no individual substance and could, not, absent success on the

identification and/or alibi issues, found on their own a basis for upsetting the convictions.

45. Accordingly, I must dismiss the appeal against conviction.

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