

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
SCA. 117/92

MIGUEL DIAZ V. REGINA

Mr. J. Furniss for the appellant
Mrs. J. Banks for the Crown

JUDGMENT

Heard 30.4.93

Before Bingham J (Acting)

On 30th April 1993 I heard arguments in this appeal and at the end of which I reserved judgment in order to examine the matter more carefully. The appeal involving as it did in part the question of visual identification that subject matter being an area of the law which has now taken on a character all of its own calling for special considerations in the examination and determining of each case which turns on that question.

The appellant was tried and convicted by the Senior Magistrate on 30th July 1992 for the offence of burglary contrary to section 220 (1) (b) of the Penal Code, Law 13 of 1975, committed on 5th April 1992. He was sentenced to serve a term of eighteen months imprisonment.

The facts in this case were as follows -

The virtual complainants Mr. and Mrs. Raymond Lyn Byrd owned an apartment at the Island Pines condominium complex which is situated along what has been commonly referred to as the seven mile stretch at West Bay Road, in Grand Cayman.

On 5th May, 1992 the day of the incident, a Sunday around 3:00 to 3:30 p.m. while the Byrds were seated on their porch reading they observed

a man who they later identified as being the appellant walking by. He looked in towards the porch and on seeing the couple he appeared somewhat surprised at seeing them there. It was their custom to spend a great deal of their time around that period on the beach but because the day was overcast they had resorted to reading on the porch. About three minutes after the man walked by, Mrs. Byrd observed the same person who she had earlier seen now in their bedroom. She stared at him for about four seconds before calling out to her husband who jumped up from his chair and ran towards the bedroom. As he approached the intruder he recognised him as being the same man who he had earlier seen walking pass the apartment at a distance of about fifteen feet away from where he had been seated on the porch.

As he went in the direction of the bedroom the man then ran out of the apartment but not before he had turned and closed the screen door and ran off in the direction of the adjoining apartment complexes at Sea Gull and Coral Caymanian. Mr. Byrd continued chasing the man but eventually lost sight of him. A check of the bedroom revealed a number of items of jewellery - being a gold bracelet and a necklace with a chain and a charm belonging to Mrs. Byrd and a knife which was a gift to Mr. Byrd by his wife missing. Mrs. Byrd placed the value of these items at \$1500.

A report was made to the police who visited the apartment shortly after and carried out investigations including searching for a man answering a description which the Byrds gave to the police. This search took place in the immediate vicinity of the apartment complex and its environs. This, however, proved futile.

The Byrds continued the search and about two to two and a half hours later they went to the Beach Club where they saw a man answering the description of the burglar talking to two other persons. On closer examination Mr. Byrd recognised the appellant as the same person who had been in the apartment earlier that afternoon. They accosted him and on being questioned he denied being at the apartment that

afternoon. Mr. Byrd remained by the appellant while his wife summoned the police who came about half an hour later and took the appellant into custody. A search of the appellant's clothing revealed none of the missing articles. When questioned by the police the appellant denied the charge saying that "he had just come from fishing" and stated being at sea at the time of the incident.

The appellant gave evidence which reiterated the fact that he had gone fishing at the time of the incident and called two witnesses Elvis Erlin Watler and Marlon Duke Ebanks to support his alibi. They testified to going fishing with the appellant on the afternoon in question returning after 5:00 p.m. They were however, unable to state categorically as to being in the appellant's company around the time that the Byrd's apartment was burgled.

The learned Senior Magistrate accepted the account given by the Byrds as being truthful and reliable and rejected the alibi defence of the appellant and his witnesses in finding him guilty of the charge.

The conviction has been challenged by the appellant on three grounds namely:-

- "1. The Senior Magistrate erred in Law over the question of identification.
2. The Senior Magistrate (sic) in relation to the facts.
3. The Learned Magistrate was wrong to reject the evidence from the appellant in relation to his alibi."

