

FEDERATION OF ST CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCRAP 2009/021/022

BETWEEN:

[1] JAMOY WARNER
[2] EVAN DANIEL

Appellants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Jamoy Warner appellant in person
Evan Daniel appellant in person
Ms. Rhonda Nisbett-Browne with Mr. O'Neil Simpson for the Respondent

2011: March 14, 17.

ORAL JUDGMENT

- [1] **EDWARDS, J.A.:** Both appellants were jointly indicted and convicted on 19th December 2009, for shooting at Kirk Jerome Huggins (the virtual complainant or "V.C.") at Parsons Mountain, St. John on 9th October 2008, with intent to do him grievous bodily harm. On 17th December 2009, the appellant Jamoy Warner was sentenced to 6 years imprisonment while Evan Daniel received a sentence of 10 years imprisonment. They were unrepresented at the trial.
- [2] They were convicted on the uncorroborated evidence of the V.C who knew both appellants before the offence. The appellant Daniel who is called "Fubu", is the

V.C.'s first cousin, being a son of the V.C.'s uncle. The V.C. for many years grew up around the appellant Jamoy Harper whom he calls "Barha".

[3] The V.C. testified that on the date of the offence he was at his farm planting green peppers at about 7:30 a.m. His uncle Mr. Anderson Huggins who is called "Ziggy" among other names was also present beside him at the farm. The two appellants along with another unidentified man came from the bushes onto the farm where the V.C. was. The appellant Daniel who was wearing a black hat, black shirt, and black pants, had a gun in his hand which he pointed at the V.C. while telling the V.C. to get off his farm, otherwise he would kill him. Daniel "bust two shots" from the gun at the V.C. in the air. While this was happening the other appellant Warner stood up while Daniel "was passing orders to him." The V.C. who was frightened, immediately ran on the other side of the farm and then ran from his farm to the village and made a report to Inspector Vaughn Henderson who, along with three other police officers, returned to the V.C.'s farm with him. The police did not recover any spent shells or any other material confirming that a firearm was discharged. According to the V.C. his uncle Ziggy remained where he was and did not run at the time of the incident.

[4] The V.C. apparently gave the names of the appellants to the police because after the police carried out an unsuccessful search in the area, on 21st October 2008, the police obtained 2 Warrants in the First Instance for the arrest of the appellants. On 22nd October 2008, Inspector Henderson arrested the appellant Daniel. Prior to being arrested, Daniel ran from the police who chased him and with the assistance of Defence Soldiers, cornered Daniel. Upon being arrested, informed of and questioned about the incident, Daniel said:

"Officer I don't have anything to say. Officer, I don't know what you talking about."

No firearm was recovered at the premises of the appellant Daniel.

[5] Subsequently, the appellant Warner also said the same thing when informed of the incident and questioned after his arrest. The V.C. contradicted himself in

describing how the appellant Warner was dressed at the time of the offence. He admitted that though prior to the trial he had said that Warner was wearing a hat, it was not Warner but the appellant Daniel who was wearing a hat. At first the V.C. testified that Warner was wearing a blue shirt, blue pants, and carrying a blue bag. Under cross examination he changed that evidence and said that Warner was wearing a black shirt and blue pants. Then he later reverted to the description of a blue shirt and blue pants, and then finally he stated that Warner was wearing a black pants and blue shirt.

- [6] The V.C.'s uncle "Ziggy" gave evidence which contradicted the testimony of the V.C. Uncle "Ziggy" first said in answer to a question from the appellant Daniel, that he was on a farm with the V.C. on 19th October 2008, and something happened while he was there. He denied that anybody shot at him while he was on the farm. He denied seeing the appellant Daniel at anytime at all on 19th October 2008. He did not recall seeing the appellant Warner on the date of the offence either. He testified that he had a farm in the Parsons area and the V.C. had his own personal farm. He said that he was on his farm and was never on the V.C.'s farm on the date of the offence.
- [7] Both appellants elected to remain silent and each called a witness which in effect was an alibi witness. Daniel called his mother, Ms. Everette Cannonier. She testified that on Sunday 19th October 2008, while she was getting ready to go to church she had just come out of her bathroom when the V.C. came and used indecent language to noisily complain about the appellant Daniel who lives with her. About half an hour before going in her bathroom, she had spoken to Daniel about something to do with the fridge and Daniel went back in his room and shut the door. While the V.C. was making the complaint, she reprimanded him and told him to leave, and she could not say whether Daniel was then in his room; and she does not know where Daniel then was. Under cross examination she said it was about 6:00 a.m./7:00 a.m. when she spoke to Daniel about taking the drink from the fridge, he go in his room and shut the door. She said that she does not know where Daniel was at 7:30 a.m. on the Sunday morning. Under re-examination,

Mrs. Cannonier said that she did not know whether Daniel was in the house at 7:00. She said (at page 70 of the Record):

"I don't know, I didn't look at the time. I am just suggesting a time, I don't know. She said that all of this happened before 9:00 a.m. as church starts at 9:00 a.m."

