IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA

CASE ANUHCR 2014/0010

REGINA

V

DELESS PHILLIP

APPEARANCES

Ms Rilys Adams and Mr Curtis Cornelius for the Crown.

Mr Sherfield Bowen for the defendant.

2019: JULY 10

RULING

On the admissibility of identification evidence in a flawed investigation

1 **Morley J**: The defendant Deless Phillip (dob 03.01.88), now 31, was when 25 charged on indictment with shooting with intent to murder and aggravated robbery on Herbie Williams on 10.04.12. He was previously tried and convicted of these offences before Redhead J on 07-08.10.15, but the conviction was overturned by the Court of Appeal owing to difficulties concerning the identification evidence. On 09.07.19, a fresh jury was sworn before me and in their absence there was legal argument advanced by Counsel Bowen on the face of the papers to exclude the identification evidence. Such argument did not occur in the previous trial. I have decided I will rule the identification evidence is inadmissible, with the consequence the Crown will be unable to offer evidence to implicate Phillip so that I expect there shall be a

directed verdict of not guilty this morning, 10.07.19. I have promised written reasons, which are these.

2 As I begin, I wish to pay tribute to the arguments of counsel on both sides for their intelligent and detailed approach, and in particular to Crown Counsel Adams for her fair-minded analysis, which was in the best traditions being a Minister of Justice.

3 On 10.04.12, Herbe Williams was living in Hatton, and returning from a beach party at 02.35 went outside to get water. A man, X, called him a 'pussyhole', described in Williams' statement of 14.04.12 as *'slim, 5ft11, dark in complexion dressed in dark clothing wearing a tam on his head and a kerchief around his face'*. X shot Williams from 2ft, through his chest and right shoulder, there was a pursuit, and a struggle on the ground for the gun, near street lighting 5ft away, when Williams managed to pull off the kerchief and saw the face of X, who he had not seen before, and bit his hand saying in his statement '*there must be a bite mark'*. X robbed him of his gold neck chain and ran off, observed by William's partner Judiana St Louis, who described him in her statement of 14.04.12 as *'slim, about 6ft tall, with a tam on his head, with a kerchief tied around his face, wearing a dark coloured long sleeve shirt, long pants and tennis shoes'*. A green kerchief was recovered from the scene. That was the extent of the description of X in the statements, though in evidence in October 2015, three years later, Williams said the kerchief was green, he had seen the face of X for *'20-30 seconds'* during the struggle, and that he was *'about 6ft'*.

4 It should be noted there was no description of any distinguishing features, apart from height, when Phillip is a rastaman with locks, a noticeable gap between his front teeth, the right incisor being broken, and with strong cheekbones and a notably strong angular forehead. Counsel Bowen's first note of caution was that there ought to have been something more distinctive recorded to identify X if either witness really did get a good look at him.

5 Moreover, on 09.07.19, unlike in the first trial, evidence was provided to the court from the police that Phillip, though slim, is 6ft3, which it may sensibly be thought would mean at least one of the two witnesses would have described X as being taller than 6ft, and not as 5ft11 or

merely about 6ft. At this stage, for Counsel Bowen, alarm bells were ringing, and in fairness to Counsel Adams, she could hear them too.

6 Concerning the investigation, Cpl Frank Simmons was the investigation officer (IO), and he attended the scene, but kept no notes of what he was told, so that there were no first descriptions of X preserved. Phillip lived within two miles and was on bail for an aggravated robbery with persons named Beenieman, Blondel Joseph, and Nikki Nicom. Word reached the IO Phillip had stopped reporting to Grays Farm police station shortly after the Williams robbery, so he became the chief suspect. He was interviewed on 21.05.12, denying he was the robber, saying he had been at Donovan's bar with friends named Bada Bada and Juice, and had gone home after drinking a bottle of rum. The IO kept no notes of any investigation of the alibi, nor is there any evidence of tennis shoes recovered, nor a dark long sleeved top. In addition, Phillip's hands were inspected for any evidence of a bite mark, and none was found, again not recorded. Once again, Counsel Bowen struck a note of caution concerning the absence of investigation records.