From an examination of the above grounds of appeal, it appears that the word omitted from ground 2 is "erred". When grounds 2 and 3 are examined however, the arguments as presented by learned counsel for the appellant sought fully to address both grounds.

Learned counsel for the appellant contended that:-

1. The length of the observation by both crown witnesses being a matter of seconds was at best a fleeting glimpse and was not long enough for the witnesses to be sure that it was the appellant who they saw walk by the apartment and was later in their bedroom.
2. The period of time during which the witnesses purported to view the intruder in the apartment was not a full view. At least part of the time was only a side view of someone they they did not know before.
3. The alibi evidence of the appellant and his witnesses when examined establishes an account which was not discredited, ruling out the fact that they could have been at sea fishing as they stated.
4. The learned Senior Magistrate from the manner in which he sought to deal with the question of visual identification his consideration of the matter was wholly insufficient.

Learned counsel for the Crown on the other hand forcibly contended that -

- (1) Both complainants obtained more than a fleeting glimpse of the appellant.
- (2) The two opportunities available to the complainants within a short interval of time apart to view and properly identify the appellant was adequate.
- (3) Given the facts in this case it was not one to which the guidelines laid down by Lord Widgery C.J. in R v. Turnbull (1977) Q.B.D. 277 was applicable as this was on the facts not a fleeting glimpse case. She cited the following authorities as instances of cases calling for special care including the requisite warning by the trial judge:-

1. Barnes Desquottes and Johnson v. R and Scott and Walters v. R
(1989) 37 W.I.R. 330.

2. Kenneth Evans v. R (1991) 39 W.I.R. 290

3. David Kennedy Ebanks v. Regina C.I.C.A. 22/91 (unreported)
delivered on 12/8/92

4. The cumulative period of observation at the apartment took the evidence of identification beyond that of a fleeting glimpse and was sufficient to justify the conclusion reached by the magistrate.

Grounds 2 and 3.

These two grounds involving as they do questions of fact were matters for the learned magistrate who saw and heard witnesses to resolve. Having heard the evidence at the end of the day he accepted the testimony of the Byrds as truthful and reliable and rejected the account of the appellant and his witnesses. On an examination of the transcript of the Record of Appeal one cannot conclude that there was not material to support the conclusion arrived at by the magistrate. As there was no wrongful assessment or mis-application of the facts, there existed no basis for this court in reviewing the matter to say that the finding the magistrate came to was an unreasonable one. In the circumstances these two grounds must fail.

Ground I

This related to a question of mixed fact and law. In so far as the learned Senior Magistrate accepted the evidence of Mr. and Mrs. Byrd as truthful and reliable this was a question of fact for him to determine. The crucial question thereafter being the quality of the identification evidence given the fact that neither of these two eye-witnesses knew the appellant, who they purported to identify as the burglar before.

In R v. Turnbull (1977) Q.B.D. 224 the well-known guidelines in cases wholly dependent on identification evidence were laid down by the Court of Appeal in England. These have been consistently followed. In that case, Lord Widgery C.J. gave the following directions (pp 229, 230).

"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) 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."

(Emphasis supplied)

The above guidelines were also applied by the Privy Council in Kenneth Evans v. R. (1991) 39 W.I.R. 290 in allowing the appeal against conviction. There the sole eye-witness' purported identification of the gunman in witnessing a killing was five to six seconds after being awoken by the sound from the discharge of a gun. Lord Ackner who delivered the advice of the Board said:- (page 292)

"It is clear that the trial judge was not prepared to treat this as a case where the identifying evidence depended solely on a fleeting glance. True enough as established by the judges's own questions of Miss Facey, her opportunity to observe the five intruders was "fleeting". It lasted about five to six seconds."

In the instant case, however, the witnesses estimate of the length of time during which they observed the appellant was between 10-15 seconds when they first saw him walking pass the apartment and about the same time when he was observed in the bedroom. Both of these occasions were closely related in time being put by the witnesses as about five to fifteen minutes apart. On neither occasion was there any violence or threat of violence attempted to the witnesses inducing such fear as to render the circumstances of the identification difficult. Having regard to the fact that there was adequate opportunity for a positive identification therefore, it can be inferred that the learned magistrate from the manner in which he dealt with the matter approached the question of the visual identification

by the Byrds with the necessary caution.

Given the Turnbull guidelines there was also the need for him to exercise ^{the} requisite caution in assessing the identification evidence because of the dangers inherent in evidence of such a nature and the real possibility of a mistaken identification. From the record available it is clear that he was fully aware of the guidelines and the manner in which he was required to approach his task. At page 36 of the record in summarising the case the learned magistrate said:-

"I have no doubt at all when I listened to those (sic) and watched (sic) two witnesses and the Byrds testify that they knew when they saw Miguel Diaz that that was the man that was in their apartment, that was the man who took the jewellery and at sometime between 3:00 to 3:30 p.m. that afternoon....
.... I think is the time he left his friend and visited this apartment and removed this jewellery. I have no doubt at all in my mind. I am satisfied with the evidence of identification that these two people saw this man twice. It wasn't a question of fleeting. They saw him, they see him a short time later, they see the same man on the beach."

In the light of the above, the learned magistrate demonstrated that he approached this difficult question of visual identification with the care that the circumstances of the case warranted. Although the appellant was not known to the witnesses before, they saw him on two occasions which though only brief encounters were only moments apart in circumstances which allowed for a positive identification. To buttress their earlier recognition of him they were able unaided subsequently to identify him on the beach from group of persons present there. That identification coming some two to two and a half hours after the burglary incident at the apartment was a further test of the reliability as to the quality of the identification evidence.

In Turnbull (Supra) Lord Widgery was also careful to mention that the extent to which the guidelines were applicable was qualified by the nature and quality of the identification evidence. At pages 228, 229 he said:-

"If the quality is good and remains good at the close of the accused case, the danger of a mistaken identification is lessened."

The evidence given by the Byrds as to seeing the appellant walking by their apartment around 3:00 to 3:30 p.m. in the afternoon of 5th April 1992 and shortly thereafter in their apartment when examined showed that the learned magistrate was impressed by their demeanour and treated the two eye-witnesses as persons upon whose testimony he could safely rely in convicting the appellant. As an example of the quality and kind of evidence he had to assess the following account of Mr. Byrd when pressed in cross-examination on the reliability of the identification of the appellant he responded in this manner:--(page 17)

"I would say as a matter of fact he was the same person. I had no doubts when I (sic) seen him on the beach later. If it had been a month, if I had not seen him at the beach two hours later, if he had come here today, I might not recognise him. But because of the timing of the events, I can say definitely the person who walked by and the person in the bedroom is the man sitting right there."

This account must have strengthened the resolve of the witness as to the correctness of his identification of the appellant as well as impressed the magistrate. The cumulative effect of the three occasions for the proper recognition and positive identification of the appellant which were so closely related in time and circumstances would have left no doubt in the mind of the learned magistrate that the appellant was the person the Byrds saw that afternoon.

It was these two opportunities for observation available to these witnesses, two at a very short interval of time intervening and a subsequent identification about two to two and a half hours later in what was on the evidence not difficult circumstances that provided the very foundation for the conclusion to which the learned magistrate came. He saw and heard the witnesses and assessed their demeanour in coming to the conclusion to which he came.

Having addressed the arguments advanced and carefully examined the printed record of the transcript I am satisfied that there was material before the learned magistrate on which he could have properly come to the conclusion to which he came. In that regard therefore the appeal is dismissed. The conviction and sentence are affirmed. The sentence is to run as from the date of conviction.

Dated 27th May 1993



D.O. Bingham

Judge of the Grand Court (Acting)