- [8] The appellant Warner called Mr. Sylvester Kelly who testified that on 18th October 2008, Warner his very good friend came by his (Kelly's) mother's house where he then lived at about 8:00 p.m.; and Warner never left until about 3 o' clock in the afternoon of Sunday 19th. Under cross-examination, Mr. Kelly said that on 18th October 2008, he was living alone in one room when the appellant Warner was with him, that he misunderstood the question previously, and that he was presently living with his mother.
- [9] Both appellants in their grounds of appeal complain that the evidence was conflicting and insufficient to convict them. They obtained leave to argue an additional ground concerning the issue of joint enterprise. In the discharge of our duty to unrepresented appellants, we have reviewed the summation of the learned trial judge very carefully for error. The trial judge cannot be faulted in his impeccable directions to the jury on joint enterprise, the alibi defence of both appellants, the discrepancies on the prosecutions case, the inconsistencies in the evidence of the V.C., the ingredients of the offence, the burden of proof. More particular, on the issue of the identification of each appellant the judge's directions were bifurcated.
- [10] The appellants' cross-examination of the V.C. does not disclose that they were attacking the veracity and not the accuracy of the V.C. However, implicit in the alibi defence was the question of disputed identification. We are satisfied that the trial judge made it quite clear to the jury that they had to determine whether the V.C.'s identification of the appellants was right or mistaken. A full **Turnbull** warning should be given where a defendant denies that he was present at the

commission of the offence, or where there exists a possibility of mistaken identification.¹

- [11] Mindful of the possibility of mistaken identification even in cases of recognition, and that identification was a substantial issue in light of both appellants' alibi defence, the cumulative effect of the trial judge's directions at pages 91 to 92 of the record in addition to his directions at pages 80, 87, and 88 shows that the judge did give the **Turnbull** directions. Only in the most exceptional circumstances would a conviction based on uncorroborated identification evidence be sustained in the absence of a **Turnbull** warning².
- [12] We are of the view that the full force of the **Turnbull** warning was conveyed to the jury; and there was sufficient evidence for the jury to consider and return the verdicts that they did. They rejected the alibi defence of both appellants, and there is therefore no reason to disturb the conviction of both appellants.
- [13] The appellants appealed against sentence also. The record discloses at page 98 that the trial judge obviously erred in his approach to sentence when he failed to apply the sentencing guidelines established by this court in **Desmond Baptiste and others** and only took into account the prevalence of the offence, the maximum sentence of 20 years imprisonment for the offence, and the fact that Jamoy Warner was not the shooter. We therefore apply these guidelines in respect of both appellants.
- [14] The appellant Evan Daniel who was 20 years old at the date of sentence, has previous convictions which include two for carrying an offensive weapon (11/1/07) and (21/8/07); one for battery (19/6/07); and another for assault (21/8/07). We consider the sentence of 10 years reasonable in the circumstances.

¹ R. v. Slater (Robert David)[1995] 1 Cr. App. R. 584, CA; cf. R. v. Thornton (Brian)[1995] 1 Cr. App. R. 578, CA.

² Scott v. Queen, [1989] A.C. 1242 at 1261, PC; Beckford v. R., 97 Cr. App. R. 409 at 415, PC.

- [15] The appellant Jamoy Warner has no previous convictions and was almost 20 years old at the date of sentence. In the circumstances, his sentence of 6 years should not to be regarded as excessive.
- [16] The record does not disclose whether or not they were on remand or on bail after their arrest. Upon inquiry we are satisfied in respect of Evan Daniel that he was on remand from 6th November 2008. Regarding Jamoy Warner, we have been informed that he was also on remand from 6th November 2008.
- [17] Consequently, for each appellant we would dismiss his appeal against conviction and sentence, affirm the conviction and sentence; and order that the sentence of each appellant should commence from the date of remand, 6th November 2008.

Ola Mae Edwards
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal