

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 2006

BETWEEN:

MERVIN EDWARD aka "SHARK"

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh A. Rawlins

Chief Justice (Ag.)
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Jeannot Walters for the Appellant
Mr. Leslie Mondesir, Senior Crown Counsel, for the Respondent

2006: October 16;
2007: January 29.

JUDGMENT

- [1] **RAWLINS, J.A.:** The Appellant, Marvin 'Shark' Edward, was convicted on 2 counts of wounding on 1st February 2006. The first count alleged that he used a firearm with intent and unlawfully caused a wound to David 'Jah Mice' St. Omer on 17th June 1997, contrary to section 151(b) of the Criminal Code 1992. The second count alleged that he used a firearm with intent and unlawfully caused grievous harm to Juliet Fontellio on the same date, contrary to section 151(b) of the Criminal Code 1992. He was convicted on both counts and sentenced to serve 8 years in prison on each count to run concurrently. The maximum sentence on each count is 10 years. He appealed against the conviction and sentence. He appealed against the conviction on the grounds that he is not guilty of the offences and that the conviction is against the weight of the evidence.

- [2] When the appeal was heard, Mr. Walters, learned Counsel for Edward, informed this Court that while he was pursuing the appeal against sentence, he wished to withdraw the 2 substantive grounds on which Edwards initially appealed against his conviction. He was granted leave to pursue the appeal against conviction on the ground that the trial judge erred when he did not consider the relevant provisions of the Evidence Act, 2002,¹ when he dealt with identification and the admissibility of the caution statements, which Edward gave to investigating officers. Mr. Walters contended that the learned trial judge erred by admitting the caution statements into evidence without regard for the provisions of section 71 of the Evidence Act 2002. He appealed against the sentence on the ground that it was excessive. The question also arose as to whether an order for the preparation of a pre-sentence report was mandatory prior to sentencing. The facts will present a helpful precursor against which these issues will be considered.

The Facts

- [3] On Tuesday 17th of June 1997, at about 11:30am, David St. Omer was travelling as the pillion rider on a motorcycle with a friend along Darling Road in Castries when he saw the appellant, Edward with a gun. According to St. Omer, Edward fired 2 shots at him from a range of about 20 feet. At the time of that shooting there was bright sunshine and the weather was clear. He saw Edward whom he knew for over 20 years quite clearly. After Edward fired the shots, he (Edward) went into the Conway area. He (St. Omer) reported the incident to the police. He saw Edward again with one Michael 'Nupie' Jean at about 12:15pm on the same day while he (St. Omer) was at a food shop on Darling Road, Castries. St. Omer was eating when the 2 men arrived with guns and fired 5 or 6 shots at him. He again reported the matter to the police who searched but did not find the men.

¹ No. 5 of 2002 of the Laws of St. Lucia.

- [4] On the same 17th June 1997, at about 2:30pm, St. Omer was walking in the vicinity of Jeremie Street in Castries. He was going across the pedestrian crossing close to the taxi stand when he heard what sounded like gun shots. He immediately turned around and saw the appellant, Edward and Michael Jean each with a gun in their hands. St. Omer felt a burning sensation from a gun shot in his back. Another gun shot punctured his right hip. He then saw Edward and Jean running away from the scene towards the Conway area. He (St. Omar) was hospitalized as a result of the injuries that he sustained from the shooting. While he was in the hospital, St. Omer handed over to Police Corporal McGregor Francois a bullet proof vest which had a hole that was almost in the center of the back. Corporal Francois removed what appeared to have been a spent bullet from the vest. Medical examination of St. Omer revealed that he had sustained an entrance wound to his right flank or right lower back. There was a large haematoma over the area just lateral to the spinal column.
- [5] Juliet Fontellio was also on Jeremie Street in the vicinity of the pedestrian crossing close to the taxi stand at about 2:30pm on 17th June 1997. She had just crossed the road when she heard what sounded like gunshots. She looked back and saw St. Omer, whom she did not know before, immediately behind her. She felt a burning sensation and her body shook. She fell into the embrace of a man and collapsed. She was taken to the Castries Fire Station and from there to the Victoria Hospital where she was hospitalized for 2 days. Her medical examination revealed that she had sustained an entry wound in her upper back. There were no exit wounds. Further medical examinations and X-ray revealed that a bullet was lodged in her abdomen. Edward gave 2 statements to the police under caution in which he did not admit that he had injured either complainant.
- [6] Against this background, I shall consider, first, whether the Evidence Act 2002 was applicable in this case.