7 Moreover, in the interview the IO asked this question*: 'If I was to tell you that Herbe Williams picked out your picture from a profile and said is you that robbed him, what would you say, would he be lying'*; to which Phillip replied, *'if he did that he would be lying'*. This question was clearly designed to make Phillip think his photo had been picked out, but this was not true, it had not, but it now raised the spectacle that it would be. On 28.06.12 there was supposed to be an identification parade, but in his statement of 20.08.12, the IO reports *'the identification parade did not come off because of difficulties getting persons matching the accused description'*, however there are no independent records of such an attempted parade. Instead, Williams was invited on 29.06.12 at St John's police station to look through photos of known criminals with the IO, in a 'rogues' gallery', and reported in a later statement, *'I looked through the album and I picked out photo 1066'* (which was Phillip). The IO preserved no notes of how many photos he looked at, over what period, what was being said, who was in the room, what time this was, nor what instructions Williams was given, while in tandem Counsel Bowen cautioned there was perhaps an expectation created by the interview of 21.05.12 that Williams was expected to identify Phillip, leading to consternation the procedure may have been

improper, deliberately or inadvertently, leading to a misidentification in good faith by Williams, bearing in mind there was no contemporaneous material against which to measure it.

8 Moreover, during the first trial, Williams said he had looked through 500-600 photos. A parade usually involves no more than twelve persons. Such activity must have taken a long time, and begs what interaction or discussion there was in the room with the IO, about which *a fortiori* there was no record, and in a context where Williams may have felt the robber must be in the gallery and he had to pick someone out having been offered so many choices.

9 There was then a nine-man identification parade on 10.08.12 in which Phillip was picked out, but as Counsel Bowen cautioned, and I accept, this was tainted by the photo identification so that it could be said Williams was picking out the man he saw in photo 1066, begging whether the photo identification was correct, not whether the parade identification was correct.

10 Phillip was interviewed again, on 10.08.12, and said he would give a DNA sample. This might have exculpated him as the person wearing the recovered green kerchief. His DNA was not taken, and this was said by the IO to be the later decision of Phillip, though again there was no contemporaneous note of his refusal, nor when, or in what context, or where, or why.

11 The only evidence to implicate Phillip was the picking of photo 1066, eleven weeks later on 29.06.12, when Phillip is significantly the wrong height, had had no injury to his hand on 21.05.12, had in part an alibi whose investigation was unrecorded, the investigation preserved no other notes, and the IO had tried to trick him on 21.05.12 into believing his photo had already been picked, which suspiciously it later was with no contemporaneous record.

12 In all these circumstances Counsel Bowen has submitted the identification evidence ought to be ruled inadmissible. In response, Counsel Adams suggested it might help to enquire on a *voire dire* of Williams to learn more details about the photo identification, but quickly conceded that whatever he might say now, seven years later, no matter how attractive, cannot escape the absence of any contemporaneous note. This absence must be a flaw in the procedure, as we note by contrast a parade has considerable safeguards in place with notes required to be made on special forms as the parade is conducted.

13 In assessing whether to rule the photo identification inadmissible I am guided by extensive learning in the sister Commonwealth jurisdiction of England & Wales, where there is **s78 Police and Criminal Evidence Act 1984**, which reads:

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

14 Moreover, under the Act, there are codes of practice for police officers, in particular Code D concerning identification procedures. It is worth setting out **Annex E to Code D**, which details how a photo identification procedure should there be conducted:

> ANNEX E SHOWING PHOTOGRAPHS TO EYE-WITNESSES
>
> (a) Action
>
> 1. An officer of sergeant rank or above shall be responsible for supervising and directing the showing of photographs. The actual showing may be done by another officer or police staff…
>
> 2. The supervising officer must confirm the first description of the suspect given by the eyewitness has been recorded before they are shown the photographs. If the supervising officer is unable to confirm the description has been recorded they shall postpone showing the photographs.
>
> 3. Only one eye-witness shall be shown photographs at any one time. Each witness shall be given as much privacy as practicable and shall not be allowed to communicate with any other eye-witness in the case.
>
> 4. The eye-witness shall be shown not less than twelve photographs at a time, which shall, as far as possible, all be of a similar type.
>
> 5. When the eye-witness is shown the photographs, they shall be told the photograph of the person they saw on a specified earlier occasion may, or may

not, be amongst them and if they cannot make an identification, they should say so. The eye-witness shall also be told they should not make a decision until they have viewed at least twelve photographs. The eye-witness shall not be prompted or guided in any way but shall be left to make any selection without help.

6. If an eye-witness makes an identification from photographs, unless the person identified is otherwise eliminated from enquiries or is not available, other eye-witnesses shall not be shown photographs. But both they, and the eye-witness who has made the identification, shall be asked to attend a video identification, an identification parade or group identification unless there is no dispute about the suspect's identification.

7. If the eye-witness makes a selection but is unable to confirm the identification, the person showing the photographs shall ask them how sure they are that the photograph they have indicated is the person they saw on the specified earlier occasion.

8. When the use of a computerised or artist's composite or similar likeness has led to there being a known suspect who can be asked to participate in a video identification, appear on an identification parade or participate in a group identification, that likeness shall not be shown to other potential eye-witnesses.

9. When an eye-witness attending a video identification, an identification parade or group identification has previously been shown photographs or computerised or artist's composite or similar likeness (and it is the responsibility of the officer in charge of the investigation to make the identification officer aware that this is the case), the suspect and their solicitor must be informed of this fact before the identification procedure takes place.

10. None of the photographs shown shall be destroyed, whether or not an identification is made, since they may be required for production in court. The photographs shall be numbered and a separate photograph taken of the frame or part of the album from which the eye-witness made an identification as an aid to reconstituting it.

(b) Documentation

> 11. Whether or not an identification is made, a record shall be kept of the showing of photographs on forms provided for the purpose. This shall include anything said by the eye-witness about any identification or the conduct of the procedure, any reasons it was not practicable to comply with any of the provisions of this Code governing the showing of photographs and the name and rank of the supervising officer.
>
> 12. The supervising officer shall inspect and sign the record as soon as practicable.

15 Noting the English codes of practice are not in force on Antigua & Barbuda, nevertheless what is clear is how many of the rules would have been broken by the Williams procedure, arguably rules 1, 2, 4, 5, 9, 10, 11, and 12. These breaches, being many, significant and substantial, would likely have rendered the photo identification incapable of being admissible *ab initio*.

16 Accepting the annex is not in force on Antigua, and therefore the photo identification is capable of being admissible here, I turn to assistance from s78[1]. This is a statutory encapsulation of the common law power, long held by judges to control the proceedings in court, to exclude evidence where circumstances so require. As such, it can help to guide this court's approach. In particular it might be said that *'the circumstances in which the evidence was obtained'*, namely without proper record, including of the investigation generally, in the teeth of a partial alibi and Phillip being well over 6ft, with no supporting evidence of a bite, would have *'an adverse effect on the fairness of the proceedings'*, namely the trial could not properly test the reliability of the photo identification without a contemporaneous record, being instead reliant alone on the persuasiveness of Williams, who may dangerously be an honest but mistaken witness, whose very honesty makes him wrongly seem more reliable.

17 Moreover, there is a considerable unease created in this case by the trick played on Phillip, where the officer pretended he had been identified from a photo. It sits uncomfortably in the court's mind that later Phillip is indeed identified from a photo with no records made of the procedure.

[1] See Blackstones Criminal Practice 2017 F2.7-2.32.

18 I have to be sure the admission of the evidence will not lead to an unfairness in the trial. In this case, I conclude I cannot be sure. Indeed, I would go further and observe the admission of the photo identification will probably render it positively unfair. This is not the fault of Williams, but of the IO, whose investigation was not properly documented, and by not keeping records created this unfairness in the defendant's trial.

19 For application in future trials, the significance of this case is that an IO must properly keep contemporaneous investigation records, most particularly where the issue is mistaken identification, which is well known to be a unique horror in criminal proceedings, where a wholly innocent person may be wrongly convicted by the apparently reliable testimony of an honest but mistaken witness.

20 The photo identification being inadmissible, I further rule the identification parade evidence is inadmissible as tainted by the former.

21 I should mention in passing that even had the identification evidence been admissible it is difficult to see how the prosecution case would have survived a submission of no case to answer, recalling the test is whether a reasonable jury properly directed could possibly properly convict, and here the especial duty of a judge to protect proceedings from the dangers of a mistaken identification, applying the well-known authorities of **R v Turnbull 1977** QB 224 and **R v Galbraith 1981** 1 WLR 1039. At its simplest, Phillips is significantly taller than X, and there is no independent evidence to support that Williams' identification from the photo is reliable.

22 In all these circumstances, I now anticipate the Crown will offer no evidence and I will then direct an acquittal.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

10 July 2019