Was the Evidence Act 2002 applicable

- [7] The question whether the Evidence Act 2002 is applicable in this case is critically important because some of the provisions of this Act have changed aspects of the law of evidence that relate to the admissibility of caution statements and directions regarding identification.²
- [8] The Evidence Act 2002 came into effect on 1st November 2005. Edward was arraigned on 19th September 2005 and pleaded not guilty to both charges. After the plea was taken, the learned trial judge adjourned the case to 1st December 2005. The case was further adjourned to 31st January 2006. The jury was then empanelled, Edward was put in their charge and the taking of the evidence commenced.
- [9] Mr. Walters, learned Counsel for Edward, submitted that the question whether the relevant provisions of the Evidence Act 2002 apply in this case is to be determined by reference to section 10(a) and (b) of that Act. These subsections provide as follows:
- 10(1) This Act applies to and in relation to all proceedings in a court in Saint Lucia, including –
 - (a) proceedings that relate to bail;
 - (b) interlocutory proceedings or proceedings of a like kind; or
 - (c) proceedings heard in chambers.
 - (2) This Act does not apply to or in relation to –
 - (a) proceedings the hearings of which began before the commencement of this Act;
 - (b) criminal proceedings in so far as those proceedings concern the determination of the penalty to be imposed in respect of an offence.

“Proceedings” is defined in section 2 of the Act to include proceedings, “however described - (a) in a court in Saint Lucia or a court of a foreign country.”

² The relevant provisions are sections 70 and 71 of this Act which deal with the admissibility and reliability of confession statements; section 100 which deals with the exclusion of identification evidence; section 102 which deals with the directions which a judge is to give to a jury in relation to identification evidence; and section 136 which provides for the manner in which a trial judge should deal with unreliable evidence.

[10] In his submissions, Mr. Walters, in effect, seemed to equate the commencement of the taking of evidence with “proceedings”. From that premise, he contended that the trial, and therefore the proceedings, commenced in January 2006 when the jury was empanelled and the evidence was taken. He submitted that it was the process of calling witnesses and taking their evidence, rather than the entry of the plea on 19th September 2005, that constituted “proceedings” under section 10 of the Evidence Act 2000. The result, he said, was that the “proceedings” commenced in January 2006, when the Act was already in operation and was therefore the applicable law on evidence at the time of the trial.

[11] On the other hand, Mr. Mondesir, learned Counsel for the Crown contended that the trial actually commenced on 19th September 2005 when Edward was arraigned. This, he said, was clearly before the Evidence Act 2002 came into operation and Article 887(3) of the Criminal Code 2004, read with Article 871 of that Code, therefore applied. The latter section is under the rubric “Proceedings on pleas other than plea of guilty” and states:

“871. - Unless it is otherwise expressly provided in this Code if the accused pleads any plea, other than the plea of guilty, he or she is, by such plea without any further form, deemed to have demanded that the issues raised by such plea shall be tried by a jury and is entitled to have them tried accordingly.

[12] An elucidation of the present issue would benefit from setting out subsections (1) – (3) of Article 887 of the Criminal Code. They state:

“887.- (1) At the time appointed for the trial or sentence of the accused upon any indictment he or she shall appear or be placed at the bar.

(2) The accused shall be informed in open Court of the offence with which he or she is charged as set forth in the indictment and he or she shall be required to plead instantly to the indictment, unless where the accused, having been committed for trial, objects and the Court finds that he or she has not been duly served with a copy of the indictment.

(3) A trial is deemed to begin when the accused is called upon to plead to the indictment.”

[13] The Criminal Code 2004 was in force when Edward was arraigned on 19th September 2005. Under that Code a criminal trial commenced with arraignment. This is reflected in Article 887(1) and (2) of the Criminal Code 2004. Article 887(3) of the Criminal Code reinforces this and puts it beyond any doubt by deeming the time when an accused is called upon to plea to a charge as the commencement of the trial. Accordingly, the trial of Edward commenced on 19th September 2005 and the Evidence Act 2002 was not yet in force.

[14] The interpretation given to “proceedings” in section 2 in the Evidence Act 2002 is quite wide. It is not necessary to pronounce upon its ambit for the purpose of this case because it undoubtedly includes the commencement of a trial. By virtue of the provisions of section 10(2)(a) of the Evidence Act 2002, this latter Act was not the applicable law of evidence in this case because the proceedings therein commenced before the Evidence Act 2002 came into operation.

The admission of the caution statements

[15] At the trial, learned Counsel for Edward did not object to the admission of the caution statements which Edward gave to the police. At the hearing of the appeal, however, he said that the learned trial judge erred by admitting those statements by virtue of the provisions of section 71 of the Evidence Act 2002 notwithstanding that he did not object to their admission.

[16] Section 71 of the Evidence Act 2002 provides:

“71 (1) This section applies only in criminal proceedings and only in relation to evidence of a confession made by a defendant.

(2) Evidence of a confession is not admissible unless the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected.

(3) For the purpose of subsection (2), evidence that the confession is true or untrue is not relevant.

(4) For the purposes of subsection (2), the matters that the court shall take into account include –

(a) any relevant condition or characteristic of the person who made the confession, including the age, personality and education of

- the person and any mental, intellectual or physical disability to which the person is or appears to be subject; and
- (b) if the confession was made in response to questioning –
 - (i) the nature of the questions and the manner in which they were put; and
 - (ii) the nature of any threat, promise or representation made to the person questioned.

[17] When Edward was questioned in relation to the shooting of Juliet Fontellio, he simply stated that he did not know anything about that incident. When he was questioned about the shooting of St. Omer, he said that St. Omer had threatened to kill him (Edward) and his family. He (Edward) said, further, that St. Omer told him that he (St. Omer) had a gun and would shoot him (Edward) when he (Edward) came from prison. These are not confession statements because Edward did not admit or confess that he committed the crimes for which he was charged.

[18] In any event, since I have found that the Evidence Act 2002 was not applicable, the learned trial judge did not have to take into account the special considerations of the type for which section 71 provide before he admitted the caution statement. He therefore did not err when he admitted the statements in evidence when learned Counsel for Edward did not object to their admission. The appeal therefore fails on this ground.

Identification

[19] Since the Evidence Act 2002 is not applicable in this case, the issue whether the learned trial judge erred in the manner in which he dealt with the identification evidence is to be determined by reference to the guidelines that Lord Widgery CJ provided in **R. v Turnbull**.³ According to those guidelines,⁴ where identification evidence is at issue, the trial judge should assess that evidence at the end of the case for the prosecution. Where, on assessment, the judge thinks that the quality

³ (1976) 63 Crim. App. R.132.

⁴ At pages 137-138.

of the evidence is poor the judge should withdraw the case from the jury and direct an acquittal. Even in the absence of submissions from the defence, the judge should invite submissions and withdraw the case from the jury, in appropriate circumstances.⁵

[20] The quality of the evidence might be poor, for example, when identification depends upon a fleeting glance, or even upon a longer observation that is made in difficult conditions. In such circumstances, the judge should usually withdraw the case from the jury unless there is other evidence that supports the correctness of the identification. After the defence closes its case, the judge may withdraw the case from the jury if he or she determines that the identification evidence is unreliable. The rationale for this is that it protects a jury from acting upon evidence that could be a possible source of injustice.

[21] When considering identification evidence, a judge should examine closely the circumstances in which the identification was made; the length of time that the witness had the accused under observation; the distance; the light; whether observation was impeded at any time; whether the witness saw the accused before and if so how often; if occasionally whether he or she had any special reason for remembering the accused. The judge should also consider the time that elapsed between the original observation and the subsequent identification and whether there was any material discrepancy between the description of the accused that the witness gave to the Police and the actual appearance of the accused.

[22] As far as summing up to the jury is concerned, the **Turnbull** guidelines enjoin a trial judge to warn a jury of the special need for caution before the jury convicts an accused whose identification is at issue. The judge should also explain to the jury the reason for the danger and the special need for the warning. The judge should refer to the possibility of mistaken identification and the fact that a mistaken

⁵ See, *R v Fergus (Ivan)* [1993] 98 Cr. App. R. 313.

witness could nevertheless be a convincing witness. However, as Sir Vincent Floissac pointed out in his judgment in the Privy Council in *Michael Freemantle v The Queen*,⁶ the failure of a trial judge to give this warning would not preclude an appellate court from finding that on miscarriage of justice had actually occurred, thereupon upholding the conviction by applying the proviso. This would be in exceptional circumstances, as where, for example, the identification evidence was of an exceptionally good quality.⁷

[23] In this case, the evidence of St. Omer was that when he heard the gunshots on the afternoon of 17th June 1997, he looked back immediately and saw the face of Edward for some 2 to 3 minutes. He saw Edward, whom he knew for more than 20 years, holding a .38 spin barrel gun with a black nose and a brown handle. He saw him clearly because the weather was fair at the time and there was nothing obstructing his view. He had seen Edward on 2 occasions before on the same day, and on each occasion Edward had shot at him.

[24] In examination in chief, Ms. Fontellio said that when she heard the shooting she looked around just before she collapsed and got a fleeting glance of Edward who was not far away from her. Under cross-examination, she said that she did not see Edward but the time to which she was referring was not clear from the questions. In re-examination she repeated that at the time of the shooting she looked around and saw Edward fleetingly. She did not know him before. However, the shooting occurred in broad daylight. The evidence was that at the time of the shooting the weather was clear and there were no impediments or obstructions to the sight of Ms. Fontellio. The fleeting glance was not made in difficult circumstances. In any event there was other evidence that was given by St. Omer, which supported the correctness of her identification of Edwards as the person who had a gun and was deliberately shooting in the area where she was at the time. It was sufficient for the purpose of permitting the learned judge to leave

⁶ [1994] 1 WLR 1437.

⁷ See from page 1440A-1441B.

the issue of identification in the case to be determined by the jury with appropriate directions. The question is whether those directions were adequate.

The identification directions

- [25] In his summation, the learned trial judge put the issue of identification to the jury. He asked them whether, having regard to all of the evidence, they thought that St. Omer was mistaken when he told them that it was Edward who fired the shots at him (St. Omer). The learned trial judge referred to the approximate time during which St. Omer said that he saw Edward's face. He said that it was not a fleeting glance by St. Omer who knew Edward for over 20 years and who saw Edward on two separate occasions before on the same day, if they accepted the evidence of St. Omer. The judge also drew the attention of the jury to the identification evidence that Ms. Fontellio gave, noting what she said in examination in chief, cross-examination and re-examination, respectively.
- [26] The learned trial judge then addressed the jury on mistaken identification. He told them that since the case against Edward depended wholly or substantially on the correctness of the identification of Edward, which identification Counsel for him (Edward) said was mistaken, he was required to give them a special warning that they needed to exercise caution before convicting Edward. This, he told the jury, was because it is quite possible for an honest witness to make a mistaken identification and notorious miscarriages of justice have occurred as a result.
- [27] The learned judge charged the jury, further, that a mistaken witness can be a convincing one and even a number of apparently convincing witnesses can all be mistaken. He asked them to examine the circumstances in which the identification was made, carefully. In this regard he asked them to note, in particular, the number of years over which St. Omer knew Edward and the distance from which and the length of time in which St. Omer had Edward under observation. The

judge then drew upon the relevant bits of evidence from St. Omer and Ms. Fontellio. He then left the issue to be decided by the jury.

- [28] It is my view that the learned judge handled the identification evidence in accordance with the Turnbull guidelines and therefore did not err in relation to this issue. The jury, by returning guilty verdicts accepted the prosecution's evidence and found that the identification of Edward as the person who committed the crimes charged was not mistaken. In any case the identification evidence was of an exceptionally good quality and no miscarriage of justice had actually occurred. The appeal therefore fails on this ground also with the result that the appeal against conviction is dismissed and the appeal against sentence would now be considered.

The appeal against sentence

- [29] I shall first consider the question whether the trial judge should have obtained a pre-sentence report prior to sentencing Edward. I shall then consider the appeal against sentence.

Pre-sentence report

- [30] For the purpose of determining whether a pre-sentence report was required before sentencing, I think that it is necessary to fully reproduce Section 1098 of the Criminal Code 2004. This section, which is under the rubric "procedural requirements for custodial sentences", states:

1098.- (1) Subject to subsection (2), a Court shall obtain and consider a pre-sentence report before forming any such opinion as is mentioned in subsection (2) of either section 1096 or section 1097.

(2) Where the offence or any other offence associated with it is triable only on indictment, subsection (1) does not apply if, in the circumstances of the case, the Court is of the opinion that it is unnecessary to obtain a pre-sentence report.

(3) In forming any such opinion as is mentioned in subsection (2) of either section 1096 or section 1097 a Court -

(a) shall take into account all such information about the circumstances of the offence (including any aggravating or mitigation factors) as is available to the Court; and

(b) in the case of any such opinion as is mentioned in paragraph (b) of that subsection, may take into account any information about the offender which is before the Court.

(4) A custodial sentence which is passed in a case to which sub-section (1) applies is not invalidated by the failure of the Court passing sentence to comply with that subsection but any Court, on any appeal against such a sentence -

(a) shall obtain a pre-sentence report if none was obtained by the Court passing sentence; and

(b) shall consider any such report obtained by it or by the Court passing sentence.

(5) A “pre-sentence report” in this Sub-Part means a report in writing which is made by a probation officer with a view to assisting the Court in determining the most suitable method of dealing with an offender.

[31] This provision makes it clear that before a court passes a custodial sentence upon a convicted person, the court must first obtain a pre-sentence report, unless the court thinks that it is unnecessary to do so because of the circumstances of this case. In this case the learned judge expressly refused the request for a non-custodial sentence and the plea for the imposition of a probationary sentence. He expressed the view that the nature of the offences required a custodial sentence. However, he did not expressly consider, as Article 1098(2) of the Criminal Code 2004 requires, whether it is necessary, given the circumstances of the case, to obtain a pre-sentence report. However, the sentence is not thereby rendered invalid because of the provisions of Article 1098(4) of the Criminal Code 2004. This Court is empowered to request and consider such a report and an order to this effect was made for the purpose of assisting this Court to determine the most suitable method of dealing with Edward, as Article 1098(5) permits.

[32] The report, which was prepared by Terrence Louisy, Probation Officer, and approved by Lucy Myers, the officer in charge of Probation and Parole Services, was submitted on 16th January 2007.

- [33] The Probation Officer interviewed 20 persons. These included Edward and Dr. Wilson, Edward's Doctor at the Bordelais Correctional Facility, where Edward who is now 32 years of age has been an inmate since 3rd February 2006. The interviewees also included Edward's mother, his father and 9 of his siblings; the Security and Liaison Manager and 2 Correctional Officers at the Bordelais Correctional Facility and 12 residents of Monkey Town in Ciceron, Castries, where Edward lived up to the time of the offence. He lived in a small house at the back of his mother's house, which he built himself.
- [34] The Report indicates that Edward lived with his mother and father, but that his father left the home when Edward was 15 years old leaving Edward's mother to raise the children on her own. His childhood was relatively stable until he fell in with persons who seemed to have encouraged him to develop the habit of smoking marijuana. However, residents of Monkey town described him as a nice chap, with a quiet disposition.
- [35] In the interview, Edward expressed remorse for the shooting of Ms. Fontellio, whom he did not know prior to the shooting, and of St. Omer, who he said was once his friend. According to him he was scared of St. Omer who had blamed him for injuries which he (St. Omer) had received some months before to his legs. He indicated that if he is released from prison, he intended to resume fishing, in which he sometimes engaged prior to his incarceration. He had no previous convictions. The officers at Bordelais report that he has not caused any problems since his admission to the prison. He does not mingle or socialize very much with other inmates, particularly because of a medical condition which is the result of a severe injury which he sustained prior to his conviction.
- [36] Since the learned trial judge did not order a pre-sentence in keeping with the statutory imperative, and did not impose the sentence by reference to it, this Court must consider the case and impose a sentence without reference to the sentence imposed by the judge. The maximum sentence for the offences for which Mr.

Edward was convicted is 10 years imprisonment. The aggravating circumstances for the purpose of sentencing are, first, the pre-meditation coupled with the recklessness which accompanied the offence. Edward had attempted to shoot St. Omer during the morning of the incident and persisted until he succeeded, injuring an innocent passerby because of his random and indiscriminate shooting in a public street in the city. Additionally, Edward had little defence at the trial, yet he did not plead guilty. Had he done so this would have saved the time and resources of the court. It would also have saved the time of the victims. It would have saved them the anguish of going through a trial to recount the incident all over again. This Court must also be cognizant of the prevalence of serious gun crimes in the community.

[37] The mitigating circumstances are, first, that Edward had no convictions for violence prior to his conviction for these offences. It seems that he has been of good behaviour and there is some prospect that he could hereafter be gainfully employed in fishing, but for the severe injury which he nurses. Because of that injury he has little control over his essential bodily functions. The result is that he must carry a urine bag that is attached by a tube to his body around the clock. His medical condition in itself is a mitigating factor. He was about 22 years old when he committed the offence.

[38] The nature of the offences for which Edward was convicted warrant a custodial sentence, particularly in the light of the prevalence of gun crimes in the community. Taking the mitigating circumstances, and, in particular, his medical condition, into consideration, I think that Edward should serve 6 years in prison for each offence, the same to run concurrently.

Order

[39] In the foregoing premises the appeal against conviction is dismissed. This appeal against sentence is allowed to the extent that the sentence of 8 years

imprisonment on each count to run concurrently is varied and replaced by a sentence of 6 years imprisonment on each count to run concurrently from 3rd February 2006.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal